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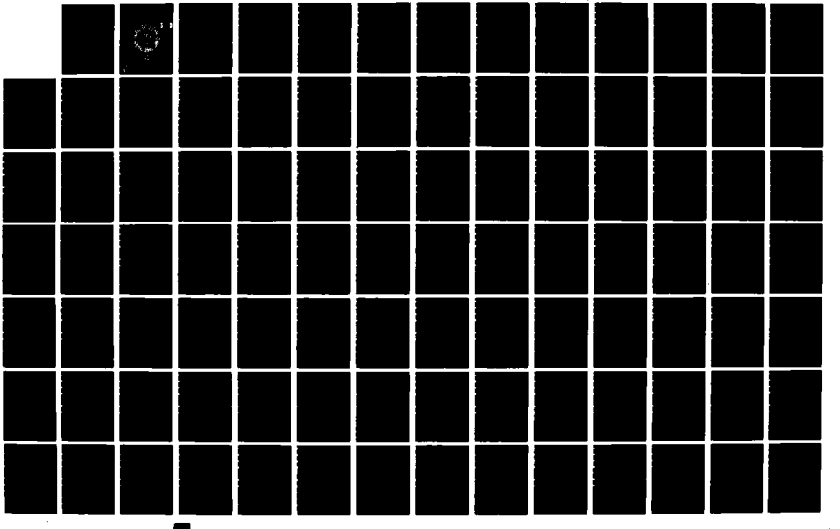

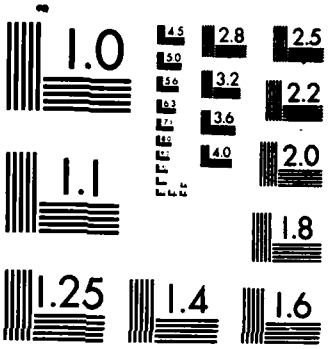

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AIDS TO PRACTICE

NAVAL JUSTICE SCHOOL

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Rev. 1/86

INTRODUCTION

This manual has been promulgated in an effort to aid the new judge advocate in court-martial practice. It is not intended to be a substitute for effective trial advocacy or thorough trial preparation. It is designed to save trial judge advocates both time and effort.

The manual is divided into four parts. The first part consists of several articles designed to introduce the new judge advocate to various aspects of trial preparation and practice with which he/she may not be familiar. The second part contains several forms which have proven to be useful in court-martial practice. The third part contains sample voir dire questions. The fourth part illustrates preferred procedures for NJS moot courts.

When you enter practice, you will undoubtedly devise and use other forms, checklists, and samples which may aid others in the field. "Share the wealth" and send any such document to the Naval Justice School TASK coordinator for consideration for inclusion in the next revision of this manual at the following address:

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PART I

ARTICLES

The articles that follow were chosen for their scholarly content and relevance to the practice of military law. Some of the original citations to the recently superceded Manual for Courts-Martial, 1969 (rev.), have been revised to reflect analogous provisions of the Manual for Courts-Martial, 1984. Otherwise, the articles have been reproduced as originally printed.

THOUGHTS ON CONDUCTING THE INITIAL INTERVIEW WITH THE ACCUSED

[Much of this discussion is based upon Professor Anthony Amsterdam's excellent article, "The Initial Interview with a Criminal Client." 20 Practical Lawyer 43 (1974)]

From both a legal and a psychological point of view, the initial interview in a criminal case is probably the most important discussion that a defense counsel will have with an accused. The accused is a person in trouble with all the forces of the government arrayed against him. He needs help. The initial interview largely shapes the accused's judgment of the defense counsel and of the help that can be expected from counsel, thus gravely influencing their future relationship. The defense counsel's primary objective in the initial interview should be the establishment of an attorney-client relationship grounded on mutual confidence, trust, and respect. The defense counsel must convey a sincere interest in helping the accused as well as project the image of a competent, knowledgeable, and capable lawyer. This is particularly important in the military where most defendants are enlisted and may feel that the military lawyer is constrained in his advocacy by his officer status, his relationship with military superiors, and his interest in his military career (real or perceived). The accused must be given an adequate opportunity to explain his problems and counsel must be able to give reasonable answers and assurances to any questions needing immediate attention. These objectives are not easily met. The discussion which follows outlines some of the legal, sociological and psychological factors which you must consider to conduct a successful initial interview.

Preparation

Proper preparation for the initial interview is essential to achieve the objective of inspiring trust and confidence in the accused. Whenever possible, the defense counsel should obtain all information in the hands of the government -- service records, witness statements, NIS/CID reports, lab analyses -- prior to interviewing the client. He should ascertain the specific charges against the accused, the type of court contemplated, and the potential maximum sentence. A thorough understanding of this information will enable the defense counsel to gain the accused's confidence by knowledgeably answering all initial questions. It will also enable counsel to guide the interview to fruitful areas of discussion. If the initial interview is conducted prior to preferral of charges, much of the information concerning the offense will not be available. Counsel should still attempt to find out as much as possible concerning the case, for instance, by contacting the accused's unit's legal officer or executive officer.

It is wise to schedule the initial interview as soon as possible after a case is assigned. Many of the rights guaranteed an accused can be vindicated only by prompt action. If the client is incarcerated, it is imperative that counsel meet with him as soon as possible. One of the counsel's most important tasks is to advise the accused of the nature, extent and importance of his constitutional and legal rights and to take the procedural steps necessary to protect them. This includes advice concerning the privilege against self-incrimination and the need to remain silent at all times and to discuss the case only with the attorney. In this regard, it is imperative that counsel's presence be officially noted by brig or confinement facility authorities. This notation may make a difference at a later date should an issue arise concerning the volition of a confession. Many cases will require that special steps be taken immediately to preserve or gather existing evidence under the control of others or to have the accused medically or psychiatrically examined. See American Bar Association, Standards for the Defense Function, 3.2 and 3.6, 4.1, 5.1.

Putting the accused at ease

Psychology is important in beginning the attorney-client relationship. Always remember that the accused is a person in trouble and that the last thing he or she needs is more trouble from counsel. For most people the process of making new acquaintances is difficult in itself, because it requires them to expose their personality to the judgment of another person. This difficulty is often exacerbated for the accused because he is required to discuss an allegation concerning a moral, or at least a legal, failing with a total stranger who will generally be from a different socio-economic and educational background, as well as superior in rank. Counsel should therefore make the beginning of his initial interview with the accused as undemanding as possible. Questions should be kept very simple until the accused's abilities to think and express himself have been evaluated, and then should be kept well within the limits of those abilities. Any indication that the accused is making a bad impression or is failing to provide what counsel wants should be avoided. To the contrary, counsel should convey the image that the accused is doing well and giving helpful information.

The accused will enter upon this meeting with certain preconceptions about military lawyers generally that may be far from favorable. These preconceptions will involve both counsel's profession as a lawyer and counsel's status as a military officer. Counsel should attempt to eliminate or, at least, alleviate these impressions by conveying the idea that his only interest is to serve and help the accused. The defense counsel should emphasize that he owes no allegiance to the accused's command and that his primary military duty, as well as legal and ethical obligation, is to represent the accused to the fullest extent of the law and counsel's abilities. See ABA STANDARDS, The Defense Function, 1.1(b), 1.6.

Counsel should explain that he is there to represent the accused and to do everything necessary to protect the accused's rights and, in order to make sure that nothing is overlooked that could help the accused, counsel needs certain information. If the relevance of counsel's questioning to the accused's needs and interests is not perfectly obvious -- obvious, that is, to a layman, not a lawyer -- counsel should explain why he is asking the questions. Counsel should avoid giving the accused any grounds for suspicion or confusion about the lawyer's role or loyalties or motives which may arise if the lawyer begins to ask for information without saying why it is needed.

The accused should be made to feel comfortable and secure in the presence of counsel. Defense counsel should consider whether their office arrangement and their "body language" are conducive to a free interchange with the accused. Some feel that the arrangement of furniture, for example, a large desk placed between the accused and counsel, can create impenetrable barriers to a trusting relationship. The developing studies concerning nonverbal communications also indicate that physical demeanor can say far more and, in fact, contradict the message you desire to convey. Therefore, counsel should examine his interviewing posture and room arrangements to determine if they are conducive to the attorney-client relationship. See generally How To Read A Person Like A Book by Gerard I. Nierenberg and Henry H. Calero; Body Language by Julius Fast; and Interviewing, A Social Work Practice by Margaret Schubert.

Counsel should ascertain and respond specifically to anything in the immediate situation that is bothering the accused and should promise specific help if, and only if, it can be delivered. Military accused will often present complaints concerning pay problems and pretrial confinement. If counsel is able to expeditiously resolve these problems, he should tell the accused so. More likely, however, he will not know if the problem can be resolved, and the accused should only be told that an attempt will be made to correct the problem through appropriate channels. An unfulfilled promise can cause later difficulties in the attorney-client relationship, and the effort to fulfill a promise unwisely made can waste valuable time and energy.

Whatever the client tells counsel should be received with interest; counsel should attempt to understand the accused and show patience, as under stress the accused may be rambling and inarticulate. He should not be shut off without explanation -- or at all, unless time is pressing. When the accused must be turned from one subject to another, counsel should explain the need to change the subject in a way that does not make the accused feel like a fool.

Convincing the accused

It is not always easy for the military lawyer to convince an accused to trust him since often the accused has never seen the lawyer before, has never had an officer working solely for him, did not request the lawyer, and may be of a different race and social background than the lawyer. As far as the accused is concerned, the military lawyer is "the law" along with the police and the judge. Moreover, as an officer, he is the establishment and symbolizes the same powers which are prosecuting him. Since the accused pays the military lawyer nothing, some expect nothing in return. These attitudes must be counteracted if a successful attorney-client relationship is to be established.

In order to overcome these attitudes, it is seldom sufficient to promise the accused that counsel is going to do something for him; counsel must actually do something for the the accused. Consequently, it is important in building the attorney-client relationship that, when possible, counsel take early effective action that visibly benefits the accused, such as stopping unit mistreatment, getting the accused released from the brig, or standing up firmly for the accused in front of an impatient or overbearing pretrial investigating officer. At the preliminary interview, though, there is often little of immediate practical consequence that counsel can do for the accused to win his confidence.

Counsel can, and should, state clearly and forcefully, "I am your lawyer; my job is to represent you; to go to bat for you; and I intend to do everything that can possibly be done to help you from now on in this case." However, abstract protestations of this sort cannot be developed or repeated too much without their beginning to sound hollow; and a useful way to emphasize counsel's fidelity to the accused without seeming to sell himself to the accused in the manner of a used car salesman is to find some obviously relevant, operational reason for describing counsel's role.

Explaining the attorney-client privilege

One of the first obligations a military detailed counsel has to his accused is to explain to the accused the right to counsel under Article 38(b) of the Code and R.C.M. 506. This explanation can either foster or hinder the attorney-client relationship depending upon the attitude which the detailed counsel conveys. Counsel should avoid giving the impression that he does not want to, or cannot defend, the accused. If the detailed counsel projects a negative attitude toward the accused and a hope that the accused will seek other counsel, either military or civilian, the accused may well become discouraged with his prospects for proper representation. However, if the accused's rights to counsel are explained in a careful manner, indicative of a desire to provide all relevant information, this will be a positive way of showing the accused that counsel is, in fact, someone the accused can trust. After introducing himself, the accused's detailed counsel should say something like this: "I am your detailed defense counsel and I am prepared and able to represent you to the best of my ability. However, before I begin to discuss your case with you, I want to tell you about all of your rights concerning counsel. You have a right to request to be represented by individual military counsel, that is some other military lawyer whom you may request. If that lawyer is available, he will be assigned to represent you, at no expense to you. If that lawyer begins to represent you, I will no longer work on your case unless you request me to do so and the convening authority lets me. In most cases, however, you can have only one military lawyer. You also have a right to hire a civilian lawyer to represent you, at your own expense. If you get a civilian lawyer, I will stay on your case and help that lawyer unless you tell me not to. I am ready and able to represent you in your case, but if you know another military lawyer that you would like to request, or a civilian lawyer that you would like to hire, or if you feel that you need more than one lawyer, you should exercise your right to request individual military counsel or to hire civilian counsel, because you have an absolute right to do so. I will not be offended and I will help you to get that other lawyer if you want me to. What would you like to do?"

If the accused indicates that he wants individual military counsel, the defense counsel should help him prepare a request for individual military counsel. (See page II-35.) If he desires to hire civilian counsel, the detailed counsel should also assist in locating civilian counsel. In the great majority of cases, the accused will decide to stay with detailed counsel. If so, counsel should then continue to explain the role of the defense counsel by explaining the attorney-client privilege. Counsel should say something like this:

> Now, during the course of our interviews, I'm going to ask you to tell me some things about yourself, and also about this charge they have against you. Before I do, I want you to know that everything you tell me is strictly private, just between you and me. Nothing you tell me goes to the police, or to your commanding officer, or to the judge, or to anybody else. Nobody can make me tell them what you said to me, and I won't. You've probably heard about this thing they call the attorney-client privilege. The law says that, when a person is consulting with his lawyer, what he tells his lawyer is confidential and secret between the two of them. This is because the law recognizes that the lawyer's obligation is to the client and to nobody else; that counsel is supposed to be one hundred percent on the client's side; and that counsel is only supposed to help the client, and never do anything -- or disclose any information -- that might hurt the client in any way.
>
> The trial counsel is the one who is supposed to represent the military in prosecuting cases, and the judge's job is to judge the cases. But the law wants to make sure that even if everybody is lined up against an accused, there is one person who is not obliged to look out for the military but to be completely for the accused. That is his lawyer.
>
> As your lawyer, I am completely for you, and I couldn't be completely for you if I were required to tell anybody else the things that you say to me in private. So, you can trust me and tell me anything you want without worrying that I will ever pass it along to anybody else, because I won't. I can't be subpoenaed or questioned or ordered by anyone to talk because I am 100 percent on your side, and my job is to work for you and only for you; and everything we talk about stays just between us. Okay?

The importance of truth

After explaining the attorney-client privilege, counsel should emphasize how important it is for the accused to tell counsel the truth, the whole truth, and the exact truth, and that the accused should not hold anything back, or be embarrassed or afraid to tell counsel everything even if the accused will look bad. If the accused has done whatever he is being charged with, or any part of it, counsel must know; the failure to tell counsel every detail will badly hurt the presentation of the defense. Counsel's job is not to judge the accused but to represent the accused, regardless of guilt or innocence, and that is exactly what counsel intends to do. But to do it well, counsel has to know the truth.

It may be helpful to state that counsel is eventually going to hear the prosecution's version anyway, and that he cannot be prepared to handle this presentation if counsel hears the facts for the first time in court, in front of judge and members. The accused should be told that "the question is what a judge or the members are going to believe, so I want you to tell me the worst possible things that the prosecution's witnesses might say, or that the prosecution may be able to prove, as well as your own recollection of everything that actually happened." The accused may be told that "I have seen defendants get crucified in court because they didn't tell their lawyer all of the damaging circumstances -- all of the evidence that might point to guilt -- that the prosecution might come up with." Another tactic is to say something like "Great. Let's take a polygraph test and take it to the convening authority. Maybe he'll drop the case."

Through all this, counsel must remember to scrupulously avoid showing any sign of reprobation or moral condemnation of the accused's conduct, or the accused will take the clue and begin to hide the worst.

Notetaking

At the outset, it is usually good to talk to the accused, at least for a little while, without taking notes. This establishes a human rapport and does not communicate machine-like dispassion. Before too long, notetaking should begin. A good impression of competence and interest can be conveyed by counsel simultaneously writing and orally summarizing the important matters stated by the accused. At the same time, clarifying questions can be asked.

Long periods of writing in silence should be avoided except as a tactic to unnerve the accused when counsel believes that the accused is lying to him. If an extended note has to be made, counsel should say aloud what he is writing as he writes. To avoid this problem altogether, record the interview. Always inform the client beforehand that you are doing so and why.

Once the serious business of getting the accused's story begins, it is advisable to put down in detail what the accused says. These notes will serve to refresh the lawyer's and the accused's memories later. Statements recorded in the notes may be admissible at trial in the accused's behalf if the prosecution seeks to create the impression that the accused's trial testimony is a recent fabrication. (If the client signs them, the notes may even be admissible.) In addition, notes will shield counsel from unwarranted attacks, such as inadequate representation and suppression of facts favorable to the defense, should the accused ultimately be convicted. It is generally wise to read the notes to the accused and, at the end of the interview, to have him sign and date them.

The problem client

The accused with poor speaking ability, low intelligence, or mental illness has to be handled on an individual basis as counsel's good sense dictates. If counsel is having trouble understanding or making himself understood by the accused, a relative or a friend who has had long-time dealings with the accused may aid communication, although that procedure raises the danger that the friend will distort the interview and undermine the protections of the attorney-client privilege.

A counsel who is dealing with an impaired client should determine as early as possible the areas and dimensions of the impairment. Careful observation may lay the foundation for a later decision to have the accused mentally examined and may provide facts to support an application for a sanity or competency board in accordance with R.C.M. 706, 909, and 916. In addition, the degree of the accused's disability may prove significant in later attacks on a confession to authorities, purported consent to searches, and other purported waivers of rights by the accused.

Getting the story

If there is any doubt about the privacy of the interview, e.g., it is being conducted in a cell block, counsel should not attempt to get the facts at that time. Obtain all other necessary information and explain to the client that the lack of privacy requires postponement of this step.

Obtaining information from the accused is a fine art and a vital one. At the outset, it is good to let the client tell the story in his own way and with few interruptions, because:

(1) The client is more at ease;

(2) the lawyer learns what the client thinks is important;

(3) the lawyer receives unsolicited details upon which, if he suspects falsehood, he can cross-examine the client later; and

(4) the client reveals his intelligence, his speaking ability, and thought processes.

The journalistic "who, what, why, when, where, and how" approach is suggested as a means of filling in details. A biographical sketch of the accused and a full chronology of his involvement in the case, including police investigative activity, should be obtained. These facts can be elicited by following the checklist which is contained in this booklet.

After the accused has told his story, specific questions on his version of the incident should be asked. There is no sense in asking questions that may be above the accused's level of comprehension. Apart from this, unless the accused is obviously lying, and unless discovery of the truth appears immediately necessary for effective defense investigation, the accused should probably not be cross-examined much during the initial interview. After some independent investigative efforts by counsel, and after the attorney-client relationship has had a little more time to solidify, there will be time to test the accused's story.

Some cases, such as uncomplicated unauthorized absences, will require little or no investigation on the merits. The defense counsel should, therefore, pay particular attention during these interviews to information which will be useful in extenuation and mitigation. Counsel should, however, avoid startling the accused in these simple cases by advising that he will be found guilty or should plead guilty -- such a revelation is probably better reserved for a subsequent interview. In every case, it is advisable to gather names and addresses of potential "E & M" sources during the first interview since postponement of this action until subsequent sessions may result in the delay of the desired letters. Such letters are of little benefit if they fail to arrive in time for trial.

Custodial complaints

An accused in custody may complain about lack of medical treatment, exercise, food, and numerous other things. Most of these problems can be corrected administratively by informing the authorities in charge about them. Counsel should seek to discover whether or not the complaints are legitimate and if so, take appropriate steps to have them alleviated.

Settling the rules

To avoid later misunderstandings, it is imperative to settle, during the initial interview, the respective roles that counsel and the accused will play in the defense. The accused should be advised of his major rights -- to have a trial at which he contests guilt and insists that the prosecution prove its case; to have a "members trial," including trial by a court consisting of at least one-third enlisted members from different commands, to testify in his own defense; and to be present and to have counsel present at every judicial proceeding in his case. He should be told that counsel undertakes to present every defense that the law permits to protect the accused's rights, and none of the rights just mentioned will be waived without the accused's express consent.

The accused will also be advised of all the developments in the case and, when decisions of any consequence have to be made, the possible choices will be described and discussed with him and, unless time does not permit, no decisions will be made until he has had full opportunity to consider the possibilities and to give counsel his opinions. Nonetheless, since counsel is representing the accused as an attorney, counsel is ultimately going to have to be responsible for most decisions. Counsel must control the strategy of the defense and have the final say about what points will be raised, what witnesses will be called, what discussions will be had with the trial counsel and the convening authority, and all the when's and where's of the investigation and the trial.

The accused must be made to comprehend that counsel is not a "mouthpiece" whose only job is to appear in court and say what the client wants. Rather, counsel's job is to plan, design, and carry out the best defensive strategy possible in the accused's interests. That kind of planning requires decisions based upon thorough technical knowledge of the law, as well as experience in working with the law, the court system, trial counsel, convening authorities, judges, and member courts in a wide range of situations. Counsel is simply not giving the accused the proper kind of representation unless decisions in the conduct of the defense are made on the basis of counsel's best professional judgment, taking into account everything that counsel knows about the legal system.

Counsel should, therefore, tell the accused that he wants the accused to inform him about anything that the accused wants or needs, or thinks should be done, during their relationship; that he wants the accused to give him any ideas and thoughts the accused has about the conduct of the case; that he always works with the accused in thinking the case through, but that he, the attorney, has to make the final decisions. See American Bar Association, *Standards on the Defense Function*, 5.2.

Advice to accused

Since the client finds himself in a frightening situation, he will be tempted to alleviate his fear through the catharsis of verbosity. Accordingly, he must be admonished in no uncertain terms to "not talk to anyone." At the conclusion of the initial interview, whether or not the accused is in custody and whether or not he has previously been given such warnings, counsel should advise him:

(1) To say nothing at all to the police or prosecuting lawyers, or any military or civilian authorities, to tell them nothing under any circumstances, and to reply to all questions by saying that his lawyer has told him not to answer questions unless the lawyer is present;

(2) under no circumstances to discuss any offer or deal with the investigator or anyone else in counsel's absence;

(3) to discuss the case with no one, and particularly not to talk to cellmates, co-defendants, or reporters about it, but to tell anyone who wants to discuss the case or who has information about it to contact counsel;

(4) if the accused is in confinement, to refuse in counsel's absence to participate in any lineup or to appear before any person for possible identification; to refuse in counsel's absence to accompany the investigator or prosecuting lawyers to any place outside the jail, except to court; to object to any inspection of his body, physical examination, or test of any sort in counsel's absence; to request permission to telephone counsel in the event that the authorities begin any lineup or identification procedure or try to take any test; and, if put in a lineup or identification situation over his objection, to observe and remember all the circumstances;

(5) to refuse consent to anyone who may ask his permission to search his home or automobile or any place or thing belonging to him, unless that person has a search warrant;

(6) not to make faces, cover up his face, or dodge if newspaper photographers attempt to photograph him; and

(7) to telephone counsel as soon as possible if anything at all comes up relating to the case -- if anyone tries to talk to him about it, if co-defendants tell him that they have made some sort of a deal, if the investigator tells him that co-defendants have squealed on him, or if the accused gets any new information about the case. The accused should be given counsel's telephone number for that purpose.

(8) Conclude the interview with a "homework assignment." Ask the client to write out his autobiography in his words. This gives the client something useful to do and makes him feel a part of the defense team. It also will greatly aid you in the preparation of a case in "E & M" or in presenting certain issues, e.g., insanity defenses.

Contact with family

Counsel will ordinarily want to be in touch with the accused's family very early in his investigation of a case. Obviously, the family will often be worrying about the accused if he has been arrested and retained in custody, and the accused will probably be troubled by the family's concern. It is, therefore, a good idea, if it is at all possible and the accused has consented, for counsel to telephone or visit, or at least get a message to, the accused's family shortly following the initial interview with an accused in custody:

(1) Reassuring them that the accused is all right;

(2) informing them when and how counsel will next contact them or how they should contact him; and

(3) informing them when, where, and how they can visit the accused.

At the close of the initial interview, counsel should offer to get in touch with the accused's family and should ask whom to call. The accused is undergoing a frightening experience and any help that counsel can give him on a human level is crucial and appreciated.

Subsequent interviews

Normally the accused must be interviewed on more than one occasion. In counsel's preparation for trial, facts will be disclosed that were untouched in earlier interviews, and these must be reviewed and analyzed with the accused. Increasingly, the accused should be cross-examined in a fashion that will help preserve the lawyer-client relationship and yet get to the truth at the same time.

THE TURNING POINT BETWEEN LAWYER AND ACCOMPLICE

by Harry M. Hipler

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Client X arrives at his lawyer's office one morning for a legal consultation. This is not the first time the two have met, since client X has consulted with his lawyer in the past in reference to other legal problems. During the interview, client X tells his lawyer that a fight occurred the day before, and that during the argument he shot or stabbed the victim. Suddenly, client X pulls the weapon out of his pocket and attempts to hand it to his lawyer.

If a client arrives at his lawyer's office with a weapon used in a crime, how should the lawyer handle the situation? What action may a lawyer take and remain ethical? Is it permissible for a lawyer to advise his client to dispose of the article without fear of being subject to criminal prosecution or disciplinary action? At what point during the legal consultation may the lawyer's conduct be considered unethical? May a lawyer take actual possession of the weapon without being subject to attack by a grievance committee?

The Code of Professional Responsibility enunciates general rules for lawyers to follow in the practice of law. While the general principles of the code are easily stated, their application to ethical problems faced by lawyers are not so easily determined. The purpose of this article is to discuss some of the ethical problems faced by a lawyer when a client arrives at his office for a legal consultation with a weapon used in the crime. By discussing some of the case law and ethics opinions in reference to this problem, the practitioner may have a better idea of how to ethically serve his client. He may also learn how to remain within the bounds of the law should a client request advice as to whether or not to dispose of a weapon or suggest the lawyer take possession.

A lawyer should represent his client zealously within the bounds of the law. Although a lawyer is required to preserve the confidences and secrets of a client, he may reveal them when required by law or upon discovery that his client intends to commit a crime.

In his representation of a client, a lawyer may not suppress evidence his client has a legal duty to produce. It is a fundamental rule of law that a lawyer who suppresses evidence from the court's consideration perpetrates a fraud upon the court and is subject to suspension or disbarment.

Historically, the early case of State v. Dawson announces several principles worthy of discussion. In Dawson, the defendants were charged with stealing silver coins. During the trial, the defendant's lawyer testified that the kind of money he was paid as a retainer was silver coins. In reversing the conviction and remanding the case for a new trial, the Supreme Court of Missouri held that the lawyer's testimony in reference to the kind of money the defendants paid him was a privileged communication. In its decision, the Missouri court stated several principles on which it based its opinion:

(1) The lawyer-client privilege is not confined to verbal or written communications made by a client to his lawyer during a legal consultation; instead, the privilege encompasses "transactions" -- words, signs, and acts -- communicated by the client to his lawyer.

(2) Public policy strongly favors the privilege to encourage consultation and freedom of discussion between a client and a lawyer; only when the purpose of the privilege would be grossly abused should the privilege be held inapplicable to the consultation.

A more recent case announcing the same principles enunciated in Dawson is the case of State v. Sullivan. In Sullivan, a client consulted his lawyer in reference to a homicide which had been committed just days before by the client. At trial, the defendant's attorney was forced to testify concerning statements his client made to him during a legal consultation relative to the location of the victim's body. In deciding that admitting the lawyer's testimony was prejudicial error, the Washington Supreme Court held that the client's statement to his lawyer in reference to the location of the victim's body was a privileged communication.

Courts and ethics opinions have consistently followed the principles enunciated in Dawson and Sullivan. Communications made by a client to a lawyer in reference to a past crime remain privileged, whereas communications in reference to the commission of a future crime or fraud are not privileged.

HOW ETHICAL IS YOUR ADVICE?

A lawyer acts as a guarantor of his client's confidences when he refuses to reveal the content of a legal consultation. Should he in fact disclose relevant portions of the legal consultation, such conduct would be tantamount to a betrayal of his client's confidence.

The basic distinction between a past and future crime in reference to the applicability of the privilege becomes even more significant when the following question is posed: Should a lawyer advise his client to dispose of a murder or assault weapon during a legal consultation? Such advice would almost certainly fall outside the scope of the privilege for at least two reasons:

(1) The lawyer would be considered as an aider and abettor of his client since he actively participated in the cover up.

(2) As an accomplice, the client's crime would be considered as a continuing crime, rather than a past one; therefore the lawyer's advice would fall outside the privilege.

Several cases lend support to such a conclusion. In Clark v. State, the lawyer advised his client over the telephone to dispose of a murder weapon used in the crime. In refusing to allow the privilege to attach to the conversation, the Texas Criminal Court of Appeals held that the lawyer's advice to the client to dispose of the weapon was not aid in preparing his defense at law, but rather, it was help to the perpetrator of the crime so he may evade arrest or trial. In Clark, the Texas court stated as follows:

> One who knowing that an offense has been committed conceals the offender or aids him to evade arrest or trial becomes an accessory. The fact that the aider may be a member of the bar and the attorney for the offender will not prevent his becoming an accessory.

In line with the viewpoint expressed in Clark is the case of In Re Ryder. During a legal consultation with his client, Ryder discovered that a sawed-off shotgun and stolen money remained in his client's safe deposit box after a bank robbery. In the course of his representation, Ryder actually transferred the sawed-off shotgun and the stolen money from his client's safe deposit box to his own. One purpose for transferring the evidence was to conceal the articles and avoid the presumption of guilt should such evidence be found in his client's possession.

Ryder was charged with violations of Canon 15 (How Far a Lawyer May Go in Supporting a Client's Cause) and Canon 32 (The Lawyer's Duty) of the Canons of Professional Ethics. In rejecting the view that Ryder's conduct was protected by Canon 5 (Defense of Accused) and Canon 37 (Confidences of a Client), the court concluded that Ryder's conduct violated Canons 15 and 32. The court further concluded that in helping his client conceal the shotgun and stolen money, Ryder acted outside the bounds of the law and showed disloyalty to the general rules enunciated by the Canons.

In rejecting the view that Ryder's acts were covered by the lawyer-client privilege, the court stated as follows:

> It is an abuse of a lawyer's professional responsibility knowingly to take possession of and secrete the fruits and instrumentalities of a crime. Ryder's acts bear no reasonable relation to the privilege and duty to refuse to divulge a client's confidential communication. Ryder made himself an active participant in a criminal act, ostensibly wearing the mantle of the loyal advocate, but in reality serving as accessory after the fact.

While a lawyer should never advise his client to dispose of fruits of a crime or take possession of such evidence with so-called felonious intent, it would be proper for a lawyer to advise his client of the potential consequences should the client be caught with such incriminating evidence.

MAY A LAWYER EVER TAKE POSSESSION?

Should a lawyer take possession of fruits of a crime with the felonious intent as did Ryder, such conduct would be considered criminal as well as unethical. But should a lawyer take possession of the fruits of a crime as a result of a legal consultation, such conduct could be considered proper.

Two significant cases lend support to such a view. In State v. Olwell, a lawyer found a murder weapon as a result of a confidential communication from his client. After taking the evidence into his possession, the State issued a subpoena duces tecum to Olwell requiring him to produce his client's murder weapon. Olwell refused to obey the subpoena duces tecum,

claiming that at the time he received the weapon he was acting as the lawyer for his client. The Washington Supreme Court in its decision held that the subpoena duces tecum was defective, since it required the lawyer to give testimony concerning information received by him from his client during their conference. In discussing whether the lawyer-client privilege was applicable to the knife held by Olwell, the court stated:

> We are in agreement that the attorney-client privilege is applicable to the knife held by [Olwell], but do not agree that the privilege warrants the attorney, as an officer of the court, from withholding it after being properly requested to produce the same. The attorney should not be a depository for criminal evidence (such as a knife, other weapons, stolen property, etc.), which in itself has little, if any, material value for the purposes of aiding counsel in the preparation of the defense of his client's case. Such evidence given the attorney during legal consultation for information purposes and used by the attorney in preparing the defense of his client's case, whether or not the case ever goes to trial, could clearly be withheld for a reasonable period of time. It follows that the attorney, after a reasonable period, should, as an officer of the court on his own motion, turn the same over to the prosecution.

By allowing the privilege to attach to the weapon, the court in Olwell established the principle that a lawyer may withhold fruits of a crime for a reasonable period of time before surrendering the evidence to police in the following situations:

(1) a lawyer must gain possession of the evidence as a result of a confidential communication;

(2) the lawyer must take possession of the evidence without the so-called felonious intent, i.e., without intending to alter or suppress the evidence or cut off its chain of custody.

Another significant case which adopts the principles enunciated in Olwell is the Florida case of Anderson v. State. In Anderson, the defendant was charged with receiving and concealing stolen property. Subsequently, the stolen property was delivered to the receptionist at his lawyer's office. Defendant's counsel immediately turned these items over to the police. The State thereafter subpoenaed the defendant's lawyer and his receptionist to testify at trial from whom they received the dictaphone and calculator. The State in Anderson argued that delivery of the property was not a communication protected by the lawyer-client privilege.

The Second District Court of Appeals in Anderson held that the defendant's delivery of the evidence to his lawyer's receptionist was a communication falling within the lawyer-client privilege. The court in Anderson further held that the lawyer or his staff may not be required to divulge the source of the items. The court, however, qualified its holding by announcing four conditions to its holding:

(1) The delivery by the defendant must be in connection with a matter the defendant retained his counsel for.

(2) The items would have to be delivered without solicitation to the lawyer or his staff for a lawful purpose.

(3) The lawyer must return the items to police after retaining them for a reasonable time.

(4) The lawyer must accept the evidence without any attempt to destroy the chain of custody.

CONCLUSION

The conclusions reached in Olwell and Anderson, supra, seem to strike an acceptable balance between the need for effective criminal prosecution, the fair administration of justice, and the promotion of freedom of consultation between a lawyer and client. While a lawyer may take possession of fruits of a crime, he should turn the evidence over to the police immediately. Should a lawyer retain possession of evidence for too long a period of time, he would fall into a Ryder-type situation, making a lawyer subject to disciplinary action.

THOUGHTS ON GATHERING CHARACTER EVIDENCE

Gathering character evidence which will be used, whether on the merits or in extenuation and mitigation, is an important function of the defense counsel. Techniques for gathering character evidence will vary with counsel's commitments and personal preferences. The following discussion is intended only to briefly outline some techniques which have been used successfully. Regardless of which method is used to gather the evidence, it must be employed quickly. Time is literally of the essence.

1. Personal contact: The best way to develop character evidence is to contact potential witnesses in person or by phone. This personal contact enables counsel to evaluate the substance of the witness's testimony as well as the witness's general demeanor. It also enables counsel to question the witness concerning other potential witnesses whom the accused may have failed to mention. The personal call can be particularly effective in the military community, since officers and petty officers often discuss the performance and reliability of their men and, thus, one favorable character witness can often supply numerous other witnesses.

2. Use of pre-interview "discovery" forms: Often the accused is unable or unwilling to provide counsel with the names of local personnel who may serve as useful character witnesses. It then becomes incumbent upon counsel to see if such people exist. One way is to personally interview all of the accused's supervisors. Not only is this method time-consuming, but it is often fruitless, because many of the accused's supervisors will consider him to be a hopeless case. Consequently, it is much more productive to search out potential "E & M" witnesses by using a "discovery" form. (A sample is included in this manual.) Simply ask the accused's command legal officer to distribute the forms and have them executed. Pick them up several days later and exploit the information gained. If all of the material is negative, simply discard the questionnaires and look for your "E & M" case elsewhere. Obviously, you must use such devices with discretion and caution.

3. Letters: This manual contains sample letters which counsel can utilize to develop character evidence. Written responses to requests for character testimonials will often uncover valuable character witnesses who can be called to testify in person. Written responses to these letters can also be introduced as defense exhibits for the purpose of extenuation and mitigation. These "solicitation" letters should be sent as soon as possible if the replies are to be of any use at trial.

4. Service records: Much valuable character evidence can be derived from service record entries. Items such as citations and letters of commendation contained in service records can be utilized to establish the good character of an accused. Counsel should be aware that in many instances, if an accused is past his first enlistment, valuable character information can be obtained from the accused's permanent personnel file in Washington, D. C.

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VOIR DIRE - A NEGLECTED TOOL OF ADVOCACY*

By Major Ronald M. Holdaway**

The author analyzes and compares the use of voir dire examination in civilian courts against such examination in the military courts-martial. He discusses those areas of examination which tend to expose matters such as bias or interest, the extent to which voir dire may be used to develop a theory of defense on the case, and the degree of control which may be exercised over the voir dire by judges and law officers. He concludes by offering practical suggestions for conducting a successful voir dire examination.

I. INTRODUCTION

Voir dire examination of jurors is considered by many leading trial lawyers to be an extremely valuable tool of advocacy,[1] quite apart from its connection with the challenging process. In civilian jurisdictions it is not uncommon for the examination of prospective jurors to take several hours or even several days as lawyers skillfully use it not only to develop possible challenges, but also as sounding boards for their theory of the case. On the other hand, use of voir dire in courts-martial is relatively neglected. This is not to say that voir dire is nonexistent in military courts; it probably is used and used effectively. Yet personal experience of the writer, his discussion with other military counsel and law officers, and a study of the relatively few cases reaching appellate level compel the conclusion that by and large, there is either no voir dire or, if an examination is conducted, it tends to be very perfunctory in nature. Therefore, the goal of this article is to develop the law of voir dire, its purposes and limitations, and the thesis that examination of prospective court members can and should be an effective tool of military advocacy provided it is carefully prepared and executed. Finally, an attempt will be made to state some practical and useful suggestions as to how to prepare and conduct voir dire examination.

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[1] See, e.g., I. M. Belli, Modern Trials 796 (1954).

II. PURPOSES OF VOIR DIRE EXAMINATION

The origin of voir dire examination of prospective jurors is rather obscure. No doubt it developed as a natural concomitant of the right to an impartial jury.[2] The major purpose of examining the jury was then and remains now, at least ostensibly, to discover possible challenges against prospective jurors. Discussed below, however, are three purposes for conducting voir dire examination.

A. DISCLOSING DISQUALIFICATION OR ACTUAL BIAS

All jurisdictions in the United States allow inquiry to disclose disqualification or actual bias.[3]

B. AID IN EXERCISING PEREMPTORY CHALLENGES

Voir dire was considerably expanded by the inclusion of peremptory challenges. Most jurisdictions, though not all,[4] will allow examination which will reasonably aid in a more intelligent exercise of peremptory challenges. Since such a challenge is often exercised on the basis of a juror's personal background and beliefs, the scope of inquiry is naturally rather broad.[5]

C. A TACTICAL DEVICE TO INDOCTRINATE THE JURY

This use of voir dire will be the main focus of this article. By indoctrination is meant that the question itself is designed to have an influence on the juror and his answer thereto is only incidental or of little significance. Such a question may be little more than an attempt to create rapport with the juror (or in courts-martial, the court member -- the terms are interchangeable for purposes of this article). However, more often the purpose of the question will be to advise, in an interrogatory form, the juror of certain rules of law, defenses, or facts expected to arise in the case in such a way as to ally the juror with the counsel's side or theory of the case. For example, the following question does not really anticipate a negative response: "Do you agree with the rule of law that requires acquittal in the event there is reasonable doubt?" The rule of reasonable doubt is one of the fundamental principles of

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[2] See 4 W. Blackstone Commentaries 352-55 (13th ed. 1800).

[3] See, e.g., State v. Higgs, 143 Conn. 138, 120 A.2d 152 (1956); People v. Car Soy, 57 Cal. 102 (1880). See also, Morford v. United States, 339 U.S. 258 (1949), wherein the Supreme Court held that the constitutional right to a jury trial was infringed when defense counsel was precluded from interrogation as to actual bias.

[4] See, e.g., People v. Raney, 55 Cal.2d 236, 359 P.2d 23 (1961); McGee v. State, 219 Md. 53, 146 A.2d 194 (1959).

[5] See, e.g., Lightfeet v. Commonwealth, 310 Ky. 151, 219 S.W.2d 984 (1949); Sorrentino v. State, 214 Ark. 115, 214 S.W.2d 517 (1948).

our criminal law and is known as such by most of our citizens; therefore, even in the instance where a court member did not particularly agree with the rule, he would hardly acknowledge so in open court. The real reason for such a question is, in a sense, to put the member on notice right from the start that there might be reasonable doubt in the case and to get him mentally familiar with the rule in the hope that he will look for reasonable doubt in the case and vote to acquit. It makes it more likely, furthermore, that in the decision-making process the member will be more aware than he otherwise would have been of the principle of reasonable doubt; he will have committed himself to believing it, and perhaps by emphasizing it at the voir dire and, of course, during summation, the rule will be enlarged in his mind. Therefore, particularly in cases where the facts are close or the defense technical, skillful examination of the jurors or court members may well prove important in the eventual outcome of the case.

Having pointed out this third use of voir dire and having noted that the focus of this article is its use as a means of advocacy, a note of caution is appropriate. Voir dire is part of the challenging procedure; therefore, its only legitimate use is as part of that challenging procedure.[6] That it may be useful for indoctrination purposes does not change the requirement that it ostensibly relate to possible challenges -- either peremptory or for cause. Thus while the farthest thing from counsel's mind might be a potential challenge, he is still obliged to frame the question so that it appears relevant to a possible challenge. This must be understood as it colors the whole spectrum of the law of voir dire. Many of the problems concerning permissible scope of examination, as will be seen, arise from a failure of counsel properly to phrase their questions so that the responses thereto appear to relate to a challenge. For example, it is fairly common to preface a question concerning a rule of law as to whether the juror understands the rule. Such a question will generally be held improper.[7] Whether the juror understands the law does not go to his qualifications or existence of prejudice (absent a response indicating a mental incompetency).[8] On the other hand, what a juror's attitude is toward the law might well go to his ability to be impartial and hence his qualification to hear the case.[9] Therefore, a slight change in phrasing, showing an understanding of the form voir dire examination must take, may be the difference between a proper and an improper examination.

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[6] See, e.g., Kephart v. State, 93 Okla. Crim. 451, 229 P.2d 224 (1951); State v. Baner, 189 Minn. 280, 249 N.W. 40 (1933); State v. Hoagland, 39 Idaho 405, 228 P. 314 (1924).

[7] See, e.g., People v. Harrington, 138 Cal. App.2d 902, 291 P.2d 584 (1955).

[8] Id.

[9] See People v. Wein, 50 Cal.2d 383, 326 P.2d 457 (1958); State v. Plumlee, 177 La. 687, 149 So. 425 (1933).

III. THE LAW OF VOIR DIRE IN CIVILIAN JURISDICTIONS

The emphasis of this article is the use of voir dire in military courts-martial. Yet, as in many other phases of courts-martial procedure and practice, the civilian law forms the basis for the military law. An understanding of the general principles applicable in federal and state jurisdictions will not only enable the military counsel better to understand the law of voir dire, but will be very instructive in formulating more effective ways of conducting voir dire examination in military courts.

There are two main problems that arise in civilian practice. The first problem pertains to who should properly conduct the examination; the second and most vexatious pertains to the proper scope of the examination.

A. WHO CONDUCTS VOIR DIRE EXAMINATION?

There is no unanimity as to whether the trial judge or counsel should conduct the voir dire examination. Some states have held that counsel has no absolute right to ask questions of the jurors;[10] while others, conceding the judge to be chiefly responsible for examinations, have found error in completely pre-empting counsel from supplementary examination.[11] Most jurisdictions, however, contemplate an examination participated in by both court and counsel. Even where the judge has chief responsibility, he is often under some obligation to allow supplementary examination by counsel.[12] The litigation has arisen as to how far the judge could go in cutting off inquiry and whether the actions of the judge were prejudicial under the circumstances.[13] If there is such a thing in this area as a modern trend, it is the practice of taking voir dire from counsel and giving the trial judge the main responsibility for examination of the jurors. This practice no doubt has arisen because of real or imagined abuses of counsel in using the examination as a springboard to indoctrinate the court, a subject to be covered later on. The federal courts greatly restricted

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[10] See, e.g., Bryant v. State, 207 Md. 565, 115 A.2d 502 (1955); Commonwealth v. Taylor, 327 Mass. 641, 100 N.E.2d 22 (1951).

[11] See, e.g., Blount v. State, 214 G. 433, 105 So.2d 304 (1958); State v. Guidry, 160 La. 655, 107 So. 479 (1926).

[12] Cal. Penal Code, § 1078 (West 1956). See generally Hamer v. United States, 259 F.2d 274 (9th Cir. 1958), wherein the court held that precluding counsel from personally asking questions pursuant to rule 24, Federal Rules of Criminal Procedure, was not violative of the defendant's constitutional rights. However, the court did look to the voir dire posed by the judge to ensure that it was adequate and fair.

[13] Compare People v. Boorman, 142 Cal. App.2d 85, 297 P.2d 741 (1956), with People v. Coen, 205 Cal. 596, 271 P. 1074 (1928).

counsel by rule 24, Federal Rules of Criminal Procedure,[14] which, in effect, gives the trial judge the authority to conduct the voir dire and permits the judge, should he so desire, to compel counsel to submit questions to him in writing. The Supreme Court of Illinois by rule[15] forbids any questions concerning the law or instructions; and, as will be seen, the wide discretion given to the judge in regulating the scope of voir dire examination in all jurisdictions has greatly curtailed counsel, even in those states where counsel has chief responsibility for examination.[16]

B. PERMISSIBLE SCOPE OF EXAMINATION

There are two general rules which are cited in almost every case that considers the permissible scope of voir dire examination. The first, and one already alluded to, is that examination of the jury is limited to questions which relate to a possible challenge.[17] The second rule is that the judge is vested with wide discretion[18] in determining whether the inquiry is relevant and proper. As to the first rule -- the necessity of relating inquiry to possible challenges -- there are few problems raised when counsel is truly seeking possible disqualification or subjective bias on the part of the juror. The statutes that set forth juror qualifications vary greatly. Suffice it to say that examination concerning statutory eligibility is not only permissible but in at least one state mandatory.[19] Also, where counsel is seeking facts showing subjective bias on the part of the juror such as prior knowledge of the case, relationship with one of the parties, or actual prejudice, there will be little question but that the inquiry is within proper limits.[20] The other broad area of challenges is, of course, peremptories. In connection with this type of challenge, it is generally held that counsel may interrogate the juror as to that part of his personal, social, and economic background that would reasonably aid counsel in exercising his peremptory challenges.[21]

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[14] Fed. R. Crim. P. 24.

[15] See Christian v. New York Cent. R.R., 28 Ill. App.2d 57, 170 N.E.2d 183 (1960).

[16] See, e.g., Roby v. State, 215 Ind. 55, 17 N.E.2d 800 (1938; State v. Hoagland, 39 Idaho 405, 228 P. 314 (1924); State v. Douthitt, 26 N.M. 532, 194 P. 879 (1921).

[17] See cases cited note 6 supra.

[18] See, e.g., State v. Hoagland, 39 Idaho 405, 228 P. 314 (1924).

[19] See Commonwealth v. Taylor, 100 N.E.2d 22, 327 Mass. 641 (1951).

[20] See, e.g., Morford v. United States, 339 U.S. 258 (1949); State v. Higgs, 113 Conn. 138, 120 A.2d 152 (1956).

[21] See I. F. Busch, Law and Tactics in Jury Trials § 84 (1959).

Therefore, so long as the question clearly relates to a juror's subjective fairness, ability to be fair in a general sense, or his background there will be little problem as to scope of examination. The problems have developed when counsel has sought to influence or indoctrinate the jury by means of voir dire examination concerning the facts or law of the case. This might be termed inquiry, not to determine an ability to be fair in general, but an inquiry concerning an ability to be fair in general, given specific facts, defenses, or rules of law that will be part of the case. Judges, no doubt discerning the true intent of such examination, have resisted such questions and a fairly considerable body of case law has developed testing the judge's discretion in regulating the scope of examination. The question usually takes the form of a hypothetical one that attempts to obtain a commitment from a juror as to how he would react to certain issues which may be developed at the trial. Appellate courts go in every possible direction in these situations. The questions that can be asked and the way in which they can be are infinite in their variety. Accordingly, it is impossible to categorize with any accuracy those questions which are permissible and those which are not. There are some general guidelines which might be helpful so long as the reader recognizes that the application of these principles is by no means universal and that they are sometimes inconsistently applied even within a single appellate jurisdiction.

It has been said that hypothetical questions and questions concerning the law of the case are improper.[22] This is much too broad a statement. If such questions are held improper (or properly excluded) it generally will not be because of the hypothetical nature of the question or because it touches on the law of the case, but rather because there is a defect in the form of the question or because the purpose of the question shows no clear relationship to a possible challenge. Thus, questions which seek a commitment from a juror as to how he will decide the case,[23] or what impact certain facts or law will have on him,[24] or what his understanding of the law is[25] will generally be excluded because the purpose of the question does not relate to anything which could form the basis of either a challenge for cause or a peremptory challenge; the purpose is to gain a commitment from the juror prior to the time he has heard any evidence. Illustration of questions defective as to form, as

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[22] Id.

[23] Kephart v. State, 93 Okla. Crim. 451, 229 P.2d 224 (1951); State v. Bauer, 189 Minn. 280, 249 N.W. 40 (1933); Christianson v. United States, 290 F. 962 (6th Cir. 1923).

[24] State v. Smith, 234 La. 19, 99 So.2d 8 (1958); State v. Dillman, 183 Iowa 1147, 168 N.W. 204 (1918).

[25] People v. Harrington, 138 Cal. App.2d Supp. 902, 291 P.2d 584 (1955).

distinguished from content, would be those that are repetitious,[26] ambiguous, confusing, or awkwardly worded. Also, those which incorrectly state the law or inaccurately or incompletely state the facts[27] would fall in this category.

It would seem to follow then that if a question is carefully framed to show a clear relation to a possible challenge and avoids defects as to form, the problems just referred to could be avoided. However, it is not that simple. The rule that vests wide discretion in the trial judge makes it by no means certain that an ostensibly proper question will be allowed or conversely that a seemingly improper question will be excluded. For example, in State v. Douthitt,[28] a case decided by the Supreme Court of New Mexico, the following question was disallowed by the trial judge: "[C]ould [you] give the defendants the benefit of reasonable doubt if such doubt should exist?"[29] Relying on the discretion of the trial judge, the court, while finding nothing particularly wrong with the question itself, said that there was no clear abuse of the judge's discretion in denying the question. Certainly a persuasive argument could be made that the question was proper. A negative response would clearly be a cause for a challenge.

On the other hand, there are several cases in which either the prosecutor or the trial judge was allowed to ask a question which seems improper according to the general guidelines set forth above, yet has been held properly allowed.[30] There are, as a result, seemingly contradictory rules within a single appellate jurisdiction.[31] However, a rule that truly does vest wide discretion in the trial judge presupposes that results need not be uniform. Trial judges within the same appellate jurisdiction can and will have differing attitudes as to what the proper scope of voir dire should be. Therefore, the appellate courts have consistently refused to impose a uniformity on them except within very broad limits.

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[26] People v. Modell, 143 Cal. App.2d 724, 300 P.2d 204 (1956).

[27] State v. Zeigler, 184 La. 829, 167 So. 456 (1936).

[28] 26 N.M. 532, 194 P. 879 (1921).

[29] Id.

[30] See, e.g., Stoval v. State, 233 Ark. 597, 346 S.W.2d 212 (1961).

[31] Compare People v. Guasti, 110 Cal. App.2d 456, 243 P.2d 59 (1952), with People v. Wein, 50 Cal.2d 383, 326 P.2d 457 (1958); State v. Hoagland, 39 Idaho 405, 228 P. 314 (1924), with State v. Pettit, 33 Idaho 319, 193 P. 1015 (1920); State v. Peltier, 229 La. 745, 86 So.2d 693 (1956), with State v. Normandale, 154 La. 523, 97 So. 798 (1923).

At this point it would be traditional to attempt to analyze and summarize the law as to the proper scope of voir dire examination in civilian jurisdictions. It should be evident, however, that this would be virtually impossible aside from the basic rule that examination must relate to challenges and whether it does is within the discretion of the trial judge. The cases in this area are decided very much on an ad hoc basis and whether the judge is found to have abused his discretion,[32] a very rare thing, probably depends on whether the appellate court thinks it important enough to base a reversal on. Subsequent portions of this article will attempt to make a more detailed breakdown as to the questions commonly asked, and an effort will be made to show how the courts have approached the problem of the proper scope of an examination on specific questions. The best that can be said in a general way concerning counsel's dilemma in determining whether a question is going to be held proper or improper is that if he wishes to have the best possible chance of having the question allowed he must be certain that the inquiry is related to a possible challenge, accurately states the law and/or facts, and is correct as to form.

IV. VOIR DIRE EXAMINATION IN MILITARY PRACTICE

In the introduction it was pointed out that examination of the court members is probably not nearly as extensive in courts-martial as it is in most civilian jurisdictions. This is an empirical observation of the writer gained from both personal experience and discussion with other military counsel and law officers. As the military system actively promotes appeals[33] as to any possible defect that might have occurred at the trial, it is surprising that there are relatively few appellate cases. Of course there are differences between courts-martial and civilian trials that partly account for this. For example, the composition of the court is known in advance. Therefore, counsel will have an opportunity to make inquiries concerning court members in advance of trial, although it should be noted parenthetically that this advantage is probably not exploited as much as it could be. Quite often too, a military counsel will know many of the members of the court at least casually. Also, a court sits for more than one case; this will afford an opportunity to observe the members, and, of course, if voir dire is conducted in the first case or two, it will make it less necessary in subsequent cases. Then, too, it should be considered that the ordinary military court is a

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[32] In relation to the number of cases that have tested the discretion of the court, those finding an abuse of discretion are extremely small. Those resulting in reversal show no common rationale but merely point up the ad hoc approach that is taken in this area. See, e.g., People v. Raney, 213 Cal. 70, 1 P.2d 423 (1931); Territory v. Lynch, 18 N.M. 15, 133 P. 405 (1913); People v. Car Soy, 57 Cal. 102 (1880).

[33] Review is automatic for all general courts-martial and most of them include a free transcript of the court-martial record as well as furnishing of appellate defense counsel. The raison d'etre of appellate defense is to carefully "fly-speck" a record for any and all errors at the trial level.

relatively homogeneous body, at least compared to the average civilian jury; there is a rough similarity of background, interests, and economic and social status. In short, the military court is much more of a known quantity and very many of the questions asked of a jury in a civilian trial, which seek basic information concerning the personality and background of the juror, are simply not necessary in a court-martial. Another factor leading to a less extensive examination is that an accused is only entitled to one peremptory challenge and unless the challenge reduces the membership below five members no one is appointed to replace the challenged member. Therefore, the somewhat exhausting and exhaustive process of repeating questions to a prospective juror who is called to replace one challenged is avoided.

Perhaps another reason which would explain in part the less extensive examination of the court, if the reader will accept the assumption that it is less extensive, is inherent in the military structure of the court. There is a tradition, very real to some, that says that an officer will do his duty and is not to be questioned or put on oath about his ability to do so, particularly by one junior in rank. This attitude as it applies to examination of the court is exemplified in a comment made by The Judge Advocate General of the Army during World War II in an indorsement to a general court-martial that had been submitted to him for review and transmittal to the Secretary of War. There had been a voir dire conducted during the trial, the nature and extent of which are not contained in the opinion, but it apparently was an inquiry pertaining to the law of the case. In discussing the propriety of such an examination of the court, The Judge Advocate General said: "[Voir dire] assumes that there may be members of the court who are unwilling to follow the mandates of the law and is a gratuitous assumption carrying aspersions which are unfair and unauthorized"[34] That there has been a change in the official line goes without saying; examination is specifically allowed by the Manual for Courts-Martial,[35] and certainly has the blessing of the Court of Military Appeals. In fact, one case found that failure to voir dire the court was an error in tactics that indicated, along with other deficiencies, inadequate representation.[36] Yet the old attitude hangs on and from time to time there is a case where attempted examination of the court provokes an outburst from a "traditionalist" that he resents his word being questioned.[37] Undoubtedly some counsel, particularly those junior in rank, are deterred from at least some examination because of this.

Yet aside from the fact that the membership of the court is known in advance, the reasons for voir dire would appear to be just as persuasive as in civilian trials; perhaps more in some instances. Certainly anytime there is even the hint of improper command

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[34] B.R. (E.T.O.) 2203, Bolds (1944).

[35] R.C.M. 912(d).

[36] See United States v. McMahan, 6 U.S.C.M.A. 709, 21 C.M.R. 31 (1956).

[37] See United States v. Lynch, 9 U.S.C.M.A. 523, 26 C.M.R. 303 (1958).

influence, a factor unknown in civilian criminal law, voir dire becomes a necessity. Also, the fact that the court-martial is the sentencing agency would seem to call for more and broader examination of the court's attitude towards crime and punishment.[38] Consider also that in many instances the military community is relatively small and perhaps parochial in its outlook; this would seem to call for inquiry concerning knowledge of the case and relationship of the court members with the parties, witnesses, or convening authority, and attitudes towards courts-martial in general. The military procedure then, although perhaps calling for a less extensive examination of the "jurors," should not discourage the necessity for examination and, in fact, might indeed demand a more incisive examination than would be true in civilian trials.

The United States Court of Military Appeals (hereinafter referred to as the court) has developed a rule, discussed hereinafter, not too different in form to that discussed above as to civilian jurisdictions. Yet the substance of the rule has a subtle difference as to emphasis which implies a much broader examination.

In the military there is no problem as to who is to conduct voir dire examination. The Rules for Courts-Martial states in Rule 902(d)(2) that counsel "shall be permitted to question the military judge..." and although formerly Judge Latimer expressed a preference for the federal rule which gives the trial judge chief responsibility,[39] this view was disputed in the same case by Judge Quinn and has not been brought up again in any reported case. However, there is no doubt that the law officer has the right to supplement counsel's examination should he so desire.[40] The troublesome question that the court has been called on to decide is, as is true in civilian jurisdictions, the proper limits of voir dire examination. The use or attempted use of the examination to indoctrinate the members of the court-martial has been the chief cause of most of the litigation. The landmark case, the one which definitively stated the rule and the one which is cited in every case since is United States v. Parker,[41] decided in 1955. There were several questions asked on voir dire, all of which were obviously designed to indoctrinate rather than obtain an answer. The following colloquy took place:

> Defense Counsel: Is there any member of the court who would, though finding any reasonable doubt in his mind as to the guilt of the accused, nevertheless find the accused guilty?

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[38] The Court of Military Appeals has recognized that the court-martial sentencing powers make relevant the attitudes and beliefs of court members. See, e.g., United States v. Fort, 16 U.S.C.M.A. 86, 36 C.M.R. 242 (1966); United States v. Cleveland, 15 U.S.C.M.A. 213, 35 C.M.R. 185 (1965).

[39] See United States v. Parker, 6 U.S.C.M.A. 274, 19 C.M.R. 400 (1955).

[40] Id. at 282, 19 C.M.R. at 408.

[41] 6 U.S.C.M.A. 274, 19 C.M.R. 400 (1955).

> Law Officer: That question is improper because the court will be instructed on reasonable doubt at the time the law officer gives his instructions. That question will not be answered.
>
> Defense Counsel: Very well, is there any member of the court who, while being instructed on matters given by the law officer, would feel he personally is privileged to go ahead and arrive at conclusions disregarding the instructions given by the law officer?[42]

The latter question was also disallowed. The court stated that generally as to scope of voir dire:

> [The members of the court-martial] may be asked any pertinent question tending to establish a disqualification for duty on the court. Statutory disqualifications, implied bias, actual bias, or other matters which have some substantial and direct bearing on an accused's right to an impartial court. . . .[43]

In applying this general principle to the case, while upholding the rulings of the law officer, the court said:

> [W]e do not seek to encourage law officers to be miserly with counsel on the preliminary examination. Within the military system, if any reason is advanced therefor, we think the law officer who either inquires himself or permits inquiry to determine with certainty that court-martial members will accept their law from the law officer, follows a desirable course.[44]

Concerning the questions in this particular case, Judge Latimer stated:

> Perhaps as to these particular questions, the law officer would have been wiser had he permitted them to be answered, although negative responses were inevitable. But one of the well-recognized rules of criminal jurisdiction is that wide discretion is vested in trial judges as to the questions which must be answered by jurors on voir dire. Appellate courts should reverse only when a clear abuse of discretion, prejudicial to the defendant, is shown. Conceding that the purposes of voir dire are to determine whether individual jurors can fairly and impartially try the issues, and to lay a foundation so that peremptory challenges can be widely exercised, those purposes do not permit the examination to range through fields as wide as the imagination of counsel. Because bias and prejudice can be conjured up from many imaginary sources and because peremptory challenges are uncontrolled except as to number, the areas in

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[42] Id. at 279-80, 19 C.M.R. at 405-06.

[43] Id. at 279, 19 C.M.R. at 405.

[44] Id. at 282, 19 C.M.R. at 408.

which counsel seeks to question must be subject to close supervision by the law officer.[45]

The rule as thus stated and the rationale to support it are not different in any substantial respects from the rules earlier discussed that apply in most civilian courts; examination is limited to inquiry touching upon challenges for cause or that which will aid in the exercise of peremptory challenges. While some latitude should be given counsel, the law officer has broad discretion and only clear abuse on his part will be considered error. Yet it is apparent that the court is troubled to some extent by the law officer's ruling. In the part of the opinion just quoted, the court concedes that it "would have been wiser" to allow the question and that law officers should not be "miserly with counsel" in limiting the scope of examination. In another part of the opinion, wherein Judge Latimer prefaces the discussion on voir dire with some general considerations, he states that "when there is a fair doubt as to the propriety of any question, it is better to allow it to be answered. While materiality and relevancy must always be considered to keep the examination within bounds, they should be interpreted in a light favorable to the accused."[46] There is then, as contrasted with civilian jurisdictions, much more emphasis on the accused's rights to impartial triers of fact. Perhaps there is even a hint that the court has reservations about a military court's ability to be impartial. Anyone who read this opinion in 1955 could not have been too surprised, considering the language in it, to see the emphasis shift in later cases from the wide discretion of the law officer to the wide latitude to be allowed counsel. This has happened.

Consider the following colloquy from United States v. Sutton,[47] decided in 1965:

DC: . . . .

Major, if a reasonable doubt were raised in your mind, would you vote for a finding of guilty --

LO: Well, I'll interrupt that question.

On voir dire examination preliminary to challenges, the members of the court-martial may be asked any pertinent question tending to establish a disqualification, implied or actual bias, or any other matter which would have some substantial doubt -- I correct myself -- which would have some substantial and direct bearing on the accused's right to an impartial court as exercised through his challenges for cause, are proper subjects for inquiry. While counsel will be allowed considerable latitude, each will be expected to stay within the bounds which I have just indicated in asking any questions.

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[45] Id. at 280, 19 C.M.R. at 406.

[46] Id. at 279, 19 C.M.R. at 405.

[47] 15 U.S.C.M.A. 531, 36 C.M.R. 29 (1965).

> Now, the question that you just put [Captain] undertakes to go into the matter of what the law of the case will be. When this court gets ready to make its decision they must take the law from me. You do not know what the law is going to be as it applies to this case at this time, and consequently, I think that I will hold that this is not a proper question on voir dire.
>
> You may proceed within the limitations that I have indicated, but before you do so I turn to each member of the court and say that each of you should listen carefully to any question asked. If you do not understand the question you should say so. If you wish to enlarge any answer to a question calling for a "yes" or "no" to express yourself clearly, you should say so.
> . . . .
>
> DC: In view of the ruling by the law officer, the defense has no further questions of the court.[48]

Pause briefly and consider the importance this exchange must have had in the minds of the participants. Had counsel been fully conversant with the case law, and particularly Parker, he would not have been surprised by the law officer's ruling; no doubt the law officer felt confident of the correctness of his ruling. The question asked was almost identical to the first question asked in Parker. The law officer quoted almost verbatim from the general rule cited in Parker as to the permissible scope of voir dire in making this ruling. It is true that he placed the emphasis on his discretion and paid lip service to that portion of Parker enjoining him to be liberal in his rulings, yet such a rule presupposes, implicitly anyway, that lip service will have to be paid to one facet or another of the rule. You cannot give the law officer wide discretion and at the same time give wide latitude to counsel; one or the other has to be dominant. The law officer in Sutton must have been certain that he properly exercised his discretion and would be upheld on review of the case. There is nothing certain in the law; the court found error in the law officer's ruling and somehow managed to quote Parker as precedent.

> While an accused is not entitled to favorable court members or any particular kind of juror, he is guaranteed the right to a fair-minded and impartial arbiter of the evidence. . . . When one is found to be willing to convict, though he entertains a reasonable doubt of guilt, he fails to accord the proper scope to the presumption of innocence and may be imbued with the concept that the accused may be blameworthy, else he would not stand arraigned at the bar of justice. And to those who doubt the existence of such beliefs on the part of some court members, we point to our decisions in United States v. Carver and United States v. Deain. . . . Thus, it seems entirely proper for counsel to interrogate a member, as in this case, as to whether he entertains such beliefs and would convict despite a reasonable doubt of the accused's guilt.[49]

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[48] Id. at 534-35, 36 C.M.R. at 32-33.

[49] Id. at 536, 36 C.M.R. at 34.

This quote from Sutton could have been equally applicable to Parker. In Sutton, both sides on appeal cited Parker, the government relying on the "wide discretion" of the law officer and the defense relying on the "wide latitude" to be allowed counsel. It would be oversimplifying to say that the court was successful in distinguishing the facts. They were not that different. Yet instead of overruling Parker directly, the court did attempt to reconcile it. Four general distinguishing facts were pointed to: (1) The inquiry was not general, but was directed to one member; (2) the law officer misunderstood the purpose of the question; the question did not go into the law of the case, but rather was an inquiry into the member's belief in the law; (3) the guidelines of the law officer excluded voir dire as an aid in peremptory challenges; and (4) this cautionary instruction to the court indicated that counsel was trying to trap them. There was also some indication that the court felt Parker was partly based on a suspicion that counsel did not ask the question in good faith.[50] In any event Sutton, while ostensibly relying on the Parker case, emphasizes the point that had been merely referred to in Parker, that is that counsel should be allowed a wide latitude and slid over the crux of Parker, which was the wide discretion to be accorded to the law officer.

Other cases, one quite recent, might indicate that the court has not wholly abandoned the law officer. In United States v. Freeman[51] and United States v. Fort,[52] the rulings of the law officers, excluding questions, were upheld. In Freeman, the following question was excluded by the law officer:

> IC: . . . Now gentlemen, is there anybody on this court who does not think, in his own opinion, that a person can be so drunk that they cannot entertain a specific intent and a prescribed offense, such as, say, the intent to willfully disobey an order, or say, the intent to deprive somebody, permanently of their property?[53]

Appellate defense counsel construed this as asking whether anyone had a prejudice against intoxication as a defense; thus they tried to fit it into the rationale of Sutton. The law officer apparently construed it as asking how the court would decide the case and based his ruling on that. The court felt it could be construed either way. In their holding they pointed out that all the law officer did was point out the infirmities in the question and emphasized that the ruling of the law officer did not prohibit further questioning.[54] There is then an implication that the general line of inquiry was proper.

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[50] Id. at 535, 36 C.M.R. at 33.

[51] 15 U.S.C.M.A. 126, 35 C.M.R. 98 (1964).

[52] 16 U.S.C.M.A. 86, 36 C.M.R. 242 (1966).

[53] United States v. Freeman, 15 U.S.C.M.A. 126, 128, 35 C.M.R. 98, 100 (1964).

[54] Id. at 129, 35 C.M.R. at 101.

Similarly in Fort, wherein the charge was indecent assault on a 68-year-old woman, the following colloquy took place:

> DC: In spite of any mitigation, or extenuating circumstances. Just the sole fact of conviction on this charge. Regardless of what may be presented in the case. Regardless of what may be presented in extenuation. Do you think this would require a punitive discharge?
>
> PRES: I think it might. I don't know that it would require it absolutely, but you made an assumption that he is guilty. This is an assumption that we don't know yet.
>
> LO: I don't think we ought to carry this -- I think the question is improper because of the way it is worded.
>
> DC: Sir, can I rephrase the question?
>
> LO: All right, rephrase the question. You make it a very difficult question to answer because the nature of the offense in itself calls for a punitive discharge. The nature of the offense itself, if one is found guilty, calls for a punitive discharge and other accessories. The way you have the question worded makes it difficult for anyone to answer it.
>
> DC: Well, my question is this, sir, I'll rephrase it, that regardless of what it presented in mitigation or extenuation, regardless of what comes in at this point, that you would require -- that you would find that this would require a punitive discharge, regardless of what might be brought in later as to the circumstances surrounding the -- or any extenuation or mitigation.
>
> PRES: Well I think it might.
>
> LO: Does any member of the court wish to comment?
>
> MEMBER: I think it might.
>
> LO: I think the question is highly improper and I don't think we'll go into this discussion. If you wish to question the members individually, you may do so. I think that collectively it is difficult to answer this question anyway.[55]

On appeal when the rulings of the law officer were attacked, inter alia, for improperly curtailing voir dire examination, the court, citing Parker, found that the law officer did not abuse his discretion. Had they left it at that then perhaps there would have been an indication that the pendulum was swinging back to the discretion of the law officer. However, the court stressed the fact that the law officer did not foreclose further inquiry but merely

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[55]United States v. Fort, 16 U.S.C.M.A. 86, 87-88, 36 C.M.R. 242, 243 44 (1966).

directed that under the circumstances the inquiry would have to be on an individual basis; this ruling was proper they said in view of the fact that individual members had indicated a possible ground of disqualification. The clear implication again is that the content of the inquiry was proper and that a ruling of the law officer which shut it off entirely would have been error.[56]

In summarizing the military rule, it would be safe to state that while the Court of Military Appeals purports to apply the same general rule cited in Parker as to permissible scope of juror examination, in reality the rule has evolved to a point that the wide discretion vested in the law officer has largely been dissipated by emphasizing the accused's right to an impartial court and the concomitant of that, a right to a searching examination of the attitudes and beliefs of the court members. To this extent the military practice and procedure is significantly different than its civilian counterpart. A study of the civilian cases compels the conclusion that, if anything, there is a trend towards removing voir dire examination from counsel and making it a function of the judge, and of course as has been seen, even where counsel conducts the inquiry, most civilian appellate jurisdictions repose a truly wide discretion in the trial judge in regulating the scope of examination. On the other hand, the Court of Military Appeals has rejected any attempt to remove the examination from counsel and has very distinctly moved from a position of restrictive examination under the strict supervision and discretion of the law officer to one of a wide examination covering almost every relevant belief and attitude a court member might have. While ritual homage is paid to the law officer's power in regulating the scope of the examination, it really appears to be little more than power to guide the inquiry so that it is in an understandable and appropriate form.

Whether the court consciously moved to a rule different from that of the civilian courts is a matter of pure speculation. As has been intimated before, the cases from civilian jurisdictions are not that clear, and they too have reached different results while purporting to apply the same rule.[57] But it could be theorized that the court did consciously reach the result they did in Sutton because of the peculiar nature of the military court-martial as distinguished from the civilian jury. A military court is a creature of orders created for the express purpose of deciding cases referred to it by the convening authority, who is in most cases also the commanding officer of the court members. Moreover, by the nature of rank and position of the members, most of whom are either subordinate commanders or members of the convening authority's staff, they have a personal and direct stake in the maintenance of discipline. No fair minded person will deny that the potential for abuse exists in such situations. Because

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[56] Id. at 39, 36 C.M.R. at 245.

[57] See note 31 supra and accompanying text.

of this the court has been quick to strike at even the hint of illegal command influence or the existence of predispositions or prejudices on the part of the court members.[58]

While the court has not explicitly stated a different rule as to voir dire examination, their opinions do show a great sensitivity to the attitudes and beliefs a court member carriers into court with him. Such a concern is nonexistent in civilian trials, except perhaps in those few cases that have engendered a great deal of newspaper publicity.[59] It could be said that a civilian court will presume a juror can be fair as to the general issues of a case, whereas, perhaps, at least insofar as the court is concerned, no such presumption exists in courts-martial because of the more personal involvement of the member in the system. This makes possible an extensive examination, subject only to the limitations that it be relevant in a very broad sense and that it be phrased in an understandable and proper form. A persuasive argument could therefore be made that the military situation does call for a different approach to examination of the court.

V. VOIR DIRE AS AN INDOCTRINATION DEVICE

As indicated heretofore the main burden of this article is to focus on voir dire examination as a tool of advocacy in influencing or indoctrinating the court-martial members. We have seen in discussing the scope of examination that its use for this purpose alone is not proper. It must be made relevant to a possible challenge. Yet it is apparent from the cases so far cited and discussed that much of the litigation as to scope of inquiry has arisen from attempts to bring up legal and factual issues that will arise during the trial, not for the purpose of challenging prospective jurors but for the purpose of gaining a commitment in one form or another that the juror will apply the defense (or prosecution) oriented law to the case or will not be unduly influenced by adverse facts expected to develop at the trial. In this section, then, will be discussed the arguments for and against voir dire examination as an indoctrination device, circumstances where it can be so utilized, and analysis of questions commonly asked.

A. THE CASE AGAINST INDOCTRINATION BY VOIR DIRE

Basically, the argument against voir dire examination of this type is that its use in such a manner is a subversion of the legal purpose of examining the jury. A corollary of this argument is that unrestricted voir dire can result in such a serious abuse as to impede the administration of justice. As Judge Latimer pointed out in Parker, the variety of questions that can be asked are only limited by the "imagination of

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[58] See United States v. Fort, 16 U.S.C.M.A. 86, 36 C.M.R. 242 (1966); United States v. Sutton, 15 U.S.C.M.A. 531, 36 C.M.R. 29 (1965); United States v. Cleveland, 15 U.S.C.M.A. 213, 35 C.M.R. 185 (1965).

[59] See Sheppard v. Maxwell, 384 U.S. 333 (1966).

counsel."[60] Similarly, consider this language from the New Mexico Supreme Court: "The examination of jurors would be interminable if parties were allowed to take up the whole law of the case item by item, and inquire as to the belief of the jurors and their willingness to apply it."[61] This is somewhat overdrawn. Good sense of counsel, not to mention the trial judge, will ordinarily impose some reasonable limitation far short of this; yet it is apparent that there is potential for abuse. In turn, this has led to curtailing examination by counsel and reposing chief responsibility on the judge. The federal courts by rule 24 of the Federal Rules of Criminal Procedure gave the trial judge almost plenary authority over voir dire examination.[62] California, as a result of real or imagined abuses on the part of counsel, did the same thing by statue.[63] Illinois moved directly against indoctrination by voir dire with a 1958 rule of their Supreme Court which states that counsel "shall not directly and indirectly examine the jurors concerning matters of law or instructions."[64] The reports of the Committees which recommended the adoption of this rule succinctly summarized the arguments against this type of examination:

> The examination of jurors concerning questions of law supposed to be encountered in the case is without question one of the most pernicious practices indulged in by many attorneys. The usual procedure is to inquire as to whether or not jurors will follow certain instructions if given. . . [The] supposed instructions as orally expounded by the advocate are slanted, argumentative and often . . . clearly erroneous. . . .
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> . . . [P]ropounding questions of law to the jury is of no aid in arriving at the legitimate purpose of the voir dire, namely, an intelligent exercise of the right of challenge. Such questions are improper and should not be allowed. . . .
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> . . . [M]any lawyers infringe upon the prerogatives of the court and under the guise of eliciting information attempt to impart to the jurors a conception of the law highly favorable to their side of the cause. Such tactics, unfortunately almost universally followed in today's Illinois jury trials, invade the province of the court, are time consuming, tend to confuse the jurors and do nothing to further the purpose of the voir dire procedure. . .[65]

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[60] United States v. Parker, 6 U.S.C.M.A. 274, 19 C.M.R. 400 (1955).

[61] State v. Douthitt, 26 N.M. 532, 534, 194 P. 879, 880 (1921).

[62] Fed. R. Crim. P. 24.

[63] Cal. Penal Code, § 1078 (West 1956).

[64] People v. Lexow, 23 Ill.2d 541, 542, 179 N.2d 683, 684 (1962).

[65] Christian v. New York Cent. R.R., 28 Ill. App.2d 57, 59-60, 170 N.E.2d 183, 185-86 (1960).

B. THE CASE FOR INDOCTRINATION BY VOIR DIRE

The arguments for allowing counsel to indoctrinate by means of voir dire cannot be found articulated anywhere other than in texts on trial practice. The reason is obvious. If counsel admitted or even inferred this was his reason for conducting an examination, he would lose all legal standing to conduct it. Nevertheless, a case can be made that counsel should, within limits, be allowed to inquire into the juror's attitudes concerning the law or facts of a case. It is generally acknowledged, or at least is part of our legal folklore, that many of the rules of law, particularly those designed to protect seemingly guilty people, are probably pretty much ignored in deliberations as to guilt or innocence. The judge or law officer intones these high sounding rules in a not always interesting or understandable fashion and likely they are promptly forgotten by most of the jurors. For example, instructions to acquit because of insanity, instructions on intoxication as a defense, or instructions to ignore a confession if there is duress or the warning found improper may largely be ignored if the juror thinks the accused probably did the act alleged. The author feels there is nothing wrong with a system that admits such attitudes might exist and allows inquiry concerning them. It is disingenuous to argue that a person prejudiced as to the facts or biased against the particular accused is disqualified from sitting, but a person prejudiced as to the law of the case is not. If it be admitted that few people will acknowledge such a prejudice, at least counsel should be able to force potential jurors to deny such bias. The result would be less of a chance that mere lip service would be paid to some of these so-called "unpopular" but nevertheless important rules of law. There is certainly adequate machinery available in the guise of the trial judge to curb any blatantly improper examination.

C. THE ACTUAL USE OF VOIR DIRE TO INDOCTRINATE IN CURRENT PRACTICE

Arguments pro and con aside, there is no doubt but that voir dire examination is extensively used in an attempt to indoctrinate the jury. One recent study,[66] admittedly of a limited scope, concluded that of examinations conducted in one jurisdiction during one session of the court, 80 per cent were designed to indoctrinate the jury and only 20 per cent were legitimately concerned with challenges. Moreover, the inquiries designed to indoctrinate were far more effective. Therefore, the task of this section will be to discuss some of the more common lines of inquiry for a voir dire examination, the main goal of which is to influence or indoctrinate potential jurors. There are perhaps four broad areas of inquiry which lend themselves to possible indoctrination. The first, and most common, are questions which

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[66] Broeder, Voir Dire Examinations: An Empirical Study, 38 Cal. L. Rev. 503 (1965).

touch upon the law of the case; second, are questions concerning evidence which might be introduced during the trial. This type of question usually takes the form of inquiry as to the impact certain evidence would have on a juror or the effect conflicting evidence would have. The third broad type of question concerns the influence a juror would feel from the other jurors; and finally, there are questions which seek to determine the effect the testimony a certain witness or type of witness would have on the juror.

1. Examination Concerning the Law of the Case.

Questions about the law of the case may take the form of inquiry as to whether the jury would follow the instructions of the judge[67] or about specific rules of law or legal defenses that will be relevant to the case. Also, it is common to ask a juror about his reaction to or belief in reasonable doubt,[68] burden of proof,[69] self-defense,[70] or insanity.[71] Such questions are proper provided they are in such a form as to clearly relate to a challenge, although in most civilian jurisdictions it is not an abuse of discretion on the part of the trial judge to disallow them.[72] Certainly in the military the rationale of the Sutton case would make such questions proper. When this type of question is disallowed it is often because of some reason aside from the fact that it pertains to the law of the case. For example, such questions are disallowed because the form is seeking a commitment[73] from a juror as to how he will vote,[74] is repetitious,[75] or is worded in such a manner as to render it ambiguous, unclear, or an incorrect statement of the law.

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[67] State v. Dean, 65 S.D. 433, 274 N.W. 817 (1937).

[68] State v. Douthitt, 26 N.M. 532, 194 P. 879 (1921).

[69] State v. Bauer, 189 Minn. 280, 249 N.W. 40 (1933).

[70] State v. Zeigler, 184 La. 829, 167 So. 456 (1936).

[71] State v. Hoagland, 39 Idaho 405, 228 P. 314 (1924).

[72] See State v. Douthitt, 26 N.M. 532, 194 P. 879 (1921); Commonwealth v. Barner, 199 Pa. 335, 49 A. 60 (1901).

[73] State v. Bauer, 189 Minn. 280, 249 N.W. 40 (1933).

[74] McKinney v. State, 80 Tex. Crim. 31, 187 S.W. 960 (1916).

[75] State v. Williams, 230 La. 1059, 89 So.2d 899 (1956); State v. Peltier, 229 La. 745, 86 So.2d 693 (1956).

2. Examination Concerning Evidence.

Inquiry concerning the effect of certain evidence commonly occurs when one side expects adverse testimony to be introduced and it is desirable to bring the matter up at voir dire. The purpose of the inquiry on voir dire is to steal the thunder from the other side and also to gain a commitment from the jury that they will disregard the adverse evidence to the extent legally permissible. For example, a record of previous convictions or aggravating circumstances surrounding the alleged offense are often the subject of examination.[76] The tenor of the question is usually directed to whether a juror can disregard such evidence or whether he can and will follow an instruction which requires him to disregard it.[77] Such questions have been held to be proper,[78] although to allow them is not ordinarily considered an abuse of discretion in most civilian jurisdictions.[79] Generally, when such questions are disallowed it is because they are defective in form or purpose rather than because the ultimate line of inquiry is inappropriate.[80] Exclusion would also be proper if the question asked for a commitment from the juror or the phrasing was ambiguous. The most serious defect of questions as to evidence, however, is a failure to properly qualify the question. It may be perfectly proper for such evidence to be considered and weighed by the jury; therefore, to the extent the question infers that the evidence is to be disregarded in its entirety it may be disallowed as an inaccurate statement of the law.[81]

3. Inquiry on Conflicting or Evenly Balanced Evidence.

This type of question is normally phrased this way: If at the end of the trial you determined that the evidence was evenly balanced, that if there was as much reason to believe one side as the other, would you feel compelled to vote for

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[76] See, e.g., People v. Louzen, 338 Mich. 146, 61 N.W.2d 52 (1953); State v. Dillman, 183 Iowa 1147, 168 N.W.2d 204 (1918).

[77] See People v. Louzen, 338 Mich. 146, 61 N.W.2d 52 (1953).

[78] See, e.g., People v. Hosier, 116 N.Y.S. 911 (1909) (prejudicial error not to allow a question as to impact prior convictions of the defendant would have on the jury).

[79] See, e.g., Manning v. State, 7 Okla. Crim. 367, 123 P. 1029 (1912).

[80] See People v. Louzen, 338 Mich. 146, 61 N.W.2d 52 (1953).

[81] See Manning v. State, 7 Okla. Crim. 367, 123 P. 1029 (1912); State v. Dillman, 183 Iowa 1147, 168 N.W.2d 204 (1918).

the prosecution?[82] There are decisions,[83] notably from Michigan, that would allow this question, but such a question seems to be clearly improper as to form and purpose. The defects are obvious; not only does the question seek a commitment from the juror as to how he would decide the case, but more importantly, it fails to sufficiently define what is meant by "evenly balanced." The judge can dispense with such a question by stating that he will properly instruct the jury as to the weight to be given evidence and the quantum of proof required, leaving open only the general question as to whether the jury will follow the judge's instructions.[84]

4. Examination on the Weight to be Given the Testimony of Specific Witnesses.

This line of inquiry concerns the weight the jury will give to the testimony of certain people or classes of people. Many older cases asked about the ability or willingness of the jury to give as much weight to the testimony of non-whites as that accorded to the testimony of whites.[85] Other questions asked along the same lines concern the effect a juror is willing to give the testimony of a convict, an accomplice, or the accused himself.[86] There are also questions where the inquiry was directed to the weight the jury would give to the testimony of an expert or a police officer.[87] Here again, questions of this sort have been held proper, but the disallowance of them has not been normally considered an abuse of discretion.[88] In addition to upholding the discretion of the trial judge, exclusion of such questions has often been based on the usual defects discussed previously, that is, improperly seeking a commitment, defective phrasing, or repetition. However, the most serious error found in this line of questioning is failure to properly qualify it. For example, as the

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[82] See People v. Peck, 139 Mich. 680, 103 N.W. 178 (1905).

[83] E.g., id.; Towl v. Bradley, 108 Mich. 409, 66 N.W. 347 (1896).

[84] See People v. Lockhart, 342 Mich. 595, 70 N.W.2d 802 (1955).

[85] See Lee v. State, 164 Md. 550, 165 A. 614 (1933); People v. Car Soy, 57 Cal. 102 (1880).

[86] See Frederick v. United States, 163 F.2d 536 (9th Cir. 1947); State v. Smith, 234 La. 19, 99 So.2d (1958); Lesnick v. State, 48 Ohio App. 517, 194 N.E. 443 (1934).

[87] See Sellers v. United States, 271 F.2d 475 (D.C. Cir. 1959); Matney v. State, 26 Ala. App. 527, 163 So. 656 (1935).

[88] See, e.g., Lesnick v. State, 43 Ohio App. 517, 194 N.E. 443 (1934); cf. Sellers v. United States, 271 F.2d 475 (D.C. Cir. 1959).

testimony of a convict, accomplice, or accused ordinarily is not entitled to as much weight as that of another witness, a question implying that such testimony has absolute equality with other testimony should be disallowed as erroneous.[89] Also, a question may be defective in that it attempts to get the juror to commit himself as to the weight he would give one witness singly or as compared to another witness. This inquiry is unrelated to challenges and is nothing more than an attempt to get a juror to commit himself as to the testimony of a witness before he has even heard the witness testify.[90] An illustration of this defect, together with the appellate court's solution as to how to properly ask the question, occurred in Chavez v. United States.[91] Defense counsel requested the judge to ask the prospective jury this question: "Would any of you place a greater amount of weight upon the testimony of law enforcement officers over that of the defendants?"[92] The court of appeals stated that the exclusion of the question was proper, but went on to state that had the question been properly qualified by asking "whether the prospective juror would give greater or less weight to the testimony of a law enforcement officer than to that of another witness simply because of his official character,"[93] then it would have been allowable.[94] A subsequent case, citing Chavez, found error when the trial judge disallowed the question that the court in Chavez had suggested would have been proper. Some lawyer had been doing his homework.

5. Examination on the Influence of Fellow Jurors.

A question commonly asked in civilian courts and normally held properly excluded pertains to whether or not a juror will allow his decision to be influenced by his fellow jurors.[95] The defect in such a question is that it tends to create division among or between jurors when jurors should listen to the opinions of one another. However, such a

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[89] See People v. Louzen, 338 Mich. 146, 61 N.W.2d 52 (1953); Manning v. State, 7 Okla. Crim. 367, 123 P. 1029 (1912).

[90] See Chavez v. United States, 258 F.2d 816 (10th Cir. 1958); Matney v. State, 26 Ala. App. 527, 163 So. 656 (1935).

[91] 258 F.2d 816 (10th Cir. 1958).

[92] Id. at 819.

[93] Id.

[94] Sellers v. United States, 271 F.2d 475 (D.C. Cir. 1959).

[95] See, e.g., State v. Wolfe, 343 S.W.2d 10 (Mo. 1961); Caesar v. State, 135 Tex. Crim. 5, 117 S.W.2d 66 (1938); Walks v. State, 123 Fla. 700, 167 So. 523 (1936).

question, if properly qualified, does seem appropriate to a court-martial because of the rank structure of the court. Thus the question, "Would you allow yourself to be influenced by the other members of the court?", is objectionable for the reasons cited above. On the other hand, it would seemingly become allowable in a court-martial by adding the phrase, "solely because of the superior rank of the other members."

6. Examination Concerning Predisposition Towards Sentence.

Questions peculiar to military cases are those pertaining to the attitudes and beliefs of court members towards sentencing. The only civilian parallel are those cases upholding the right to ask about a juror's feelings concerning the death penalty.[96] In a court-martial the question is generally directed towards possible bias in favor of a discharge as part of the sentence. Those most familiar with the military system will concede that the very fact that a case is before a general court-martial has a tendency to predispose the court members to adjudge discharge in the event of conviction. Recognizing this, the court has laid down a very broad rule as to inquiry in this area. "Inflexible attitudes" and predispositions concerning sentence can be inquired into very extensively provided counsel clearly frames the question properly as to purpose and form.[97]

VIII. VOIR DIRE BY THE PROSECUTION

The implicit orientation of this article has been the use of voir dire examination by the defense. This is not due to any particular defense bias on the part of the writer but rather to the fact that the case law has largely developed around denial of voir dire to the defense. Denial of voir dire to the trial counsel or prosecution is not an appealable error in the vast majority of American jurisdictions. However, some cases have reached the appellate level on the theory that examination allowed to the prosecution was prejudicial to the accused. These cases do warrant a brief treatment of voir dire by the prosecution.

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[96] See, e.g., United States v. Puff, 211 F.2d 171 (2d Cir. 1954).

[97] The language in Cleveland v. United States, 15 U.S.C.M.A. 213, 35 C.M.R. 185 (1965), and United States v. Fort, 16 U.S.C.M.A. 86, 36 C.M.R. 242 (1966), certainly expresses sensitivity as to the attitudes and beliefs court members carry into court with them. This would imply, as mentioned previously, a very broad and far reaching voir dire into the very mental processes of the members.

Ostensibly, the same general rules apply to both sides of the case. The prosecution may ask any question relevant to the exercise of his challenge, be they for cause or peremptory. Likewise, he may, to the extent that he is successful in relating them to challenges, ask questions designed to indoctrinate the jury. However, common sense suggests that greater restrictions are placed upon the prosecutor. He must be careful not to use voir dire as a guise for the introduction of inflammatory or otherwise inadmissible evidence.[98] There have been a few cases finding error when this was done.

There are no military cases where examination by the trial counsel[99] resulted in reversible error. In United States v. Carver, the Court of Military Appeals found the error nonprejudicial as it was not directed to the subject matter of the inquiry (i.e., weight a member would give the opinion of an expert), but rather the fact that the trial counsel was seeking to get a member to commit himself to his attitude toward a witness who had already testified.

It could be assumed that the court would apply the same rules on voir dire to trial counsel examination as it would for defense counsel examination, absent an attempt to improperly influence the court.[100]

VIII. SOME PRACTICAL RULES FOR PREPARING VOIR DIRE

That voir dire examination can be and should be better utilized is the theme of this article. From the antecedent discussion it is apparent that much of the litigation has arisen because of defects in the form of the inquiry rather than its substance. Since the vast majority of the cases, at least from civilian courts, are finding exclusion of questions proper, it is fairly obvious that poorly executed voir dire often results in exclusion of questions which if properly planned and executed would have been allowed. There are some rules which if applied should at least greatly enhance the chances of having the question accepted. These suggestions are largely limited to examination designed chiefly to indoctrinate the court. While many of them apply equally to an examination seeking possible challenges, by and large such an examination will cause little difficulty. If there is a suspected or known

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[98] See, e.g., People v. James, 140 Cal. App.2d 392, 295 P.2d 510 (1956); State v. Hoffman, 344 Mo. 94, 125 S.W.2d 55 (1939); Nelson v. State, 129 Miss. 288, 92 So. 66 (1922).

[99] 6 U.S.C.M.A. 258, 19 C.M.R. 384 (1955).

[100] Beyond the purview of this article, which is concerned with the scope of examination, are those problems raised when voir dire results in disclosure of information which is prejudicial to the accused, such as a member's knowledge of a previous act of misconduct on the part of the accused. Counsel who is aware of such potential problems should take care that the member is excused prior to trial or is questioned and challenged outside the presence of the other members.

disqualification, or a known or suspected bias on the part of a court member, there will be little problem in either the phrasing or the form of the question. The problem arises, as has been stated throughout this article, when counsel's purpose is to influence the court members by his questions.

1. Examination Must Only Touch on Important Issues.

While the argument has been made here, persuasively it is hoped, that there should be more voir dire in courts-martial, this is not to say that there should always be extensive examination or even examination at all. It should be saved for the important issues if it is to have the intended effect. It must be remembered that a military court might hear several cases presented by the same counsel. While each case is separate, it would not do to ignore the fact that the court might have been examined on the same point before in a previous case. Also, there will be routine guilty pleas before a court that has not been immoderate in sentencing. In such a case, examination would not be particularly appropriate by the defense and could be dangerous if conducted by the prosecution.

2. Examination Should Have a Clear Purpose.

This ties in somewhat to the first rule. Before asking any question, counsel should first decide what the purpose of the question is and whether the question is framed to aid this purpose. He will then have to relate his examination to what his general analysis of the case has revealed are the crucial issues of law and fact that the court will be called on to decide. The examples are obvious. If reasonable doubt and burden of proof appear to be the chief hope for the defense, then the purpose of examination will be to emphasize these rules in the minds of the court members. Likewise if insanity, self-defense, or intoxication are to be the defenses, the purpose of voir dire will be to negate, insofar as is possible, the unpopularity that such defenses often have in the minds of laymen. The point is that the truly important issues of the case must be isolated and pinpointed, and the inquiry planned to revolve around only those issues (unless of course there is an apparent reason to examine for a possible challenge).

3. Voir Dire Must Be Thoroughly Prepared.

Every phrase of a properly tried case demands this; nevertheless, how many times does counsel carefully prepare his case yet stand up to examine the court with little or no preparation and only a vague idea of what he would like to accomplish by voir dire? It is apparent from reading the cases that this often happens. Consider the following question asked in a case arising in Illinois prior to the adoption of their rule forbidding such an inquiry:

> The prosecuting witness may appear to be an elderly white lady who may have parted with various sums of money, and it may develop that this defendant received this money and that she had not received any part of the money back and she entered into an obligation with this defendant by which she expected to receive large returns for the money that she advanced, and if you are satisfied that this defendant did receive this money, but the criminal intent to defraud her by making representations that are false, and he had knowledge of the falsity, if the state fails to show that this is the truth, would you by your verdict find this defendant not guilty?[101]

Perhaps this is the case that prompted the Illinois Supreme Court to greatly curtail examination as to the law. It is clear that such a question, aimless and with no apparent purpose other than to state the facts of the case in advance of the trial, was not planned or well thought out. This is admittedly an extreme case, yet it can be used to illustrate what proper analysis would have done. The key to the defense was reasonable doubt and burden of proof concerning the intent to defraud; therefore, a simple question to the juror as to his attitude towards these rules would have stood at least some chance of acceptance. Even if a long, rambling question is allowed it will largely lose its effectiveness. The question needs to be incisively drawn, highlighting the issue considered important, else the wheat will get lost in the chaff.

4. Examination Should Be Directed To An Individual.

Collective questions which allow an individual court member to answer more or less anonymously normally do not accomplish the intended result. The very purpose of this type of examination is to force a commitment of sorts from an individual.[102] Only in this way will it have a lasting effect. A court member does not come into court expecting to be placed on the spot. While he may resent it, nevertheless, the fact that all eyes are on him while he is answering the question is likely to make the question and his answers loom large in his mind. Moreover, if a senior member of the court commits himself to belief in or sympathy with a certain rule of law, or commits himself to disregarding certain adverse facts, then this is likely to have at least some effect on the junior members.

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[101] People v. Robinson, 299 Ill. 617, 618, 132 N.W. 803, 804 (1921).

[102] Commitment not in the sense of how the member would vote, but rather a commitment as to the willingness to apply a certain rule or ignore a certain fact.

5. The Court Should Be Advised of the Purpose of Voir Dire.

The preceding paragraph noted that examination of the court will catch most of the members by surprise; also, particularly in the case of quite senior members, the experience of having their attitudes and beliefs questioned will be relatively novel. The following response to a question posed on voir dire by the court president in United States v. Lynch[103] will no doubt stir memories of similar instances in the minds of those who have practiced extensively in courts-martial:

> You, as a civilian lawyer, may not be aware that an officer of the United States Army is bound to tell the truth.
> . . . .
> Possibly, in civilian courts, you do not trust the witnesses or the members of the jury. This is not a jury. This is a court -- it's a military court. It is a custom of the service -- from all usage of military courts -- that those members of the court are officers and -- I'm running out of words. I think you know what I mean. There is a difference between civilian trials and military trials.[104]

Defense counsel unsuccessfully challenged the president of the court for cause. The case was naturally reversed, not so much because voir dire was curtailed, but because of the outburst of the president. While the case makes for light reading, the situation at the trial was no doubt rather tense. No matter how well planned and executed, voir dire in such a situation will not accomplish much. The goal is, remember, to ally the court with the questioner's theory of the case. If it is done in such a way as to antagonize the court then it will not accomplish its purpose. This is so whether or not the court should have reasonably been antagonized. Furthermore, there is not sure way of avoiding this type of problem. There will always be a few irreconcilables who simply do not care for the present court-martial system. But there is a way to minimize the possibility of this happening and that is a low-key, simple explanation to the court of the nature of voir dire examination with emphasis on the fact that it is a perfectly legitimate part of the trial process and has express approval of the Manual for Courts-Martial. While the law officer might cut off a lengthy discussion, he no less than counsel should wish to avoid the type of situation exemplified by Lynch. It might be well to informally advise the law officer prior to the trial that voir dire is planned and invite him to explain to the court its nature and purpose. This would illustrate to the court members his approval of voir dire and remove some of their suspicion.

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[103] 9 U.S.C.M.A. 523, 26 C.M.R. 303 (1958).
[104] Id. at 525-26, 26 C.M.R. at 305-06.

6. Examination Should Be Phrased to Show a Purpose Consistent with Possible Challenges.

This point has been made throughout, yet it is clearly the chief defect in questions held improper by appellate courts. In addition to relating to a possible challenge, that is in such a form that a response thereto would be grounds for challenge or an aid in exercising a peremptory challenge, the question should be simple, concise, accurate as to law and facts, and insofar as possible stripped of legalisms not understood by most laymen.

IX. SUGGESTED QUESTIONS FOR VOIR DIRE EXAMINATION

Some suggested questions in areas of inquiry commonly encountered which meet the requirements of most jurisdictions are suggested in this section. The author does not contend that the questions must be allowed, only that there is a reasonable possibility that they will be.

A. QUESTIONS AS TO LAW

Are you in sympathy with (or do you agree with) the rule of law that (herein state rule)?

Are you willing to follow the instructions of the law officer without qualifications?

Does the fact that charges have been referred predispose you to a belief that the accused is guilty?

Do you have any bias against a defense based on insanity (or intoxication or any other relevant defense)?

If you determine that there is a reasonable doubt as to the accused's sanity, will you acquit, even though you might feel he committed the act alleged?

B. QUESTIONS CONCERNING EXPECTED TESTIMONY

1. Police.

Would you give more weight to (or would you believe) the testimony of a policeman simply because he is a policeman?

2. Officer.

Would you give more weight to (or would you believe) the testimony of an army officer, solely because of his rank?

3. Accused.

Would you tend to disbelieve (or give less weight to) the testimony of the accused, bearing in mind his interest in the case, solely because he is the accused?

4. Accomplice or Convict.

If a witness testifies who is a/an (convict) (accomplice) will you give such weight to his testimony as allowed by law regardless of the conviction (complicity)?

C. SENTENCE

Would you feel obligated, regardless of extenuation and mitigation, to adjudge a discharge because of the nature of the offense alleged?

Are you predisposed to adjudge a discharge because the case has been referred to a general court-martial?

D. DELIBERATIONS OF THE COURT - DIRECTED TO JUNIOR MEMBERS

Lt. _____, there are several officers of higher rank on the court than yourself. During the deliberations of the court will you allow yourself to be influenced by the opinions of the senior members based solely on their superior rank?

X. CONCLUSION

We have seen that voir dire examination may have a usefulness quite apart from its ostensible purpose of aiding in the process of challenges. This use is as a trial tactic for indoctrinating or influencing prospective court members. However, the rules which set forth the guidelines as to what extent such examination may properly go still require that if counsel is to use it as an indoctrinating device he must be careful to plan his questions so as to satisfy the requirement that they relate to possible challenges. If this is done, and it is hoped that this article has suggested ways of doing it, then voir dire can be a positive aid in gaining a more sympathetic court.

A proper balance between the right to inquire into a prospective court member's attitudes and beliefs and the need for an orderly trial can be struck. A rule which emphasizes one to the detriment of the other, however, can result in the inclusion of court members unqualified to sit because of fixed or inelastic attitudes. The ideal rule, which is perhaps pretty close to present military practice, recognizes that such attitudes might exist and will allow inquiry concerning them. On the other hand, the rule must be flexible enough to prevent such limitless and extensive examination that would impede the orderly processes of the court. The discretion accorded to the law officer together with proper preparation by counsel can result in an effective voir dire which can insure to the maximum extent possible a fair and impartial court.

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PROCEDURE FOR AND CONTENT OF ARGUMENT ON FINDINGS

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All experienced trial lawyers and judges understand the importance of final argument on the issue of the guilt or innocence of the accused. Carefully prepared, final argument plays a vital role in a trial by summarizing the evidence for the court members, impressing the members with counsel's interpretation of this evidence, and discussing its applicability to the law which will be instructed upon by the military judge. To achieve these important functions, knowledgeable counsel carefully prepare their argument and thoroughly understand the nature of the comments they plan to make.

Many trial lawyers and judges have comparatively less understanding of the rules of law regarding the proper procedure for and the content of argument on findings. This is reflected in the large number of improper objections made at trial. Generally, the precious time available with which to prepare each case must be allotted to the functions of what evidence to present and what argument to make. Consequently, relatively little, if any, time is spent in determining whether these planned comments are legally proper.

The military courts have considered many of the possible issues involved, especially in the areas of procedural rules governing final argument, the limitations upon content, including comments upon the silence of the accused, and the general rules regarding reversal due to prejudicial error. From these cases, a definite law regarding permissible final argument has grown. Review of this body of law prior to preparation for trial will conserve counsel's time and, hopefully, avoid embarrassment in the courtroom.

PROCEDURE

The Rules for Courts-Martial sets forth the general procedure to be followed by counsel in presenting argument on findings.[1] The Manual provides that after both sides have rested, counsel for both sides are permitted to make argument. These arguments may be either oral or in writing. Trial counsel may make the first argument and defense the second. Trial counsel may then make an argument in reply in rebuttal -- his remarks are limited to a discussion of those matters raised by the defense counsel in his argument. If trial counsel is permitted to introduce new matter in his reply in rebuttal argument, defense counsel is then entitled to a second argument. However, if no new matters are raised by trial counsel, a

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[1] R.C.M. 919.

second argument by defense is within the discretion of the military judge.[2] Finally, if defense counsel is allowed to make a second argument, trial counsel still has the right to present the last argument. These procedures concerning the order of argument are simple, known to all judges and lawyers, and should cause little problem during trial.

A more difficult procedural problem concerns the accused's right to have argument on findings presented on his behalf. Failure of the defense counsel to argue may be, in appropriate circumstances, sufficient reason for reversal. Thus, in United States v. McMahon,[3] the Court of Military Appeals reversed a conviction for premeditated murder because defense counsel failed to argue on findings. The Court's criticism of defense counsel filled approximately two pages of its opinion and included the following language:

> (His duties) include the overriding necessity of presenting to the court members by oral argument, the facts, circumstances, and inferences in a light most favorable to the accused. Except in unusual circumstances, a failure to do that is for all practical purposes an admission of guilt. Certainly, the presenting of a "jury argument" is a virtual cornerstone of the universal right to assistance of counsel.

The aggravated circumstances of the McMahon case, which included a murder charge and failure of defense counsel to prepare his case, voir dire the court, and make an opening statement, contributed to the Court's holding. Regardless of its particular circumstances, however, this decision serves as fair warning to judges and defense counsel that failure to argue on findings may result in reversal for inadequate representation by counsel.

An issue similar to that of failure of defense counsel to argue is presented when the military judge refuses to allow defense counsel to argue. The Rules specifically provide that both sides are entitled to present and support their contentions upon any matter presented to the court for decision.[4] Although there are no military cases concerning the specific issue of denial of the defense counsel's right to present argument, it can be reasonably inferred from the provisions of the Manual, the unequivocal language of the Court in McMahon, and from the decisions concerning mere infringement upon argument that such a ruling would constitute reversible error regardless of the particular circumstances of the case.

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[2]United States v. Snook, 12 U.S.C.M.A. 613, 31 C.M.R. 199 (1962). The Court followed the Manual rule that the judge did not abuse his discretion by not allowing defense counsel a second argument when trial counsel brought up no new matter in rebuttal. However, it stated that "perhaps in serious cases the rules should be relaxed."

[3]6 U.S.C.M.A. 709, 21 C.M.R. 31 (1956).

[4]R.C.M. 919.

A mere infringement upon final argument by the military judge which amounts to less than a complete denial also raises problems of improper procedure. Although the military judge in his discretion may limit or refuse to hear argument when it is trivial or mere repetition,[5] an abuse of this discretion may cause reversible error.[6] Determination of whether this discretion was abused depends upon the facts and circumstances of the particular case. Moreover, it is difficult to anticipate what facts and circumstances will result in an abuse of discretion. Thus, a suggestion by the judge that defense counsel close in fifteen minutes after arguing for one hour and fifteen minutes was held not to be error.[7] However, it was held to be reversible error for a judge to refuse to grant defense counsel's request for a ten minute recess prior to argument.[8] In view of this holding, and the general impact of the language in the Manual, the judge should normally refrain from interfering with counsel's right to present argument.

Counsel may properly object to improper remarks in argument by opposing counsel.[9] Nevertheless, the rules governing this procedure place objecting counsel in a difficult situation. The Manual specifically provides that "argument should not be interrupted by the other side unless it becomes improper".[10] Conversely, the Court of Military Appeals and Air Force Boards of Review have held that failure to object to improper argument waives the error and precludes counsel from asserting it upon appeal.[11] Obviously, many comments made in argument could be held proper or improper depending upon the facts of the case and the discretion of the judge. Counsel are thus placed in the position of objecting and risking censure in the eyes of the judge and court members for improper objection or of not objecting and waiving the right to appeal a damaging, improper remark. Resolution of this dilemma depends upon counsel's understanding the rules defining improper argument and the circumstances under which failure to object will waive appeal.

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[5] Id.

[6] United States v. Sizemore, 2 U.S.C.M.A. 572, 10 C.M.R. 70 (1953).

[7] United States v. Gravitt, 5 U.S.C.M.A. 246, 17 C.M.R. 249 (1954).

[8] United States v. Sizemore, 2 U.S.C.M.A. 572, 10 C.M.R. 70 (1953).

[9] R.C.M. 919. This paragraph does not in specific language authorize objection, but indirectly authorizes it if argument becomes improper.

[10] Id.

[11] E.g., United States v. DeStefano, 41 C.M.R. 515 (A.C.M.R. 1969); United States v. Tobin, 38 C.M.R. 884 (A.F.B.R. 1968); United States v. Sierra, 38 C.M.R. 869 (A.F.B.R. 1968).

The general rule is that failure to object will waive the error caused by improper argument.[12] This rule exists so that timely objection will enable the judge to cure the error by appropriate instructions.[13] However, as with all general rules, there is an exception: failure of counsel to object does not preclude appellate review if application of the rule of waiver would result in a manifest miscarriage of justice.[14]

The only situations in which the Court has found a manifest miscarriage of justice are those in which the judge has compounded the improper argument by an erroneous ruling of his own or in which the comments of counsel are so prejudicial that the judge should have stopped him. In United States v. Skees,[15] the prosecution argued that the arrest of the accused could be a defense to failure to obey an order only if the accused testified to that effect. Previously, the judge had allowed a witness to testify that the accused has stated at the time of the offense that he could not obey the order and had subsequently sustained an objection to defense counsel's cross-examination requesting accused's explanation of why he could not obey the order. The Court held that a miscarriage of justice occurred because the trial counsel's improper remarks upon the silence of the accused in court were directly connected to the erroneous ruling of the judge restricting cross-examination. In United States v. Ryan,[16] the Court held that trial counsel's argument that field grade officers were more credible witnesses than enlisted men was so prejudicial as to require sua sponte instructions from the judge. The absence of such instructions required reversal. The basis of these two decisions, and the basis of the exception to the general rule of waiver, appears to be that objection by counsel will have little possibility of eliminating prejudice through proper instructions from the judge in view of the judge's previous erroneous ruling on the same issue and in view of the great probability of prejudice inherent in certain types of remarks. Thus, in determining whether to risk objection to argument, counsel should give considerable weight to the prior rulings, if any, of the judge on the issue in question and to the type of argument being made.

The outline of the procedures governing final argument reveals that, in general, they are simple and straightforward. Difficulty should arise for the judge only in exercising his discretion in limiting counsels' right to argue and for counsel only in deciding whether to object to argument of opposing counsel. Although these procedural issues can cause difficulty in particular situations, they do not present the most difficult problems surrounding permissible content of argument.

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[12] See authorities cited note 11 supra.

[13] Id.

[14] United States v. Shees, 10 U.S.C.M.A. 285, 27 C.M.R. 359 (1959); United States v. Jackson, 31 C.M.R. 654 (A.B.R. 1961).

[15] 10 U.S.C.M.A. 285, 27 C.M.R. 359 (1959).

[16] 21 U.S.C.M.A. 9, 44 C.M.R. 63 (1971).

CONTENT

Proper content in final argument may be simply defined as what counsel may say without risking error. The nature and type of argument which may be within or without this definition are limited only by the imagination of counsel, and it is impossible to evaluate and comment upon every conceivable type of remark. Thus, this article will discuss only the two general principles of proper content and will illustrate these principles by a further discussion of the unique arguments already considered by military courts.

Content Limited To Evidence Of Case

The first general principle is that the content of final argument is limited to a reasonable comment upon the evidence. This principle is set forth in the Manual in the following language:

> Arguments may properly include reasonable comment on the evidence in the case, including inferences to be drawn therefrom, in support of a party's theory of the case. R.C.M. 919(b).
>
> Argument may include comment about the testimony, conduct, motives, interests, and biases of witnesses to the extent supported by the evidence. Counsel should not express a personal belief or opinion as to the truth or falsity of any testimony or evidence on the guilt or innocence of the accused, nor should counsel make arguments calculated to inflame passions or prejudices.[17]

According to an Air Force Board of Review, "subject to these limitations . . . counsel may with perfect propriety appeal to the court with all the power, force and persuasiveness which his learning, skill, and experience enable him to command . . . ."[18] In determining whether argument has remained within this general limitation, courts will look to the issues, facts, and circumstances of each case.[19] As long as the argument concerns the issues, facts, and circumstances of the case, it will not be held improper because it may incidentally criticize or denounce the accused or stir the sympathies or prejudices of the court members.[20] The extent to which the propriety of argument depends upon the issues, facts, and circumstances of the case is illustrated by an Air Force Board of Review case and two decisions of the Court of Military Appeals.

In the first case, an Air Force Board of Review was concerned with argument by trial counsel that he believed from the evidence that the accused, who

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[17] R.C.M. 919(b), discussion.

[18] United States v. Doctor, 7 U.S.C.M.A. 126, 21 C.M.R. 252 (1959); United States v. Weller, 18 C.M.R. 498 (A.F.B.R. 1954). These cases include excellent and lengthy discussions of the overall purposes and limits of argument.

[19] See cases cited note 18 supra.

[20] Id.

was charged with larceny, was the worst kind of barracks thief.[21] After stating the rule that comments based upon the evidence and reasonable influences therefrom is not improper as tending incidentally to criticize or denounce the accused and stir the sympathies or prejudices of the court members, the Board held that trial counsel's argument was proper. Since the issue was the guilt or innocence of the accused to a charge of larceny in the barracks, a contention by trial counsel that he was a barracks thief merely concerned the primary issue of the case.

In the second case, the Court of Military Appeals considered argument of trial counsel to the effect that the accused was a psychopathic liar and a schemer who would falsify to anyone. Additionally, he stated that he did not cross-examine the accused because he disliked listening to lies from the witness stand.[22] Again, the court held the comments proper since they accurately described the crime charged and their use was supported by testimony. Here the crime charged was false swearing, which would support the statement that the accused would falsify to anyone, and there was a conflict in the testimony of the government's witnesses and the accused, which would support the comment concerning lies from the witness stand.

In the last case, the Court evaluated a statement by trial counsel that the accused perjured himself when he testified.[23] The charge was violation of an order, and the accused testified that he did not hear the order. No witness testified to the contrary, and there was no evidence in the record that the accused was lying. Finding that the comment by trial counsel was not based upon evidence in the record and that the comments were so inflammatory as to prejudice the accused, the Court reversed the conviction.[24] The logically differing facts, issues, and circumstances of these three cases clearly illustrate the danger of voicing critical, inflammatory, and denuciating remarks about the accused not predicated upon evidence of record.

In addition to the situation of inflammatory or denunciatory remarks, the general principle limiting argument to evidence of record has been applied to the practice of counsel reading from other cases or the Manual for Courts-Martial. The Manual specifically provides that "[c]ounsel may not cite legal authorities or the facts of other cases when arguing to the members on findings."[25] This practice has also been condemned by a number

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[21]United States v. Weller, 18 C.M.R. 498 (A.F.B.R. 1954).

[22]United States v. Doctor, 7 U.S.C.M.A. 126, 21 C.M.R. 252 (1958).

[23]United States v. Pettigrew, 19 U.S.C.M.A. 191, 41 C.M.R. 191 (1969).

[24]Accord, United States v. Westergren, 14 C.M.R. 560 (A.B.R. 1953) (where prosecutor's argument that accused was a liar was held beyond the scope of the evidence and, thus, error).

[25]R.C.M. 919(b), discussion.

of Air Force and Army Board of Review decisions.[26] The rationale for this rule is twofold as there is a distinction between the prohibition against reading the facts of other cases and reading the law set forth in other cases. Logic and a close reading of the decisions disclose that the prohibition against reading the facts of other cases is simply an application of the general rule confining argument to the facts of the case being heard.[27] In regard to reading principles of law set forth in other cases, the practice would violate not only the rule that argument is to be confined to reasonable comment upon the evidence but, additionally, the rule that the law of the case is to be provided by the military judge.[28]

This rule against reading legal authorities during argument to the court members does not preclude a discussion of the applicability of the facts to the law of the case before the court.[29] It would be patently impossible for counsel to present a persuasive argument on the matters before the court without reference to the law of the case. It has thus been held proper for counsel to discuss the meaning of reasonable doubt and its application to the facts before the court.[30] Counsel risk error, however, if their discussion sets forth an erroneous principle of law.[31] To avoid this possibility, comments upon the law by counsel should be limited to and follow the principles of law instructed upon by the judge.

Closely related to erroneous statements of law in argument are erroneous statements of fact by counsel. In a long and complicated trial, counsel have a tendency to misstate facts brought out in testimony or to argue facts that were not testified to. Misstatements of fact have a propensity for harm because the court members are not trained in hearing and evaluating evidence and to a great extent, if improperly, tend to be influenced by counsel's recollection of the evidence as related to them in argument. This problem, however, has not been extensively reviewed and what decisions there are do not really settle the question.[32]

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[26] E.g., United States v. Daniels, 10 C.M.R. 918 (A.F.B.R. 1953); United States v. Burton, 7 C.M.R. 244 (A.F.B.R. 1953); United States v. Teibold, 6 C.M.R. 631 (A.F.B.R. 1952).

[27] Id. See cases cited note 26 supra.

[28] R.C.M. 920.

[29] Id.

[30] United States v. Krokroski, 32 C.M.R. 767 (A.F.B.R. 1962); United States v. Beachley, 13 C.M.R. 392 (A.B.R. 1953).

[31] E.g., United States v. DeMaris, 8 U.S.C.M.A. 750, 25 C.M.R. 254 (1958); United States v. Henthorne, 8 U.S.C.M.A. 752, 25 C.M.R. 256 (1957) (the erroneous statement was that the court could infer intent to desert from the length of the absence alone); United States v. Buchanan, 37 C.M.R. 927 (A.F.B.R. 1967) (the erroneous statement was that "money spent is permanently depriving the owner of it.").

[32] United States v. Schreiber, 16 C.M.R. 639 (A.F.B.R. 1954); United States v. Tinacre, 6 C.M.R. 417 (A.B.R. 1952).

The distinct facts of these decisions do give a rationale for an acceptable answer. Thus, an Air Force Board of Review held it was error for trial counsel to refer to differences between a pretrial statement of the accused admitted into evidence and a pretrial statement of accused not admitted into evidence.[33] Conversely, an Air Force Board of Review held that trial counsel did not commit error by arguing that a larceny victim had not given the accused permission to take the property, despite a lack of such evidence in the victim's testimony.[34] The Board reasoned that the court members had heard the testimony in question and could reach their own conclusions as aided by rebuttal argument and the judge's instructions. These different holdings seem to indicate that only erroneous statements of fact concerning evidence the court members have not heard will be considered serious enough to warrant a holding of error.[35]

Two other types of argument are analogous to counsel misstating a fact upon which the court has no evidence. The first of these occurs when counsel states that he had additional witnesses available to bolster his case. A statement such as this is an erroneous statement of the facts of the case since it indirectly asserts that there are facts not in evidence that would be favorable to his cause.[36] The second situation occurs when counsel refer to the effect of the case upon relations between the military and civilian communities.[37] This occurred in United States v. Boberg, and the Court of Military Appeals reversed a murder conviction because trial counsel stated that the accused's acts failed to impress Vietnamese citizens and compromised the mission.[38] The Court's holding in this case specifically followed United States v. Cook, in which it reversed a conviction for murder of a Filipino because trial counsel argued to the court members that their decision would have a great impact on life in the Philippines for American forces and they must show everyone that justice could be done.[39] In both of these cases, the Court's holding was based upon the rationale that such argument poses theories or facts not supported by the evidence.

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[33] United States v. Smith, 12 C.M.R. 519 (A.F.B.R. 1953); accord, United States v. Ryan, 21 U.S.C.M.A. 9, 44 C.M.R. 63 (1971) (reversal of a conviction because trial counsel argued that field grade officer witnesses were more credible than enlisted witnesses).

[34] United States v. Soto, 30 C.M.R. 859 (A.F.B.R. 1960).

[35] See United States v. Tackett, 16 U.S.C.M.A. 226, 36 C.M.R. 382 (1966).

[36] Id.

[37] R.C.M. 919(b), discussion.

[38] 17 U.S.C.M.A. 401, 38 C.M.R. 199 (1968).

[39] 11 U.S.C.M.A. 99, 28 C.M.R. 323 (1959).

The last specific example of argument held in violation of the general rule limiting it to the evidence of the case concerns the personal opinion of counsel. In this area, the rule is that counsel may not express to the court his personal opinion of the guilt, innocence, or veracity of the accused.[40] If the argument is clearly a comment upon the evidence as it pertains to guilt or innocence or to the veracity of a witness, however, it will not be improper.[41] Thus, various Boards of Review have held proper comments by counsel that they believe the evidence is clear and convincing and that in their opinion the specification has been proved.[42] Clearly, such comments fall within the general principle of reasonable comment upon the evidence and do not inject unfounded opinions of counsel into the case.

It is clear that the content of final argument must be limited to the evidence before the court and the reasonable inferences that can be drawn therefrom. This rule can be used as a guide for nearly every conceivable issue that will arise concerning propriety of argument. Counsel will be allowed reasonable latitude in commenting on the evidence, and the judge's discretion will govern alleged abuses of this latitude. Rulings will be much more generous and more latitude will be allowed in this area than in the area of commenting upon the silence of the accused.

Comments Upon The Silence Of The Accused

Argument upon the silence of the accused as tending to raise an inference of guilt is a crucial concern to judges and appellate courts, and counsel tending to so argue will be given no latitude at all. Rigorous application of the rule against such argument is necessary because such an argument would not be based upon the evidence before the court, and, therefore, would be inadmissible as a violation of this general principle. However, this is merely a rule of evidence in which the discretion of the judge would control the latitude given. The real reason for this rule, and for its rigorous application, is that comments upon the silence of the accused infringe upon his right to remain silent under the Constitution and Article 31 of the Code of Military Justice.

The general rule in the military concerning argument on the silence of the accused is stated in the Manual for Courts-Martial.[43] The language of the Manual is clear and simply states that the "prosecution may not comment upon the failure of the accused to take the witness stand." The Manual provides an exception to this rule, however, by stating that "if the accused has testified on the merits . . . and if he fails in that testimony to deny or explain specific facts of an incriminating nature that the

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[40]United States v. Hunt, 9 U.S.C.M.A. 735, 27 C.M.R. 3 (1958); United States v. Reddick, 33 C.M.R. 587 (A.B.R. 1963); United States v. Westergren, 14 C.M.R. 560 (A.F.B.R. 1953).

[41]United States v. Potter, 39 C.M.R. 791 (N.B.R. 1968); United States v. Shipley, 14 C.M.R. 342 (A.B.R. 1954).

[42]Id.

[43]R.C.M. 919(b), discussion.

evidence of the prosecution tends to establish . . . such a failure may be commented upon."[44] However, when an accused is charged with more than one offense and does not testify to all, no comment may be made on his failure to testify to the others. These simple rules are not difficult to apply when there is a direct comment upon accused's failure to testify. They have been applied to such direct comments by trial counsel as saying the accused did not tell him where he got the money and that maybe he should comment on the lack of defense witnesses to testify to what the accused was doing[45] and an argument that the only way the arrest of the accused could be a defense to failure to obey an order is for the accused to say he was arrested.[46] Although direct comments such as these are clearly improper, other types of comments present more difficult decisions.

Difficult decisions are presented when the comment of trial counsel may be interpreted either as an improper comment upon the silence of the accused or as a proper comment upon the evidence before the court. To solve this problem, the Court of Military Appeals has announced the following test for determining whether argument is improper comment upon the silence of the accused:

> [The test is] whether the language used was manifestly intended or was of such character that the triers of fact could naturally and necessarily take the prosecutor's remarks to be a comment on the failure of the accused to testify.[47]

Thus, the test is: 1) whether the trial counsel intended the court to take his remarks as comment upon the silence; or 2) whether the court members could have understood the language to be such a comment. Whether either facet of the test has been met must depend upon the type of language used,[48] the manner in which it relates to the testimony or other evidence before the court,[49] and whether there is objection by defense counsel.[50] In practical applications of this test, the Court has upheld an argument that there has been no evidence to impeach, discredit, or rebut the

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[44] Id.

[45] Accord, United States v. Webb, 29 C.M.R. 644 (A.B.R. 1960); United States v. Spriggs, 25 C.M.R. 739 (N.B.R. 1958).

[46] United States v. Shees, 10 U.S.C.M.A. 285, 27 C.M.R. 359 (1959).

[47] E.g., United States v. Gordon, 14 U.S.C.M.A. 314, 34 C.M.R. 94 (1963); United States v. Simmons, 44 C.M.R. 804 (A.C.M.R. 1971); United States v. Hamilton, 41 C.M.R. 970 (A.F.C.M.R. 1970).

[48] See cases cited note 47 supra.

[49] United States v. Simmons, 44 C.M.R. 804 (A.C.M.R. 1971).

[50] United States v. Simmons, 44 C.M.R. 804 (A.C.M.R. 1971).

government's witnesses as fair comment upon the evidence[51] and upheld an argument that only the victim and the accused knew what happened and the victim could not appear in court to testify as fair comment on the availability of a murder victim to testify.[52] In determining that the language was not intended or could not be taken as comment upon the accused's silence, the court gave great weight to defense counsel's interpretation of the language and its relation to the evidence as shown by his failure to object.[53] The prohibition against comment upon the silence of the accused extends to his pretrial reliance on Article 31.[54] This rule applies not only to silence at an official interrogation following the alleged offense, but also to investigations under Article 32.[55] Under this rule, trial counsel's argument of guilt from the accused's silence at an Article 32 investigation and from his failure to call witnesses at that investigation has been held improper.[56]

These examples of improper comment on the silence of the accused demonstrate the extreme sensitivity of this issue and the strict protection afforded the accused against infringement of his right to remain silent. Any comment, direct or indirect, which is intended to cause the court to raise an inference of guilt from his silence or which may reasonably cause the court members to take it as such will be error. Further, because of the importance of this protection, the rules governing prejudice to the accused as a result of trial error will be more strictly applied than in other situations.

PREJUDICIAL ERROR FROM IMPROPER ARGUMENT

Not every improper procedure or comment in final argument will be held prejudicial error requiring reversal of a conviction. The state of the evidence in the case may be such that appellate courts may not deem the error prejudicial or reversal necessary. More important to judges or trial lawyers, there may be actions or omissions at trial which remove any prejudice and avoid reversal. The failure of counsel to object, which was considered earlier, is an omission which will avoid reversal when not compounded by an error of the judge. Additional actions at trial, and the relation of the evidence to any prejudice, will be considered below.

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[51] Id.

[52] United States v. Gordon, 14 U.S.C.M.A. 314, 34 C.M.R. 94 (1963).

[53] United States v. Simmons, 44 C.M.R. 804 (A.C.M.R. 1971).

[54] United States v. Stegor, 16 U.S.C.M.A. 509, 37 C.M.R. 189 (1967).

[55] United States v. Hickman, 10 U.S.C.M.A. 566, 28 C.M.R. 134 (1959).

[56] R.C.M. 919(b), discussion. United States v. Aefalle, 30 C.M.R. 845 (A.F.B.R. 1960); United States v. Stowe, 12 C.M.R. 657 (A.F.B.R. 1953); United States v. Martin, 7 C.M.R. 542 (A.F.B.R. 1952).

The easiest and most logical action that may be taken at trial is for the judge to stop counsel, instruct the court to disregard counsel's comments, and properly instruct them on the issue in question, if necessary.[57] This is an effective method of avoiding prejudice when the comment merely violates the rule of evidence that argument must be confined to the evidence.[58] For example, an expression of opinion by counsel may be corrected by an instruction that arguments of counsel are not evidence.[59] Also, erroneous statements of law may be corrected by admonishing counsel and properly instructing the court members on the law.[60] However, just as proper admonishment and instructions may cure improper argument, a failure of the judge to take such action may result in prejudice and reversal.[61] In view of this, it should be standard procedure for the judge to take the necessary corrective action in regard to argument he deems improper.

Corrective action by the judge may not be sufficient to avoid prejudice from an improper comment by trial counsel upon the silence of the accused. Instructions by the judge to the court members to disregard trial counsel's comments on the accused's silence were held insufficient in United States v. Stegar.[62] In that case, the accused remained silent in his first pretrial interview, denied the offense in the second, and in court admitted that he witnessed it. Trial counsel's references to the silence were repeated, lengthy, and direct. The Court stated that the ability of the judge to erase the impact of trial counsel's argument depends upon the circumstances of the case and, in view of the nature of the remarks, prejudice remained in this case. Thus, since corrective action cannot be depended upon to avoid prejudice and reversal for repeated, lengthy, and direct comments, little latitude should be allowed and trial counsel should be stopped at the first intimation that his argument is going into this area.

A second situation in which improper argument will not result in prejudice and reversal occurs when defense counsel initially comments upon such matters.[63] This rule is analogous to that of waiving error in the absence of objection. Since the action of counsel in initially raising the objectionable matter is a positive, intentional action, the Court has not

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[57]United States v. Aefalle, 30 C.M.R. 845 (A.F.B.R. 1960); United States v. Stowe, 12 C.M.R. 657 (A.F.B.R. 1953); United States v. Martin, 7 C.M.R. 542 (A.F.B.R. 1952).

[58]Id.

[59]United States v. Aefalle, 30 C.M.R. 845 (A.F.B.R. 1960).

[60]United States v. Stowe, 12 C.M.R. 657 (A.F.B.R. 1953); United States v. Martin, 7 C.M.R. 542 (A.F.B.R. 1952).

[61]United States v. Abernathy, 24 C.M.R. 765 (A.F.B.R. 1957).

[62]16 U.S.C.M.A. 569, 37 C.M.R. 185 (1967).

[63]E.g., United States v. Anderson, 12 U.S.C.M.A. 223, 30 C.M.R. 223 (1961); United States v. Doctor, 7 U.S.C.M.A. 126, 21 C.M.R. 252 (1956); United States v. Walker, 42 C.M.R. 973 (A.F.C.M.R. 1970).

applied the miscarriage of justice exception of the failure to object rule.[64] Rather, in each reported instance where defense counsel by his own actions has invited a violation of the rule of evidence restricting argument to the evidence of the case, the Court has refused to find prejudice.[65] Since few defense counsel would invite attention to the accused's silence, few trial counsel have, in all probability, been invited to comment upon it. However, the situation arose in one case, and the Court held that the comments of the trial counsel in response to the accused's explanation of his pretrial silence were not error since the accused sought to justify his silence in positive terms as part of his own case.[66]

The last rule avoiding prejudicial error from improper argument is that no prejudice will result if there is other clear and compelling evidence of the guilt of the accused.[67] This rule has been applied to opinions concerning the guilt of the accused,[68] comments of counsel regarding the facts and law of other cases,[69] and inflammatory comments not based upon the evidence.[70] Significantly, the presence of other compelling evidence of guilt renders trial counsel's argument upon the silence of the accused non-prejudicial.[71] This distinction from the situation involving attempts to correct error through instructions is logical since this is the only situation in which it can be positively said that the improper argument did not result in an unfounded conviction.

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[64] See cases cited note 62 supra.

[65] Id.

[66] United States v. Sims, 5 U.S.C.M.A. 115, 17 C.M.R. 115 (1954).

[67] United States v. Reddick, 14 C.M.R. 560 (A.F.B.R. 1953); United States v. Westergren, 33 C.M.R. 587 (A.B.R. 1963).

[68] United States v. Anderson, 12 U.S.C.M.A. 223, 30 C.M.R. 223 (1961).

[69] United States v. Stowe, 12 C.M.R. 657 (1953); United States v. Martin, 7 C.M.R. 542 (A.F.B.R. 1952); United States v. Johnson, 6 C.M.R. 810 (A.F.B.R. 1952).

[70] United States v. Westergren, 33 C.M.R. 587 (A.B.R. 1963).

[71] United States v. Hickman, 10 U.S.C.M.A. 568, 27 C.M.R. 134 (1959).

CONCLUSION

The preceding discussion outlines the law concerning final argument and, hopefully, will spare counsel the necessity of research while preparing their final arguments prior to trial. Additionally, this outline should aid judges in understanding when interruption of counsel is necessary. The primary lessons to be gained for both counsel and judges are that generally objection from counsel is required unless the objection could not elicit curing instructions, that counsel must confine their argument to the facts of the case before the court, that counsel may not in any way comment upon the failure of the accused to testify, and that admonishment and instruction from the judge is the most effective way of curing error, except when the argument is particularly inflammatory or involves comments upon the silence of the accused. If these general principles are understood and applied by judges and lawyers, little problem should arise at trial concerning the proper procedure for and content of final argument.

From: The Army Lawyer, July 1975, pp. 39-41

THE OPENING STATEMENT - SETTING THE STAGE FOR A SUCCESSFUL DEFENSE

A Note from Defense Appellate Division

By: Captain David A. Shaw, Defense Appellate Division, USALSA

The duty of trial defense counsel representing a client in a court-martial proceeding is to defend his client to the utmost of his ability with the ultimate objective in every case of serving the best interest of that client. R.C.M. 913(b), Manual for Courts-Martial, states that defense counsel may make an opening statement of the issues to be tried and what the defense expects to prove. This statement can be made immediately following the opening statement of trial counsel or after the prosecution has rested. DA Pamphlet 27-10, Military Justice Handbook, The Trial Counsel and The Defense Counsel, at paragraph 74a describes the opening statement as encompassing a statement of the case and evidence, and should emphasize the defense theory of the case. DA Pamphlet 27-173, Military Criminal Law: Trial Procedure at paragraph 15-4 indicates the opening statement is particularly important in a complicated case. The statement alerts the judge and court members to the evidence counsel will present and the order in which it will be presented. The Manual thus provides defense counsel in courts-martial the opportunity to utilize this historically engrained jury trial practice of making an opening statement.

The general purpose of an opening statement is to inform the jury of the facts relied upon to establish the defense, to apprise the jury of the nature of the issues involved in the case and to prepare the jury at the outset of the case to understand in a general way what will be presented during the course of the trial. The impression counsel conveys to the jury at the outset of the case to understand in a general way what will be presented during the course of the trial. The impression counsel conveys to the jury during the opening statement is very important. As first impressions are lasting and difficult to change, the rapport, or lack thereof, that counsel establishes with the jury during the remarks can last throughout the entire trial and during deliberations. Thus, the opening statement is inherent with great risks and enormous opportunities.

Prior to trial counsel's opening argument, defense counsel should insure that all witnesses who will testify are excluded from the courtroom. This will prevent the witnesses from hearing a synopsis of the case, and how their testimony will fit into the case. Paragraph 53f, Manual, states that witnesses should be excluded from the courtroom except when they are testifying. Defense counsel must closely monitor this procedural rule.

Under R.C.M. 913(b) the opening statement is limited to discussing issues and intentions of proof. During the opening statement, use terms which the jury will remember during the case-in-chief. Show confidence and be predictive as to what will be presented. This will also add persuasive power to the closing argument when it relates back to the opening statement.

Try to minimize what the trial counsel has conveyed in his opening statement. Explain to the members that this is but one of many cases prosecuted by the trial counsel, but to your client it is a matter of grave importance. Prepare the jury for the strong points of the government's case and "cushion the blow" for the evidence to be introduced. This will lessen the "shock effect" of some piece of particularly damaging government evidence. When this is done, also highlight the strong points of the defense and the evidence that will be presented on behalf of your client. Never overstate the case, but forcefully argue the strong aspects.

Place the burden of proof squarely on the government and reiterate the fact that the government has the heavy burden of proof beyond a reasonable doubt. Instill in the minds of the jurors the importance of their duties as members and the fact it is their obligation to require that the government has completely performed its job. Convince the jurors that it is their duty to protect the client's rights, insure he is given a fair trial, and that the government has proven him guilty beyond a reasonable doubt.

Acquaint the jury with the procedural rules. The government will present its case first, then the defense will present its case. Prepare the members to maintain an open mind and reserve judgment until all the evidence has been presented.

Personalize the client. If possible, persuade the members to identify with the client and his plight, and to view the evidence from the client's point of view. Persuade the members to give the client the benefit of the doubt.

The opening statement must be thoroughly prepared, structured to fit each individual case, and well delivered. It has been stated in "Criminal Defense Techniques," edited by Robert M. Cipes, at §22[01] that "a skillfully prepared and delivered opening statement can create in the jury's mind a psychological propensity in favor of your client that will serve as subliminal support throughout the trial buttressing the presumption of innocence." The importance of an opening statement to ultimately favorable disposition of your client's cause is a trial tactic which should be carefully considered in every case.

From: The Advocate U.S. Army, Defense Appellate Division, Vol. 13, No. 4, July - August 1981

SENTENCING ARGUMENTS: DEFINING THE LIMITS OF ADVOCACY

by Captain Guy J. Ferrante*

The sentencing phase of a guilty plea case is crucially important: the defense counsel must not only present favorable evidence and arguments on behalf of his client, but also insure that the trial counsel remains within the bounds of the law in presenting the government's case. In this article, Captain Ferrante focuses on prosecutorial sentencing arguments and catalogues the errors that appellate courts have found prejudicial. He suggests that trial defense counsel raise timely objections to these recurring errors in order to secure curative instructions or preserve the issue for appeal.

Although every trial defense counsel's primary goal is to secure an acquittal for his client, if this effort proves unsuccessful he must remember that the court-martial "does not end with the verdict," and instead continues until "the sentence has been finally adjudged."[1] Zealous representation of the client should therefore continue throughout the sentencing phase of the trial. During the course of the presentencing hearing, it is the defense counsel's duty and obligation -- and it is a crucially important one -- to insure that the trial counsel does not exceed the permissible limits of advocacy. The trial counsel's duty is to prosecute, and while "he may strike hard blows, he is not at liberty to strike foul ones."[2] In making his sentencing arguments, the trial counsel is granted reasonable latitude. In this respect, he may make reasonable comment on the evidence and may draw such inferences from the testimony as will support his theory of the case.[3] In sum, "it is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[4]

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[1]United States v. Olson, 7 U.S.C.M.A. 242, 244, 22 C.M.R. 32, 34 (1956).

[2]Berger v. United States, 295 U.S. 78, 88 (1935); see generally, ABA Standards, The Prosecutorial Function §§ 5.8, and 5.9 (1971).

[3]R.C.M. 919 and 1001(g).

[4]Berger v. United States, supra note 2.

Preserving the Record

The importance of timely and specific objections to improper trial counsel arguments is reflected in the landmark case of United States v. Lania, where the Court of Military Appeals warned that "defense counsel should be alert to object and seek cautionary instructions if they perceive a risk that the court members are being diverted . . . from their duty to fit the punishment not only to the crime but also to the particular offender."[5] Appellate courts treat cases where there was no objection to improper arguments in three ways. First, some courts find the lack of defense objection to be a "persuasive inducement to conclude that the argument was appropriate and proper."[6] Second, an argument may be deemed harmless on the ground that defense counsel's failure to object indicated that the argument had a minimal impact on the court members.[7] Finally, a number of courts have held that the failure to object waives the issue on appeal unless the trial counsel's argument is so flagrant or egregious that it triggers the military judge's sua sponte duty to interrupt and present curative instructions.[8] In the vast majority of cases involving improper trial counsel arguments, therefore, an accused will be denied meaningful appellate relief if his defense counsel does not object. On the other hand, defense counsel will preserve the record by properly objecting, and may obtain meaningful immediate relief in the form of a curative instruction or a warning from the military judge.

Catalogue of Improprieties

General Deterrence

The propriety of stressing general deterrence as a sentencing consideration has long been the subject of appellate review. In some early cases, general deterrence arguments were considered improper since that factor was:

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[5] United States v. Lania, 9 M.J. 100, 104 (C.M.A. 1980).

[6] United States v. Carmans, 9 M.J. 616, 620 (A.C.M.R. 1980). See also United States v. Ryan, 21 U.S.C.M.A. 9, 44 C.M.R. 63 (1971).

[7] See United States v. Eck, 10 M.J. 501 (A.F.C.M.R. 1980); United States v. Arnold, 6 M.J. 520 (A.C.M.R. 1978) petition denied, 6 M.J. 151 (C.M.A. 1978); United States v. Albrecht, 4 M.J. 573 (A.C.M.R. 1977); United States v. Spence, 3 M.J. 831 (A.F.C.M.R. 1977), petition denied, 4 M.J. 139 (C.M.A. 1977).

[8] See United States v. Doctor, 7 U.S.C.M.A. 126, 21 C.M.R. 252 (1956); United States v. Williams, 8 M.J. 826 (A.F.C.M.R. 1980); United States v. Tanksley, 7 M.J. 573 (A.C.M.R. 1979), aff'd, 10 M.J. 180 (C.M.A. 1980); United States v. Moore, 6 M.J. 661 (A.F.C.M.R. 1978), petition denied, 6 M.J. 199 (C.M.A. 1979); United States v. Herrington, 2 M.J. 807 (A.C.M.R. 1976).

> included within the maximum punishment prescribed by law, but not as a separate aggravating circumstance that justifies an increase in punishment beyond what would be a just sentence for the individual accused determined on the basis of the evidence before the court.[9]

That view was based on United States v. Mamaluy,[10] in which the Court of Military Appeals reasoned that:

> accused persons are not robots to be sentenced by fixed formulae but rather, they are offenders who should be given individualized consideration on punishment[.] There is no real value in reciting generalities to courts-martial. They should operate on facts, and instructions should be tailored[.] [T]he difficulty with these instructions is that they pose theories which are not supported by testimony and which operate as a one way street against the accused.[11]

In United States v. Lania, however, the Court held that general deterrence is relevant to sentencing.[12] Further, the trial counsel may refer to society's interest in general deterrence if, as a whole, it does not appear that he is urging consideration of that factor to the exclusion of all others: the argument must also invite consideration of other sentencing factors.[13] In United States v. Geidl, the Court of Military Appeals recently found that a trial counsel's repeated references to general deterrence were "on the borderline of propriety," and noted that "[e]ntreaties that court members impose the maximum sentence are quite susceptible to an interpretation that the government is inviting a reliance on deterrence to the exclusion of other factors."[14]

Citation of Authorities

In their sentencing arguments, neither counsel may cite legal authorities or the facts of other cases.[15] Court members must reach their decisions on the basis of properly admitted evidence and the military judge's instructions. Outside influences from legal authorities are improper,

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[9] United States v. Mosely, 1 M.J. 350, 351 (C.M.A. 1976). See also United States v. Upton, 9 M.J. 586 (A.F.C.M.R. 1980); United States v. Moore, 1 M.J. 865 (A.F.C.M.R. 1976) (trial counsel may not cite general deterence as aggravating factor justifying additional penalty).

[10] 10 U.S.C.M.A. 102, 27 C.M.R. 176 (1959).

[11] Id. at 106-107, 27 C.M.R. at 180-81.

[12] See United States v. Lania, supra note 5.

[13] See United States v. Geidl, 10 M.J. 168 (C.M.A. 1981); United States v. Smith, 9 M.J. 187 (C.M.A. 1980); United States v. Thompson, 9 M.J. 16 (C.M.A. 1980); United States v. Lania, supra note 5; United States v. Upton, supra note 9.

[14] United States v. Geidl, supra note 13, at 169 (citation omitted).

[15] R.C.M. 1001(g) and 919(b).

confusing, and irrelevant to sentencing.[16] Military courts have condemned references to specific provisions of the Manual[17] such as discussions of the elements of proof;[18] likewise, members may not possess copies of the Manual[19] during their deliberations. The restriction on the use of legal authorities also embraces references to specific reported cases[20] and "official" technical manuals.[21] Finally, military appellate courts have consistently held that it is improper for trial counsel to argue the facts of another case,[22] or the conclusiveness of a co-accused's acquittal.[23] Because other cases involve extraneous facts and have nothing to do with the offense in question or the appropriateness of a sentence, the trial counsel may not suggest that the facts or sentence in another case should be considered.[24]

Misstatements of law and fact

As an officer of the court, the trial counsel has a duty and responsibility to ensure that his statements to the court members are accurate. As the government representative, much emphasis is placed on what the prosecutor says; accordingly, defense counsel should be alert for misstatements of the law.[25] This problem often arises with references to the maximum imposable sentence. For example, the trial counsel may not inform the members that

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[16] See United States v. Johnson, 9 U.S.C.M.A. 178, 25 C.M.R. 440 (1958); United States v. Rinehart, 8 U.S.C.M.A. 402, 24 C.M.R. 212 (1957); United States v. Yelverton, 8 U.S.C.M.A. 424, 24 C.M.R. 234 (1957).

[17] See United States v. Rinehart, supra note 16; United States v. Crosley, 25 C.M.R. 498 (A.B.R. 1957).

[18] See United States v. Spruill, 23 C.M.R. 485 (A.B.R. 1956).

[19] See United States v. Wilson, 25 C.M.R. 788 (A.F.B.R. 1957); United States v. Smith, 24 C.M.R. 812 (A.F.B.R. 1957).

[20] See United States v. McCauley, 9 U.S.C.M.A. 65, 25 C.M.R. 327 (1958).

[21] See United States v. Allen, 11 U.S.C.M.A. 539, 29 C.M.R. 355 (1960).

[22] See United States v. Bowie, 9 U.S.C.M.A. 228, 26 C.M.R. 8 (1958); United States v. Rogers, 17 C.M.R. 883 (A.F.B.R. 1954).

[23] See United States v. Beirne, 22 C.M.R. 620 (A.B.R. 1956).

[24] See United States v. King, 12 U.S.C.M.A. 71, 30 C.M.R. 71 (1960).

[25] See United States v. Johnson, 1 M.J. 213 (C.M.A. 1975) (not guilty plea as matter in aggravation); United States v. Cox, 9 U.S.C.M.A. 275, 26 C.M.R. 55 (1958) (misstatement of law); United States v. Vasquez, 9 M.J. 517 (A.F.C.M.R. 1980) (guilt of one offense raises inference of guilt of another); United States v. Goheen, 32 C.M.R. 837 (A.F.B.R. 1962) (incorrect statement of burden of proof); United States v. Abernathy, 24 C.M.R. 765 (A.F.B.R. 1957) (erroneous theory of law); United States v. Powell, 17 C.M.R. 483 (N.B.R. 1954).

the maximum imposable punishment exceeds a special court-martial's jurisdictional limit.[26]

Arguing Facts Not in Evidence

The trial counsel may not state in an argument any matter of fact as to which there has been no evidence,[27] although he may properly include reasonable comment on the evidence in the case and may draw such inferences from the testimony as will support his theory of the case.[28] The rule set forth by appellate military courts is that arguments must be based on the evidence introduced at trial, comments on contemporary history or common knowledge within the community, and reasonable inferences therefrom which do not exceed the bounds of fair comment.[29] Arguments which transgress these boundaries are improper because they amount to unsworn testimony by the trial counsel.[30]

Interpretation of Evidence

The most serious type of improper argument by trial counsel is one which has no basis in properly adduced evidence. Appellate courts have found error where the trial counsel alleged that the accused is a psychopathic liar;[31] relied on a fictional novel to illustrate how some defense attorneys encourage witnesses to fabricate defenses;[32] asserted that the Army has encountered more disciplinary problems with young E-5's than any other group;[33] referred to what a witness' testimony would have been had he been called to the stand;[34] discussed punishments which would have been

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[26] See United States v. Crutcher, 11 U.S.C.M.A. 483, 29 C.M.R. 299 (1960); United States v. Green, 11 U.S.C.M.A. 478, 29 C.M.R. 294 (1960); United States v. Capps, 1 M.J. 1184 (A.F.C.M.R. 1976).

[27] R.C.M. 919(b).

[28] Id.

[29] See United States v. Long, 17 U.S.C.M.A. 328, 38 C.M.R. 121 (1967); United States v. Eck, supra, note 7; United States v. Diaz, 9 M.J. 691 (N.C.M.R. 1980); United States v. Campbell, 8 M.J. 848 (C.G.C.M.R. 1980); United States v. Young, 8 M.J. 676 (A.C.M.R. 1980), petition denied, 9 M.J. 15 (C.M.A. 1980).

[30] See United States v. Mills, 7 M.J. 664 (A.C.M.R. 1979); United States v. Williamson, 17 C.M.R. 507 (N.B.R. 1954).

[31] See United States v. Doctor, supra note 8.

[32] See United States v. Allen, 11 U.S.C.M.A. 539, 29 C.M.R. 355 (1960).

[33] See United States v. Adkinson, 40 C.M.R. 341 (A.B.R. 1968).

[34] See United States v. Shows, 5 M.J. 892 (A.F.C.M.R. 1978).

available in other jurisdictions;[35] and characterized the accused's behavior in Vietnam as cowardly.[36] A similar problem arises if the trial counsel's argument contains unreasonable inferences drawn from the evidence. Thus, in United States v. Young[37] the evidence established that the accused sold certain drugs, and the trial counsel described him as a "pusher." The Army Court of Military Review held that it was unreasonable to infer that the accused was engaged in the on-going business of selling drugs.[38]

Because references to witnesses who were not called to testify necessarily entail comments on facts not in evidence, the Court of Military Appeals has held that counsel should avoid suggesting that other witnesses could have been called.[39] Thus, in United States v. Tawes,[40] the Army Court of Military Review held that the trial counsel impermissibly stated that he could have called more witnesses to substantiate the testimony actually presented. Such statements render the trial counsel a witness and serve to wrongly corroborate the other witnesses' testimony. Nor should counsel rely upon evidence for a purpose other than that for which it was admitted. In United States v. Salisbury,[41] evidence was admitted for the limited purpose of rebutting the accused's defense. Later, the trial counsel improperly referred to it in an effort to prove that the accused committed the crime.[42] This issue arises frequently with respect to conditionally admitted evidence. In United States v. Porter,[43] evidence was admitted by the military judge on the condition that the prosecutor eventually connect it to the accused. The prosecutor never connected the evidence, so it was never properly admitted. The Court of Military Appeals held that prosecutorial arguments based on that evidence were improper.[44]

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[35] See United States v. Davis, 47 C.M.R. 50 (A.C.M.R. 1973).

[36] See United States v. Pendergrass, 17 U.S.C.M.A. 391, 38 C.M.R. 189 (1968).

[37] United States v. Young, supra note 29.

[38] See also United States v. Collins, 3 M.J. 518 (A.F.C.M.R. 1977), aff'd 6 M.J. 256 (C.M.A. 1979) (prosecutor erred in arguing that accused violated "special trust" by selling drugs while working as security officer); United States v. Lewis, 7 M.J. 958 (A.F.C.M.R. 1979).

[39] See United States v. Tackett, 16 U.S.C.M.A. 226, 36 C.M.R. 382 (1966).

[40] 49 C.M.R. 590 (A.C.M.R. 1974).

[41] 50 C.M.R. 175 (A.C.M.R. 1975), rev'd on other grounds, 7 M.J. 425 (C.M.A. 1979).

[42] See also United States v. Collins, supra note 38; United States v. Young, supra note 29; United States v. Lewis, supra note 38.

[43] 10 U.S.C.M.A. 427, 27 C.M.R. 501 (1959).

[44] Id. at 431, 27 C.M.R. at 504.

References to Other Misconduct

Evidence of uncharged misconduct may not be considered for sentencing purposes unless it is properly introduced before findings or admitted during the pre-sentencing proceedings.[45] As a result, trial counsel may not associate the accused with other offenses if there is no relevant evidence to that effect.[46] In United States v. Edwards,[47] the court held that the trial counsel erred by referring to an offense as to which a finding of not guilty had been entered. In United States v. Baker,[48] the court condemned an argument based on a prior offense involving moral turpitude.

Convening Authority and Command Influences

The trial counsel may not bring to the attention of the court any intimation of the views of the convening authority with respect to an appropriate sentence,[49] since references to his desires improperly impinge upon the court members' discretion.[50] Nor may the trial counsel argue that a severe sentence is warranted because the convening authority ordered a general court-martial[51] or effectively reduced the punishment by convening a special rather than a general court-martial.[52] In United States v. Ruse,[53] the court held that the trial counsel erroneously argued that because the members represented the convening authority, they should punish the accused in order to set an example for prospective offenders.

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[45] See United States v. Poinsett, 3 M.J. 697 (A.F.C.M.R. 1977), petition denied, 3 M.J. 483 (1977).

[46] See United States v. Long, supra note 29; United States v. Sitton, 4 M.J. 726 (A.F.C.M.R. 1977); petition denied, 5 M.J. 394 (C.M.A. 1978); United States v. Abernathy, supra note 25.

[47] 39 C.M.R. 952 (A.B.R. 1968).

[48] 34 C.M.R. 833 (A.F.B.R. 1963). See also United States v. Andrades, 4 M.J. 558 (A.C.M.R. 1977) (attempted introduction of alleged prior act of misconduct); United States v. Abner, 27 C.M.R. 805 (A.B.R. 1958) (appeal to members to consider offense of which accused was acquitted); United States v. Beneke, 22 C.M.R. 919 (A.F.B.R. 1956) (implication that accused's prior conviction may have been for more offenses than reflected in record).

[49] R.C.M. 502(d)(6), discussion (E).

[50] See United States v. Lackey, 8 U.S.C.M.A. 718, 25 C.M.R. 222 (1958); United States v. Olson, supra note 2; United States v. Higdon, 2 M.J. 445 (A.C.M.R. 1975).

[51] See United States v. Daley, 35 C.M.R. 718 (A.B.R. 1964).

[52] See United States v. Crutcher, supra note 26; United States v. Carpenter, 11 U.S.C.M.A. 418, 29 C.M.R. 234 (1960).

[53] 22 C.M.R. 612 (A.B.R. 1956).

Appellate courts view external command influences in the same light as references to the convening authority. Trial counsel may not incorporate such considerations in their argument because they exceed the proper scope of the court members' deliberations.[54] Thus, courts have held that references to command policies or directives concerning certain offenses;[55] comments that a record of the adjudged sentence would be posted on the command bulletin board;[56] arguments incorporating a command policy in regard to troublemakers in certain ranks;[57] and pleas to support national efforts to eliminate drug traffic[58] are improper.

Placing Members in Position of Victim or Relative

An accused is entitled to have his sentence determined by court members who are impartial to the outcome of the case. When the triers of fact are asked to consider the effects of the offense on the victim, their impartiality is undermined.[59] Consequently, arguments which advocate such comparisons are improper, as are suggestions that members consider what it would be like if they or a close relative had been victimized by the accused.

Comments on Military-Civilian Relations

The trial counsel may not appeal to a court-martial to predicate its verdict upon the "probable effect of its action on relations between the military and the civilian community[.]"[60] The Court of Military Appeals has condemned such references, observing that "proper punishment should be determined on the basis of the nature and seriousness of the offense of proof."[61] Accordingly, appellate military courts discountenance attempts by the trial counsel to base all or part of his argument on the effect of

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[54] See United States v. Estrada, 7 U.S.C.M.A. 635, 23 C.M.R. 99 (1957); United States v. Fowle, 7 U.S.C.M.A. 349, 22 C.M.R. 139 (1956); United States v. Cummins, 24 C.M.R. 861 (A.F.B.R. 1957).

[55] See United States v. Estrada, supra note 54; United States v. Fowle, supra note 54.

[56] Id.

[57] See United States v. Leggio, 12 U.S.C.M.A. 8, 30 C.M.R. 8 (1960).

[58] See United States v. Spence, supra note 7.

[59] See United States v. Shamberger, 1 M.J. 377 (C.M.A. 1976); United States v. Wood, 18 U.S.C.M.A. 291, 40 C.M.R. 3 (1969), overruled in part, 1 M.J. 377 (C.M.A. 1976); United States v. Moore, supra, note 3; United States v. Poteet, 50 C.M.R. 73 (N.C.M.R. 1975).

[60] United States v. Cook, 11 U.S.C.M.A. 99, 103, 28 C.M.R. 323, 327 (1959).

[61] United States v. Mamaluy, supra note 10, at 107, 27 C.M.R. at 181.

the offense or the sentence on the relationship between the military and civilian communities.[62]

Comments on Accused's Silence

If the accused asserts his constitutional right[63] to remain silent, the prosecutor may not comment upon [his] failure to take the witness stand [or if] an accused is on trial for a number of offenses and has testified to one or more of them only, no comment can be made in his failure to testify as to the others; nor may the prosecutor comment on the exercise by the accused of his rights under Article 31(b).[64] The Court of Military Appeals has stated that the test is "whether the language was manifestly intended or was of such character that the triers of fact would naturally and necessarily take the prosecutor's remarks to be a comment on the failure of the accused to testify."[65] This mandate has been applied where the trial counsel expressly refers to the accused's decision to remain silent[66] and where the military judge fails to inform the accused of this right.[67] The right to remain silent, and the prohibition upon comments thereon, applies with equal force to the court-martial's sentencing phase.[68]

More often than not, however, arguments which violate this rule do so through subtle innuendoes rather than direct statements. Appellate military courts have not been reluctant to look behind bare statements in order to determine the argument's clear import. Indeed, a statement that the government's evidence is unrefuted constitutes commentary on the accused's silence if he is the only person who could have refuted it.[69] Further, in United States v. Russell,[70] the accused was tried for carnal

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[62]See United States v. Boberg, 17 U.S.C.M.A. 401, 38 C.M.R. 199 (1968); United States v. Cook, supra note 60; United States v. Mamaluy, supra note 10; United States v. Poteet, supra note 59; United States v. Baker, supra note 48.

[63]See United States v. Mills, 7 M.J. 664 (A.C.M.R. 1977).

[64]R.C.M. 919(b), discussion.

[65]United States v. Gordon, 14 U.S.C.M.A. 314, 34 C.M.R. 94 (1963).

[66]See United States v. Albrecht, supra note 7; United States v. Grisson, 1 M.J. 525 (A.F.C.M.R. 1975); United States v. Finchbaugh, 1 M.J. 1140 (N.C.M.R. 1977).

[67]See United States v. Penn, 4 M.J. 879 (N.C.M.R. 1978).

[68]See United States v. Mills, supra note 63; United States v. Gordon, 5 M.J. 653 (A.C.M.R. 178), petition denied, 5 M.J. 361 (C.M.A. 1978).

[69]See United States v. Kees, 10 U.S.C.M.A. 285, 27 C.M.R. 359 (1959); United States v. Mills, supra note 63; United States v. Cazenave, 28 C.M.R. 536 (A.B.R. 1959).

[70]15 U.S.C.M.A. 76, 35 C.M.R. 48 (1964).

knowledge. The government properly admitted an analysis of semen found on the victim's clothing. The trial counsel then argued that, even though there was an 85% chance that if the accused had submitted to a blood test it would have proven that the semen was not his, he did not submit to a blood test. Trial counsel was suggesting that the absence of the test was evidence of the accused's guilt. The Court had little trouble in finding this to be an improper reference to the accused's exercise of his constitutional rights. Arguments concerning an accused's decision to make an unsworn statement are permissible if the emphasis is on the weight to be accorded that statement.[71] However, comments that because the accused made an unsworn statement neither the trial counsel nor the members were able to cross-examine him are improper.[72]

Interjection of Personal Opinions

Generally, it is improper for the trial counsel to assert before the court his personal belief.[73] Such statements constitute inadmissible unsworn testimony which is not subject to cross-examination.[74] In the vast majority of cases, therefore, the trial counsel may not express his personal opinion as to the credibility of the accused or witnesses.[75] In certain situations, appellate military courts have found trial counsel arguments improper on the basis of form rather than content. In United States v. Horn,[76] for example, the trial counsel said "I think" no less than 28 times during his argument; the Court of Military Appeals determined that such repetition amounted to an improper expression of personal opinion.[77]

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[71] See United States v. Cain, 5 M.J. 844 (A.C.M.R. 1978).

[72] See United States v. King, supra note 24; United States v. Murphy, 8 M.J. 611 (A.F.C.M.R. 1979); petition denied, 9 M.J. 55 (C.M.A. 1980); United States v. Lewis, 7 M.J. 958 (A.F.C.M.R. 1979).

[73] R.C.M. 919(b), discussion.

[74] See United States v. Horn, 9 M.J. 429 (C.M.A. 1980); United States v. Tanksley, supra note 8. In a limited number of circumstances, personal beliefs may be asserted if they are "based solely on evidence introduced and the jury is not led to believe that there is other evidence, known to the prosecutor but not introduced, justifying that belief." Henderson v. United States, 218 F.2d 14 (6th Cir. 1955); United States v. Weller, 18 C.M.R. 473 (A.F.B.R. 1954).

[75] See United States v. Tanksley, supra note 8; United States v. Reddick, 33 C.M.R. 587 (A.B.R. 1963). Some examples include a statement that there is no place in the Army for a person like the accused, see United States v. Morgan, 40 C.M.R. 583 (A.B.R. 1968), or comments upon the character of the accused, see United States v. Long, supra note 29.

[76] 9 M.J. 429 (C.M.A. 1980).

[77] See also United States v. Knickerbocker, 2 M.J. 128 (C.M.A. 1977).

Inflammatory and Prejudicial Arguments

The Supreme Court has criticized prosecutorial arguments which are "undignified and intemperate [and] contain improper insinuations and assertions calculated to mislead the jury."[78] The appellate military courts have similarly held that the trial counsel may not:

> use vituperative and denunciatory language, or appeal to, or make reference to religious beliefs, or other matters, where such language and appeal is calculated only to unduly excite or arouse the emotions, passions,[79] and prejudice of the court to the detriment of the accused.

An inconclusive line of cases, however, suggests that such inflammatory and prejudicial arguments are not per se improper.[80] These cases indicate that an apparently inflammatory argument may be proper if it amounts to fair comment on evidence in the record. In light of this authority, defense counsel must examine the types of arguments which appellate military courts have found to be inflammatory, prejudicial, or beyond the bounds of fair comment.

Many of the previously discussed improprieties, such as comments not based on the evidence or attempts to place court members in the place of the victim, are also inflammatory. The most common type of inflammatory argument is a denunciatory reference to the accused. In United States v. Nelson,[81] the trial counsel compared the accused to Adolph Hitler, an analogy which the Court of Military Appeals easily identified as inflammatory. Other comments which courts have held to be inflammatory include references to the socialist and marxist background of the accused and his family,[82] accusations that the accused was a sexual pervert who should be incarcerated before he accosted one of the court members' daughters,[83] and characterizations of the accused as a moral leper who needs to be put where moral lepers belong.[84]

Occasionally, an argument will be held inflammatory because of references to other parties to the trial. In United States v. Begley,[85] for example,

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[78] Berger v. United States, supra note 2, at 85.

[79] United States v. Weller, supra note 74, at 478.

[80] See United States v. Arnold, supra note 7; United States v. Fields, 40 C.M.R. 396 (A.B.R. 1968).

[81] 1 M.J. 235 (C.M.A. 1975).

[82] See United States v. Garza, 20 U.S.C.M.A. 536, 43 C.M.R. 376 (1971).

[83] See United States v. Jernigan, 13 C.M.R. 396 (A.B.R. 1953).

[84] See United States v. Douglas, 13 C.M.R. 529 (N.B.R. 1953).

[85] 38 C.M.R. 488 (A.B.R. 1966).

the trial counsel appealed to the court members' emotions. The accused was a noncommissioned officer. The trial counsel addressed the noncommissioned officer members by name, and invited them to consider how the accused had disgraced the noncommissioned officer corps. Another example of inflammatory argument arose when the trial counsel insinuated that the defense counsel had made an unsworn statement on behalf of the accused with the hope of financial gain from the accused's $800,000 inheritance.[86] Although there was evidence of an inheritance, the statements exceeded the bounds of fair comment. When the trial counsel exposes the members to embarrassment or contempt if they do not return a stiff sentence, their potential emotional reaction renders the argument inflammatory.[87] For example, the trial counsel may not assert that the members are "selfish, self-centered and are not fulfilling [their] responsibility to . . . society or the Air Force"[88] if the adjudged sentence does not include a discharge and confinement.

Prejudicial arguments, like inflammatory ones, usually are also improper on other grounds.[89] In United States v. Ryan, the trial counsel asserted that higher ranking witnesses were more credible than their subordinates. Although this is obviously improper and incorrect, the prejudicial impact stemmed from the fact that most of the higher ranking witnesses had testified for the prosecution.[90] Trial counsel may attempt to unfairly influence the members by presenting irrelevant and unnecessary arguments.[91] In United States v. Simpson, the trial counsel urged the members to adjudge a dishonorable discharge by noting that a bad-conduct discharge could eventually be removed from the accused's record administratively. Similarly, the trial counsel erred by introducing evidence of credit card theft in order to establish identity in a court-martial for larceny of a wallet because the former was a much more serious offense than that charged, and there was no issue of identity.[92] Finally, the trial counsel may not comment that the making and uttering of checks was tantamount to stealing since that argument injects an irrelevant specific intent into the court members' consideration and ignores the fact that stealing is a much more serious offense.[93]

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[86] United States v. Vogt, 30 C.M.R. 746 (C.G.B.R. 1960).

[87] See United States v. Poteet, supra note 59.

[88] United States v. Wood, supra note 59, at 8.

[89] United States v. Ryan, supra note 6.

[90] See also United States v. Ruggiero, 1 M.J. 1089 (N.C.M.R. 1977), petition denied, 3 M.J. 117 (C.M.A. 1977).

[91] 10 U.S.C.M.A. 229, 27 C.M.R. 303 (1959).

[92] See United States v. Brown, 8 M.J. 749 (A.F.C.M.R. 1980). Cf. Mil. R. Evid. 403 (relevant evidence may be excluded if danger of unfair prejudice exceeds probative value).

[93] See United States v. Bethea, 3 M.J. 526 (A.F.C.M.R. 1977).

In United States v. Pinkney,[94] the Court of Military Appeals held that undue prejudice resulted from the trial counsel's reference to the accused's request for an administrative discharge. Since such a request is not incriminatory or an admission of guilt, it should not have been used against the accused. Similarly, since an accused has a right to plead not guilty to a given offense, any comment to the effect that his not guilty plea should be held against him improperly impeded his exercise of that right.[95] Finally, arguments based on evidence in the record can still be considered prejudicial if the trial counsel oversteps the bounds of fair comment. Thus, military appellate courts have found comments on the accused's stupidity[96] or cowardice[97] and arguments which focus on a lack of promotions during a 17-year career[98] to be improper.

Conclusion

In a court-martial with members, the defense counsel can preserve issues for appeal and insure that the accused's rights are fully protected at trial by making timely and specific objections to improper prosecutorial arguments on sentencing. Absent a clear showing to the contrary, a military judge, when presiding over a court-martial without members, is presumed to base his decisions only on properly admitted evidence.[99] Military appellate courts have followed this ruling in holding that prejudicial arguments,[100] and, those based on facts not in evidence,[101] are harmless when presented in trials before judge alone. The defense counsel, however, should not assume that this gives free reign to the prosecutor. By objecting to improprieties in all cases, the defense counsel gives appellate counsel the opportunity to raise these issues on appeal in an effort to change the law.

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[94] 22 U.S.C.M.A. 595, 48 C.M.R. 219 (1974).

[95] See United States v. Johnson, 1 M.J. 213 (C.M.A. 1975).

[96] See United States v. Ortiz, 33 C.M.R. 536 (A.B.R. 1963).

[97] See United States v. Brewer, 39 C.M.R. 388 (A.B.R. 1967).

[98] See United States v. Larochelle, 41 C.M.R. 915 (A.F.B.R. 1969).

[99] See United States v. Montgomery, 20 U.S.C.M.A. 35, 42 C.M.R. 227 (1970).

[100] See United States v. Moore, 1 M.J. 856 (A.F.C.M.R. 1976).

[101] See United States v. Eck, supra note 7; United States v. Diaz, 9 M.J. 691 (N.C.M.R. 1980).

PART II

FORMS

INTRODUCTION TO THE FORMS

Time is money. It is also at the heart of all trial work. The more time that you can spend on a case, the more likely it is that you will be prepared to try it. With this thought in mind, it is important to remember that you are not the first counsel ever to try a case. Consequently, if you waste time "reinventing the wheel," you will be less prepared than you otherwise would be.

Hopefully, the forms that follow will allow you to maximize the productive use of your time. You must, however, remember that the forms are only a beginning. They cannot be substitutes for adequate trial preparation. Their use will not guarantee results or obviate the necessity for plain hard work. But they do give you a good place to start.

Some of the forms are self-explanatory. Others are accompanied by a brief introduction. Local modifications may produce optimum results.

6

DEFENSE RELATED FORMS

DUTIES AND RESPONSIBILITIES OF DEFENSE COUNSEL

I. General duties - Listed in R.C.M. 502(d)(3) and (6)

A. Recognize the information which must be obtained from and imparted to the accused

B. Recognize the professional limitations on a defense counsel's interaction with opposing trial counsel

C. Recognize the resources available to assist in effectively representing the accused

D. Recognize the necessity for developing appropriate skills and maintaining personal integrity

II. Duties to client

A. Informational - make use of forms provided in Aids to Practice

1. Knowledge obtained from client

a. Use "Pre-Interview Questionnaire"
b. "Initial Interview Checklist"

2. Knowledge imparted to client

a. "Advice to Accused Awaiting Special Court-Martial"
b. "Advice to Accused Awaiting Article 32, General Court-Martial"
c. "BCD Striker"

B. Professional

1. First interview sets tone for entire case - set accused at ease

2. Responsibility is to provide him effective assistance

-- Test - "the exercise of customary skill and knowledge that normally prevails . . . within the range of competence demanded of attorneys in criminal cases"

3. Examples of ineffective representation

a. Lack of preparation

b. Not explaining rights and preparation

c. Negotiating with government without accused's consent

d. Representing accused as a liar to the court

e. Failure to call witnesses

C. In the courtroom

1. Have accused in court in the proper uniform with all ribbons and badges to which entitled

— Arrange in advance when accused in the brig

2. Advise the accused to maintain appropriate military bearing throughout trial

-- No sleeping, laughing, or coaching witnesses

3. Don't abandon the accused during providency

a. Cover all possible questions in advance

b. Make sure of military courtesies when addressing MJ

c. Don't let the accused wander in responses

d. Be alert and prepared to stop and consult with accused if responses become hesitant, evasive, or verbose

4. Let the accused take notes and submit written questions to you if he desires

III. Relationship with trial counsel

A. Informational

1. TC has initial access to documentary and real evidence -- use formal discovery request if necessary

2. Article 45, UCMJ -- Defense counsel has equal access to witnesses

3. R.C.M. 701(e), MCM, 1984 -- Defense counsel does not need trial counsel's consent to interview government witnesses

B. Professional

-- Friendship must not interfere with representation of client

a. DR 4-101-B -- "A lawyer shall not knowingly reveal a confidence or secret of his client"

b. DR 9-101 -- "A lawyer should avoid even the appearance of impropriety"

IV. Relationship with convening authority

A. Informational

-- Meet with CA personally to discuss forum change, pretrial agreement, administrative discharge, clemency, etc.

B. Professional

-- Must overcome stigma that DC opposed to needs of military

a. Understand needs of command

b. Realistic in sentence limitation requests

V. Relationship with CO/XO/other attorneys

A. Informational

1. DR 6-101-A -- "A lawyer shall not handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it"

2. Get advice from CDC or consider an IMC if uncertain

B. Professional

1. DR 7-102 -- "In his representation of a client, a lawyer shall not ... assert a position, ... delay a trial, or take other action on behalf of his client when he knows when it is obvious that such action would serve merely to harass ...."

-- Spurious issues and motions do nothing to improve reputation or help your client

2. DR 6-101 -- "A lawyer shall not handle a legal matter without preparation adequate in the circumstances"

3. DR 5-107 -- "A lawyer shall avoid influence by others other than the client"

VI. Duties to yourself

A. Professional development

1. Skills

2. Experience

B. Personal integrity

1. DR 7-102 (A) -- "A lawyer shall not knowingly use perjured testimony or false evidence ... or participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false"

2. Know ethical obligations, limitations, and how to handle them

C. Protect yourself from your client

1. Document giving him advice and all instances when he acts contrary to his interests or your advice

2. Use "memoranda for the record"

3. Appellate counsel may need to see these documents

THE PRE-INTERVIEW QUESTIONNAIRE

Once in a while you may be so organized that you know in advance what clients will be gracing your office on any given day. When this fortuitous circumstance exists, you should consider using the pre-interview questionnaire. It is designed to glean important information from a client before he or she ever sets foot in your office. The savings in time and effort are obvious. If you are super-organized, the form can be mailed to the client well in advance of his initial appointment with instructions to bring the completed form to your office. Since it is unlikely that you will obtain this high state of organization, you should use the form while the client is waiting for you in the lobby of your office. It is suggested that you personally introduce yourself there, tell the client that you will be with him "shortly" and that, while he is waiting, he should complete the questionnaire. The accused should also be told to answer the questions on the form and not to show the letter to anyone or allow anyone to get possession of it. (If confidentiality cannot be assured, the form should not be used.) This process takes some of the impersonal nature of the form away. It also employs the client's time more fruitfully than by his reading the three-year-old issues of TIME that abound in the lobby. The form is to be used in connection with the initial interview checklist and not in lieu thereof. If the pre-interview questionnaire is not completed prior to the initial interview, the information sought by the form should be gathered during the initial interview. It should not be omitted altogether.

PRE-INTERVIEW QUESTIONNAIRE

Hello, my name is _____. I am an attorney and will be representing you in your case. We will soon have a personal interview; however, I want to take this opportunity to obtain some personal information from you. By completing this form, you will be saving both of us time -- time that we can better spend in discussing your case. If you don't give this form to me today, guard it carefully until you can hand it to me later. Don't show it to anyone!

This questionnaire is designed to provide me with some information which I will need about you. The more you write, the better. Go into detail on everything because the more you write the better your chance of my finding out something that will be helpful in court. Do not sign this and don't let anyone see it except me.

You should consider this matter to be a personal one between you and me. You should not discuss the offense(s) with which you are charged with your friends or anybody else. A simple remark made to a friend over a beer could be used against you at trial. Also, should anyone in any capacity (officer, enlisted, or civilian) attempt to question you about the case, tell that person that your defense counsel has instructed you not to discuss the matter with anybody. Also, report any such questioning attempt to me as soon as you can.

As your defense counsel, I must know all the facts, both good and bad. This allows me to know in advance the worst that we can expect and eliminate the element of surprise. Any conversations between you and me are considered to be confidential in the eyes of the law, so nothing you reveal to me about your current charge(s) may ever be used against you. I ask you not to try to cover up unpleasant facts in an attempt to look good merely for my benefit.

Remember, the more you write, the better I'll be prepared to go into court with you. Use the back of each sheet if you need more space.

Again, do not allow anyone else to see this form.

PRE-INTERVIEW QUESTIONNAIRE

I. FULL NAME: NICKNAME:

RANK/RATE: MARRIED/SINGLE/DIVORCED:

SPOUSE'S NAME AND ADDRESS:

NAMES AND AGES OF ANY CHILDREN AND ADDRESS:

HOW LONG IN SERVICE:

HOME ADDRESS: TELEPHONE NUMBER:

PARENTS: LIVING/DECEASED

PARENTS' NAMES:

PARENTS' ADDRESS: TELEPHONE NUMBER:

BROTHERS AND SISTERS:

NUMBER:

NAMES AND AGES (ALSO ADDRESSES IF DIFFERENT FROM PARENTS):

II. PERSONAL HISTORY

PLACE OF BIRTH:

OTHER PLACES YOU HAVE LIVED (INDICATE WHAT YEARS YOU WERE THERE):

HIGH SCHOOL ATTENDED:

HIGHEST GRADE COMPLETED:

ACTIVITIES:

IF YOU DID NOT GRADUATE, REASON FOR LEAVING:

COLLEGE ATTENDED:

NUMBER OF YEARS:

IF YOU DID NOT GRADUATE, REASON FOR LEAVING:

PARENTS' OCCUPATIONS:

FATHER: BUSINESS ADDRESS:

MOTHER: BUSINESS ADDRESS:

IF PARENTS DIVORCED, HOW OLD WERE YOU WHEN THEY SEPARATED:

MILITARY SERVICE:

WHEN DID YOU JOIN: AGE:

WHY?

WHERE DID YOU GO TO BOOT CAMP.

LIST ALL DUTY STATIONS AND TYPES OF DUTY (INCLUDING SCHOOLS, SEA DUTY, etc.):

WHICH ONE DID YOU ENJOY THE MOST?

WHAT KIND OF DUTY WAS IT?

WHAT MEDALS AND AWARDS ARE YOU ENTITLED TO WEAR?

III. TO YOUR KNOWLEDGE, WHAT CHARGES ARE YOU FACING?

TO WHOM HAVE YOU TALKED WITH REGARD TO THE OFFENSES WITH WHICH YOU ARE PRESENTLY CHARGED (CO-OIC, NCOIC, LPO, CPO, MP, CID, NIS, friends, family, anyone)?

IF YOU DID TALK TO ANYONE, WHEN, AND BRIEFLY DESCRIBE HOW YOUR CONVERSATION STARTED AND WHAT YOU SAID.

IV. LIST OF WITNESSES

I would like to contact by mail or telephone all possible witnesses. Therefore, I would ask you to give me a list of names of people who could speak up for you, along with their last known address and a brief note as to what they might be expected to say.

Defense witnesses: Any person, military or civilian, anywhere in the world, who might be able to present matters which would establish or support any defense you might have to any offense charged?

Mitigation, extenuation, and character: Any person, military or civilian, anywhere in the world, who might be able to provide information establishing your good character, honesty, truthfulness, or any other matters in mitigation or extenuation. Such a witness could be a former work supervisor, commissioned officer, or school teacher who could comment on your work habits, or he or she could be a relative or personal friend who knows nothing about your work, but knows you, your character, your personal habits, and your background.

The best thing you can do is to have someone come to court IN PERSON and testify in your behalf. This should be someone in the Navy/Marine Corps for whom you have worked (preferably a petty officer, noncommissioned officer or commissioned officer). If they are anywhere in the area, I can probably get them here.

INCLUDE NAMES, ADDRESSES, PHONE NUMBERS, RELATION (WHEN AND IN WHAT WAY YOU WERE ACQUAINTED WITH THEM), AND WHAT THEY MIGHT SAY IN YOUR BEHALF. If there are more than five, list additional ones on the back of this sheet.

1.

2.

3.

4.

5.

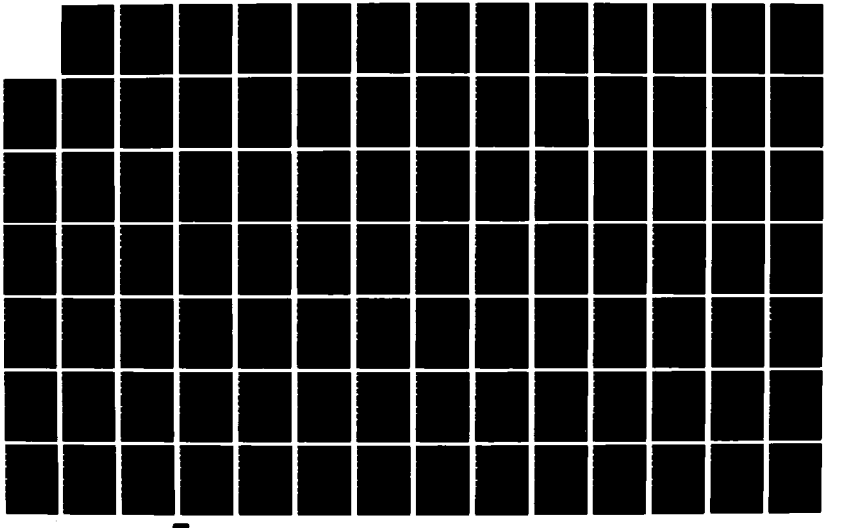
V. OTHER MATTERS

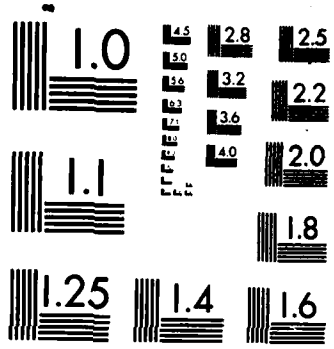
Describe your present financial situation.

List amounts of money you owe, to whom you owe it, why, and the amount of monthly payments.

AD-A165 312 AIDS TO PRACTICE(U) NAVAL JUSTICE SCHOOL NEWPORT R I 2/3
JAN 86

UNCLASSIFIED F/G 5/2 NL





MICROCOPY RESOLUTION TEST CHART
NATIONAL BUREAU OF STANDARDS-1963-A

If you are married, relate something about your wife and children, if any, emphasizing any particular problems such as health or financial.

If you are single, but have financial or other problems with your parents or other members of your family, express these problems.

If you have ever been to mast, office hours, or court, give the date, offense, type of court, and punishment you received.

VI. WRITE BELOW ANY QUESTIONS THAT YOU MAY HAVE AND MAKE NOTES OF ANYTHING YOU WANT TO TALK OVER AND TELL ME AT OUR INTERVIEW.

INITIAL INTERVIEW CHECKLIST

What follows is a sample interview form covering most of what the defense counsel will have to know in order to defend the accused adequately throughout the stages of a criminal case. Much of this information can be derived from official records or other sources; however, it is advisable to gather this information through your discussions with the accused since this will enhance the development of an attorney-client relationship. This form may appear overly detailed, but each of the areas it covers can be utilized to develop information valuable on the merits or in extenuation and mitigation. The very process of questioning an accused concerning a matter as mundane as the age of his mother might develop valuable information, such as a jurisdictional issue (she's been dead twenty years and could not have signed the Consent to Enlist form) or a matter in extenuation and mitigation (she's 82 and the accused is her sole surviving source of support).

It is a better practice not to run down this form like a checklist and to require the accused to answer each question one by one. Rather, counsel should attempt to elicit this information as the interview progresses, complete the form after the interview, and fill out any additional matters at later interviews. This form is designed to be used as a supplement to the pre-interview questionnaire. If that form has not been completed, the information which it was designed to gather should be obtained during the initial interview.

Remember: The client's first impression of you is the most important. Take your time and be thorough.

INITIAL INTERVIEW CHECKLIST

Client's Name:

Telephone number where client can be reached during the day:

Date and Time of Interview:

Place of Interview:

Supplement Personal History from Pre-Interview Questionnaire as required:

Prior employment (before military service)

Place:

Length of employment:

Reason for leaving:

Skills learned:

Name of immediate supervisor and address:

Social Security Number:

Spouse's employment status:

Contribution to support of anyone with whom not living:

Children

Fiancee

Parents

Former spouse/girl or boyfriend

Physical or mental problems of accused:

Alcohol problems

Drug problems

Handicaps

Under care of physician

Has client ever been under care of mental health specialists? (Get details if affirmative)

Any prior civilian convictions, arrests, etc., including any pending charges, etc. (Get details as warranted)

Is client currently on probation (civilian), under a suspended sentence or nonjudicial punishment (military)? (Get details if affirmative)

Has the client discussed this problem with any other lawyer?

If so, who, where, when, extent of relationship?

Present charges. The client should now be asked to tell everything he knows about the present charges, in chronological order:

1. What he did?
2. What happened to him?
3. Who was involved?
4. When and how he was arrested or apprehended?
5. What have the authorities done with him since then?

Alibi story.

Witnesses - Supplement pre-interview questionnaire as needed.

Arrest or Apprehension:

Who, what, why, when, where and how?

With whom was the client when he was apprehended; were they also apprehended?

What was client's state of intoxication at time of apprehension?

Was client ill at time?

Was client roughly handled by the authorities?

Any witnesses to the apprehension?

What questions did the authorities ask?

What answers did the client provide?

What materials were taken from the client either at the time of the apprehension or any other time?

Kind of property taken?

Did authorities display a search warrant or authorization?

What were the circumstances?

Any witnesses?

Interrogations:

If any, where did they take place?

When and how long did they last?

Who did the interrogating?

Others present?

What did they ask?

What were client's answers?

What warnings were given (in detail)?

Were others involved also interrogated?

Did client sign anything?

Were any warnings provided previously?

Any physical examination conducted:

If so, did client consent?

What happened?

Where?

Who did it?

What samples were taken?

Was client asked any questions?

What were the answers?

Were any rights given?

Was client exhibited in any lineup or other identification process:

Where?

When?

Describe the situation.

Any rights given to the accused (in detail)?

Who did the identifying?

What was their response?

Prior proceedings:

Mast/office hours?
Pre-mast/Pre-office hours?
Magistrate's hearing?
Prior courts-martial?
Article 32?
When, where, who present, circumstances, client say anything, etc.?

Advise client of any procedural and substantive rights which are required and which you wish to discuss during the first session. (See Aids to Practice, "Advice to Accused Awaiting a Special Court-Martial," "Advice to Accused Awaiting Article 32 Hearing/General Court-Martial," and "BCD Striker Advisement."

Individual military counsel (IMC)
Civilian counsel
Your role should accused opt for either:

IMC:

Does client have particular lawyer in mind?
Where stationed? [JAGMAN, § 0120(b)]
Does client wish you to make initial inquiry regarding availability? (If not, why not?)
Does he/she desire to request your services also?

Civilian counsel:

Does client have someone in mind?
How does client propose to pay?
What assistance does he require or desire from you in obtaining services of this lawyer?
Does he/she desire to have military attorney remain on case?

Discuss forum alternates

Complete Judge Alone request
Complete written request for enlisted members

Concluding

Obtain permission to send E&M letters - names & addresses obtained during interview
Have accused sign Privacy Act waiver for obtaining personal records
Execute IMC request if necessary

Admonish, again, NOT TO DISCUSS CASE with anyone else

-- Advise to contact you immediately if anyone tries to discuss case with client

Give client your phone number or card
Schedule another appointment

DEFENSE COUNSEL SHOULD DISCUSS THE CONTENTS OF THIS FORM CAREFULLY WITH THE ACCUSED DURING THE FIRST OR SECOND INTERVIEW. DETERMINE IF THE ACCUSED HAS ANY QUESTIONS AFTER HE/SHE READS IT OVER AND THEN HAVE YOUR CLIENT SIGN IT. KEEP IT IN YOUR TRIAL FOLDER.

ADVICE TO THE ACCUSED AWAITING A SPECIAL COURT-MARTIAL

I understand that the maximum penalty that can be assessed by a special court-martial is: (1) confinement at hard labor for a period of six months; (2) forfeiture of two-thirds (2/3) base pay for a period of six months; (3) reduction in rate to the lowest enlisted paygrade; (4) a bad-conduct discharge.

I have been advised that I have the following rights in my trial by special court-martial:

1. To be represented before the special court-martial by appointed military counsel at no expense to me. Such counsel shall be known as the "detailed defense counsel." In addition to the detailed defense counsel, I may be represented before the special court-martial by civilian counsel of my choice at my own choice at my own expense. I also may be represented before the special court-martial by military counsel of my own choice, if such counsel is reasonably available. Such counsel shall be known as "individual military counsel" (IMC). In the event I am represented by civilian counsel, the detailed defense counsel will continue to represent me as associate counsel unless I choose to dismiss him. If I am represented by IMC, my detailed defense counsel will ordinarily be excused, unless a request from me to retain the detailed defense counsel is approved. That decision to allow me to retain my detailed counsel in addition to this other military lawyer is entirely up to the convening authority.

2. To have three full days between the service of charges upon me and the date of trial.

3. To enter a plea of not guilty although I may actually have committed the acts in question and believe the government can prove that I have committed those acts. I understand that a plea of guilty is the strongest form of proof and that no further evidence need be introduced in order to convict me. I understand that if I decide to plead guilty to the charge or charges against me, I admit every act or omission and every element alleged with respect to the offenses to which I plead guilty and I waive the following rights: (a) my constitutional right against self-incrimination; (b) my right to trial of the facts by a court-martial; and (c) my constitutional right to confront the witnesses against me. I further understand that a plea of guilty will not be accepted by the court unless it appears that I understand its meaning and effect and that I am

voluntarily pleading guilty because I am convinced that I am in fact guilty. I also understand that a plea of guilty, if accepted, will subject me to a finding of guilty without further proof of the offense or offenses charged, in which event I may be sentenced by the court to the maximum punishment authorized.

4. To remain silent, to testify, to call witnesses in my behalf and to cross-examine all witnesses called upon the ultimate issue of guilt or innocence. If accused of more than one offense, I may limit my testimony to less than all, or to only one, of the offenses charged.

5. To assert any proper formal defense or objection, such as the statute of limitations, whether or not a plea of guilty is entered.

6. As to any offense to which I plead guilty or of which I may be convicted, to do the following prior to sentencing:

a. Remain silent;

b. take the stand and testify under oath, in which case I will be subject to cross-examination;

c. make an unsworn oral or written statement myself, in which case I will not be subject to cross-examination;

d. have counsel make an unsworn oral or written statement in my behalf, in which case I will not be subject to cross-examination; and

e. present evidence in extenuation and mitigation.

7. To be tried by a full court (jury) composed of at least three officers.

8. To request in writing the appointment of enlisted persons as members of the court, such members to constitute at least one-third (1/3) of the total membership.

9. The full court will determine my guilt or innocence by a two-thirds (2/3) vote by secret ballot and, if I am found guilty, the sentence, again by a two-thirds (2/3) vote by secret ballot.

10. If a military judge has been detailed to the court, to request in writing to be tried by military judge alone.

11. In a trial by military judge alone, the military judge alone will determine the guilt or innocence and the sentence.

12. To request in writing that I be given an other-than-honorable discharge for the good of the service in lieu of trial by court-martial under circumstances that could lead to a bad-conduct discharge. I understand that I must consult with counsel before such a request. I

understand that if such a request is approved, I will receive a discharge under conditions other than honorable, that I may thereby be deprived of virtually all veterans' benefits based upon my current period of active service, and that I may expect to encounter substantial prejudice in civilian life in many situations. I understand that once a request is submitted, it may only be withdrawn, whether or not accepted, with the consent of the officer exercising general court-martial jurisdiction over me.

Date	Accused
	Witness

DEFENSE COUNSEL SHOULD CAREFULLY EXPLAIN THE CONTENTS OF THIS FORM TO THE ACCUSED IN THE FIRST OR SECOND INTERVIEW AND THEN HAVE HIM/HER READ AND SIGN IT. KEEP THE SIGNED FORM IN YOUR TRIAL FOLDER.

ADVICE TO ACCUSED AWAITING ARTICLE 32 HEARING/GENERAL COURT-MARTIAL

I have been advised that I have the following rights:

A. At both the article 32 investigation and a general court-martial:

1. To be represented by appointed military counsel at no expense to me. Such counsel shall be known as the "detailed defense counsel." In addition to, or instead of, the detailed defense counsel, I may be represented by civilian counsel of my own choice at my own expense. I may be represented by military counsel of my own choice, if such counsel is reasonably available. Such counsel shall be known as "individual military counsel" (IMC). In the event I am represented by civilian counsel, the detailed defense counsel will continue to represent me as associate counsel, unless I choose to dismiss him. If I am represented by IMC, my detailed defense counsel will ordinarily be excused, unless the appropriate authority grants a request from me to retain him. The approval of that request is entirely up to the appointing authority.

2. To remain silent, to testify, to call witnesses in my behalf, and to cross-examine all witnesses called upon the ultimate issue of guilt or innocence. To testify under oath as a witness, in which case I may be cross-examined. If accused of more than one offense, I may limit my testimony to less than all, or to only one, of the offenses charged.

3. To present evidence in extenuation and mitigation.

B. At the article 32 investigation only:

1. To make an unsworn statement on any issue.

2. To insist that any statements made by a witness who is determined not to be available to appear at the hearing are under oath.

C. At a general court-martial only:

1. To have five full days in the case of a general court-martial between the service of charges upon me and the date of trial.

2. To enter a plea of not guilty although I may actually have committed the acts in question and believe the government can prove that I have committed those acts. I understand that a plea of guilty is the strongest form of proof and that no further evidence need by introduced in order to convict me. I understand that if I decide to plead guilty to the charge or charges against me, I admit every act or omission and every element alleged with respect to the offenses to which I plead guilty and I

waive the following rights: (a) my constitutional right against self-incrimination; (b) my right to trial of the facts by a court-martial; and (c) my constitutional right to confront the witnesses against me. I further understand that a plea of guilty will not be accepted by the court unless it appears that I understand its meaning and effect and that I am voluntarily pleading guilty because I am convinced that I am in fact guilty. I also understand that a plea of guilty, if accepted, will subject me to a finding of guilty without further proof of the offense or offenses charged, in which event I may be sentenced by the court to the maximum punishment authorized.

3. To assert any proper formal defense or objection, such as the statute of limitations, whether or not a plea of guilty is entered.

4. As to any offense to which I plead guilty or of which I may be convicted, to do the following prior to sentencing:

a. Remain silent;

b. take the stand and testify under oath, in which case I will be subject to cross-examination;

c. make an unsworn oral or written statement myself, in which case I will not be subject to cross-examination;

d. have counsel make an unsworn oral or written statement in my behalf, in which case I will not be subject to cross-examination; and

e. present evidence in extenuation and mitigation.

5. To be tried by a full court (jury) composed of at least five officers.

6. To request in writing the appointment of enlisted persons as members of the court, such members to constitute at least one-third (1/3) of the total membership. (This provision does not apply to an accused who is an officer.)

7. The full court will determine guilt or innocence by a secret ballot; two-thirds must concur for a finding of guilty.

8. If a finding of guilty results, the full court will vote on sentence by a secret ballot, and the following fraction must approve the sentence;

a. If the sentence includes life imprisonment or to confinement for more than ten years, three-fourths must concur.

b. Two-thirds must concur in all other sentences.

c. The entire panel must concur unanimously if the sentence is death.

9. To request in writing to be tried by military judge alone.

10. In a trial by military judge alone, the military judge alone will determine the guilt or innocence and the sentence, if guilty findings result.

11. I have discussed with my defense counsel the possible maximum sentence which could be imposed based on the charges preferred and the information available at this time.

D. Other matters

1. I have been advised that though charges against me have been forwarded for a formal pretrial investigation under Article 32, UCMJ, the ultimate decision on what charges, if any, should be referred to trial, and at what forum they should be tried, has not been determined.

2. I have been advised that I may request in writing that I be given an other-than-honorable discharge for the good of the service in lieu of trial by court-martial under circumstances that could lead to a bad-conduct discharge. I understand that I must consult with counsel before such a request. I understand that if such a request is approved, I will receive a discharge under conditions other than honorable, that I may thereby be deprived of virtually all veterans' benefits based upon my current period of active service, and that I may expect to encounter substantial prejudice in civilian life in many situations. I understand that once a request is submitted, it may only be withdrawn, whether or not accepted, with the consent of the officer exercising court-martial jurisdiction over me.

_____ _____

Date Accused

_____

Witness

IF, AFTER CAREFULLY COUNSELING THE ACCUSED AND URGING HIM/HER TO TALK TO OTHER SERVICEMEMBERS AND MEMBERS OF HIS/HER FAMILY, THE ACCUSED STILL WANTS TO ASK THE COURT FOR A PUNITIVE DISCHARGE, USE THIS FORM.

"BCD STRIKER" ADVISEMENT

I, _____, have been fully advised by my defense lawyer, _____, of the possible adverse consequences that a bad-conduct discharge might have upon me at the present time and in the future. _____ has explained to me that I could experience substantial prejudice in certain endeavors I might seek if I am given a bad-conduct discharge. I understand that a bad-conduct discharge has a permanent stigma, and that a person receiving such a discharge is looked upon with contempt in society, which could result in prejudice insofar as one's legal rights and employment opportunities are concerned. I understand that a bad-conduct discharge usually results in the denial of benefits administered by the Veterans Administration and will deprive me of substantially all of the benefits administered by the armed forces.

My defense lawyer, _____, after reviewing my case with me, has informed me that in his professional opinion, requesting a bad-conduct discharge for the offense(s) charged against me would not be in my best interest because of the nature of my case. My defense lawyer, _____, has also informed me that other alternatives may best serve me and would be less detrimental to my welfare, and has strongly advised me to pursue those alternatives rather than request a bad-conduct discharge.

In spite of the advice and persuasion of _____, I am voluntarily requesting a bad-conduct discharge with the knowledge of the possible adverse effects that this decision may have upon my present and future welfare. In addition, I have instructed my defense counsel to present no matters in my behalf nor to argue anything at trial which would be inconsistent with my desire for a bad-conduct discharge.

_____ _____
Signature of Accused Witness

_____ Date: _____
Rate and Organization

Date: _____

THIS IS KNOWN AS A BLUNK LETTER AND SHOULD BE KEPT IN YOUR FILE FOLDER IN CASE APPELLATE DEFENSE COUNSEL SHOULD NEED IT.

DEFENSE PREPARATION CHECKLIST

Client: Phone number:

Date charges received:

Date charges served on client: (Note statutory waiting periods)

Date assigned as counsel:

Review charge sheet and convening order for procedural and substantive error

- Defective specification
- Referral or preferral errors

Review reports of investigation (Are they final reports?)

Obtain and review client's service record

Date of initial interview with client:

Subsequent interviews as needed:

Review and ensure completion of pre-interview questionnaire

Review and ensure completion of initial interview checklist information

Review "Advice to Accused" checklists

Does mental capacity/responsibility appear to be an issue (after talking to client)?

If so, submit request for psychiatric consultation or psychological evaluation in accordance with R.C.M. 706, MCM, 1984

Date of appointment:

Name of contact physician:

Results:

Follow-up, as required:

Demand for speedy trial served on Government, as warranted: (R.C.M. 707, MCM, 1984)

Other than honorable discharge in lieu of court-martial request discussed with client

Submitted:

Approved/Denied:

"E&M" letters solicited by mail or message.

Witnesses essential for presentation of defense case on merits:

Name	Duty Station/ Address	Phone	Date Interviewed	Para.115 Request Submitted

Discovery request served on Government as needed (including specific request for any exculpatory evidence and names of Government witnesses):

Name	Phone	Date Interviewed

Discovery requests NOT complied with: _____

_____

Jencks Act/Rule 612 requests made as witness testifies or completes direct:

Extenuation and mitigation witnesses:

Name	Duty Station/ Address	Phone	Date Interviewed	R.C.M. 703 Request Submitted

Documentary/real evidence reviewed and objections/foundations prepared:

_____

_____

_____

"E&M" letter received and reviewed:

Stipulations to be utilized (reduce to writing):

Discussed with accused:

Signed by TC and accused:

Pretrial agreement considered:

Each provision discussed with accused:

Offered:

Accepted/rejected:

Signed by all parties:

Written request for trial by military judge alone prepared and signed by TC and accused (optional use of written form):

Request for enlisted members signed by the accused submitted:

Pretrial motions considered:

Researched:

Written briefs prepared and served on TC:

MJ and TC advised of same in accordance with rules of practice:

Opening statement outlined:

Arguments outlined:

Voir dire questions prepared:

Accused advised of time, place, date, and location of trial:
(Show him courtroom and positions of personnel)

Accused advised of proper uniform, personal grooming, wearing of rate/rank insignia and all ribbons and awards to which entitled:

Accused advised of proper courtroom decorum: (See Uniform Rules in this guide)

If Guilty plea to be entered:

a. Accused thoroughly briefed on elements of the offenses to which he intends to plead guilty

b. Accused advised as to the nature and expected content of the military judge's Care inquiry

c. Any possible defenses have been thoroughly explored

d. Lesser included offenses have been considered and explained to accused

e. Accused briefed as to the questions on PTA inquiry by military judge, if PTA exists?

Accused briefed on sections of trial guide which require an affirmative/ negative response (explain to him/her reason for trial guide script):

Data on page 1 of charge sheet reviewed and corrected as necessary:

Defense trial notebook prepared:

(See Trial Counsel Checklist for trial matters)

NOTICE OF REPRESENTATION

From: Lieutenant _____, JAGC, USNR, Defense Counsel
To: Commander, Naval Investigative Service Field Office, Naval Station, _____

Subj: NOTICE OF LEGAL REPRESENTATION OF _____

1. This is to serve notice upon you and those within your command that, as of this date, I have undertaken to represent _____ as (his)(her) attorney during the current criminal investigation of _____.

2. In accordance with United States v. McOmber, 1 M.J. 380 (C.M.A. 1976), it is required that I be personally informed before any criminal investigator interviews my client. If you or any of your agents or employees find it necessary to question my client, or assist any other law enforcement agency in conducting any questioning, I ask that I be contacted prior to doing so.

3. I may be contacted pertaining to this matter at _____ during working hours.

_____

Copy to:
Trial Counsel

6

SAMPLE "E&M" SOLICITATION LETTERS

IN REPLY REFER TO:
NLSO: 41B
5801
7 December 1981

From: Lieutenant D. L. Defense, JAGC, USNR, Defense Counsel
To: Active Duty Military Personnel

Subj: SEAMAN N. L. BADGUY, USN

Encl: (1) Return envelope

1. I have been appointed as defense counsel for _____, who has been charged with certain offenses and who has authorized me to write to you for information which may be of assistance in his defense.

2. If you are conscientiously able to do so, please write to me and include in your letter such information as your personal regard for this man, including his reputation for such attributes as honesty, citizenship, trustworthiness, ambition, potential and performance as a sailor. Feel free to tell me anything you know about him and his background which might tend to mitigate or explain his present predicament with the military. I am particularly interested in such matters as his job performance for any periods during which he worked for you. Please also state how long and under what conditions you knew him.

3. Since the trial will be held within the next few weeks, a prompt reply will be of great assistance in preparing the strongest possible case in his defense. I have enclosed a return envelope for your convenience.

D. L. DEFENSE

IN REPLY REFER TO:
NLSO: 41B
5801
7 December 1981

Mrs. D. W. Badguy
44 Columbia Court
Middletown, Rhode Island 02840

Dear Mrs. Badguy:

I am a naval officer and lawyer who has been appointed as defense counsel for your husband, who is awaiting trial by court-martial for _____.

In order that I might present the strongest possible case in his behalf, I request that you send me a letter outlining in detail your husband's home life and background. Feel free to tell me anything you might know which might tend to mitigate or explain his present predicament with military authorities. In addition, I suggest that you contact your clergyman or anyone else in a position of authority or responsibility who would be able to address a letter to me attesting to your husband's good character and their personal regard for him.

Since the trial will be held within the next week or so, a prompt reply would be greatly appreciated. I have enclosed a return envelope for your convenience.

Sincerely,

D. L. DEFENSE
Lieutenant
Judge Advocate General Corps
U.S. Naval Reserve

Enclosure

IN REPLY REFER TO:
NLSO:41B
5801
7 December 1981

Mr. and Mrs. D. W. Badguy, Sr.
1447 Seaview Avenue
Newport, Rhode Island 02840

Dear Mr. and Mrs. Badguy:

I am a Naval officer and lawyer who has been appointed as defense counsel for your son, who is awaiting trial by court-martial for _____.

In order that I might present the strongest possible case in his behalf, I ask that you send me a letter outlining in detail your son's home life and background. Feel free to tell me anything you might know which might tend to mitigate or explain his present predicament with military authorities. In addition, I suggest that you contact your clergyman or anyone else in a position of authority or responsibility who would be able to address a letter to me attesting to your son's good character and their personal regard for him.

Since the trial will be held within the next week or so, a prompt reply would be greatly appreciated. I have enclosed a return envelope for your convenience.

Sincerely,

D. L. DEFENSE
Lieutenant
Judge Advocate General Corps
U. S. Naval Reserve

Enclosure

IN REPLY REFER TO:
NLSO: 41B
5801
7 December 1981

Mr. J. B. Goodfriend
888 West North Street
Peoria, Illinois 53217

Dear Mr. Goodfriend:

I am a Naval officer and lawyer who has been appointed as defense counsel for _____, who has been charged with (offenses) and who has authorized me to write to you for information which may be of assistance in his defense.

If you are conscientiously able to do so, please write to me and include in your letter such information as your personal regard for this man including his reputation for such attributes as honesty, citizenship, trustworthiness and ambition. Feel free to tell me anything you know about him and his background which might tend to mitigate or explain his present predicament with the military. I am particularly interested in such matters as his participation in school or church activities prior to entering the service and any family or domestic difficulties of which you are aware. Please also state how long you have known him and under what conditions.

Since the trial will be held within the next week or so, a prompt reply will be of great assistance in preparing the strongest possible case in his defense. I have enclosed a return envelope for your convenience.

Sincerely,

D. L. DEFENSE
Lieutenant
Judge Advocate General Corps
U.S. Naval Reserve

Enclosure

IN REPLY REFER TO:
NLSO: 41B
5801
17 December 1981

Mrs. Jane Doe
c/o Local High School
Anywhere Road
City, State (Zip Code)

Dear Mrs. Doe:

Alvin Accused has indicated that I should contact you. I am a defense counsel at _____.
I have been assigned to defend AMEAA Alvin W. Accused, USN, at a (special) (general) court-martial which will be held in the near future.

If Alvin is found guilty, the court will hear matters in extenuation and mitigation before determining what sentence is appropriate. During this portion of the trial, the court will put great emphasis on character evidence.

Alvin has given me your name as a possible character witness in his behalf. If you feel that you can speak up for him, please send me a letter setting forth the details of how you know him, for what period of time, and your opinion of his character. Any other statements about Alvin that you would like to make would also be appreciated. For example, is he a hard worker; a good student; does he get along well with others; does he have any exceptional abilities or personality characteristics? Needless to say, the more personal and detailed the letter, the more weight it carries.

Alvin's trial is coming up in only a few weeks. If you are willing to write a letter for him, would you please do so as soon as possible. We are enclosing a postage-paid, addressed envelope.

Thank you very much for your help.

Sincerely yours,

Lieutenant
Judge Advocate General Corps
United States Naval Reserve
Defense Counsel

Enclosure

(REQUEST FOR INDIVIDUAL MILITARY COUNSEL)

_____
(Date)

From: (Accused)
To:
Via:

Subj: REQUEST FOR INDIVIDUAL MILITARY COUNSEL

Ref: (a) MCM, 1984, R.C.M. 506(b)
(b) JAGMAN, § 0120b(2)

1. In accordance with references (a) and (b), I hereby respectfully request that _____ be appointed my individual military counsel for my pending _____ court-martial/article 32 pretrial investigation.

2. This request is submitted in accordance with the advice I received concerning my rights to counsel as explained to me by my detailed defense counsel, _____.

3. I have a/have no prior attorney-client relationship with the requested attorney.

4. Trial is presently scheduled for _____.

5. The charge(s) are:

_____
_____
_____

6. _____ is currently stationed at _____.

7. If this request is denied, it is respectfully requested that I be informed of the reasons therefor.

_____

Copy to:
Defense Counsel
Trial Counsel

REQUEST FOR A WITNESS ON THE MERITS

From: _____, Defense Counsel *
To: _____, Convening Authority*
Via: _____, Trial Counsel

Subj: REQUEST FOR THE PRODUCTION OF A DEFENSE WITNESS IN THE CASE OF UNITED STATES V. _____.

Ref: (a) Article 46, UCMJ
(b) MCM, 1984, R.C.M. 703(c)(2)(B)(i)

1. Pursuant to the provisions of reference (a), the defense in the _____ court-martial case of United States v. _____, respectfully requests that (name)(address)(telephone number) be produced to testify on the merits for the defense. The trial is scheduled to commence (resume) on _____ and it is requested that _____ be made available to appear at that session. _____ is stationed at _____.

2. In accordance with the provisions of reference (b), the following synopsis of expected testimony is provided:

3. It is requested that the defense be informed of your decision and the reasons for any denial by return endorsement as soon as practically possible.

_____

* Subsection (2)(D) provides for resolution of disputes concerning witness production by the military judge. Application to the convening authority for relief is not required. It is permitted under R.C.M. 905(j).

REQUEST FOR A WITNESS ON SENTENCING

From: _____, Defense Counsel
To: _____, Convening Authority*
Via: _____, Trial Counsel

Subj: REQUEST FOR THE PRODUCTION OF A DEFENSE WITNESS IN THE CASE OF UNITED STATES V. _____.

Ref: (a) Article 46, UCMJ
(b) MCM, 1984, R.C.M. 703(c)(2)(B)(ii)
(c) MCM, 1984, R.C.M. 1001(e)

1. Pursuant to the provisions of reference (a), the defense in the _____ court-martial case of United States v. _____ respectfully requests that _____ be produced to testify during sentencing portion of the trial. The trial is scheduled to commence (resume) on _____ and it is requested that _____ be made available to appear at that session. _____ is stationed (resides) at _____ _____.

2. In accordance with the provisions of references (b) and (c), the following information is provided:

a. Synopsis of expected testimony:

b. Reasons showing that the testimony is necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence.

c. Reasons showing that the testimony's weight or credibility is of substantial significance to the determination of an appropriate sentence:

d. The Government is unwilling to stipulate to the facts to which the witness is expected to testify. A stipulation of facts is an insufficient substitute for the testimony because:

* Subsection (2)(D) provides for resolution of disputes concerning witness production by the military judge. Application to the convening authority for relief is not required. It is permitted under R.C.M. 905(j).

e. Reasons why other forms of evidence are insufficient to meet the needs of the court-martial in determining the appropriate sentence:

f. Reasons why the production of the witness is favored when the significance of the personal appearance of the witness to the determination of an appropriate sentence is balanced against the practical difficulties of producing the witness.

g. It is requested that the defense be informed of your determination and the reasons for any denial by return endorsement as soon as practically possible.

BLANKET DISCOVERY REQUEST

DATE: _____

MEMORANDUM

From: _____, Defense Counsel
To: _____, Trial Counsel

Subj: REQUEST FOR DISCOVERY IN THE CASE OF _____

Ref: (a) MCM,1984, R.C.M. 703
(b) Brady v. Maryland, 373 U.S. 83 (1963)
(c) United States v. Webster, 1 M.J. 216 (C.M.A. 1975)

1. It is requested that any and all favorable or exculpatory evidence in the custody and control of military authorities and related to subject case be made available to the defense to examine and to use, in accordance with reference (a).

2. References (b) and (c) express the basic principle that the government must disclose to the defense any evidence favorable to the accused. Reference (b) also expresses the rule that suppression by the prosecution of evidence favorable to and requested by an accused violates due process where the evidence is material either to findings or to sentence.

3. This request should be considered a continuing request from this date until the date of trial of subject case, applicable to any and all favorable or exculpatory evidence which may come into the custody and control of military authorities subsequent to this date as well as to such evidence presently in the custody and control of military authorities.

_____
Defense Counsel

_____
(Date)

MEMORANDUM

From: _____, Defense Counsel
To: _____, Trial Counsel

Subj: REQUEST FOR DISCOVERY IN THE CASE OF UNITED STATES V. _____

Ref: (a) MCM, 1984, R.C.M. 703
(b) 18 U.S.C. Section 3500
(c) Brady v. Maryland, 373 U.S. 83 (1963)
(d) United States v. Webster, 1 M.J. 216 (C.M.A. 1975)

1. As provided in references (a) through (d), the defense hereby requests discovery of the below checked items:

____ a. A copy of the completed charge sheet and convening order.

____ b. A list of all anticipated government witnesses not listed in the charge sheet, their present location and parent unit.

____ c. A copy of all investigative reports, including the statements and results of interviews of all witnesses and any recordings thereof.

____ d. A copy of all statements, transcriptions of interviews and recordings thereof made by the accused to any government agents.

____ e. A copy of all documentary evidence pertinent to the case including, but not limited to, any laboratory and scientific reports, coroner's reports, medical or psychiatric evaluations, and fingerprint and handwriting comparison and identity certificates.

____ f. Any evidence tending to exculpate the accused or to reduce the seriousness of the offense.

____ g. The location of all real evidence confiscated or held by government agents.

____ h. Any material evidence favorable to the accused, both as going to the case in chief and to matters in extenuation and mitigation.

____ i. The accused's service record book.

____ j. A verbatim transcript of the testimony of the following witnesses given at the article 32 pretrial investigation.

_____
_____
_____
_____

____ k. A copy of the investigating officer's report.

____ l. A copy of the article 43 advice letter.

____ m. The service record books of the following expected witnesses:

_____
_____
_____
_____

____ n. Copies of any investigative reports in which the following expected witnesses were subjects or co-subjects:

_____
_____
_____
_____

____ o. Any evidence affecting the credibility of a government witness including, but not limited to, any grant of immunity or other promise of leniency.

____ p. Other: _____
_____
_____
_____

2. It is requested that, should any of the requested items become available subsequent to this request which are not presently in the hands of the government, they be furnished to the defense without delay.

3. Your written response is requested as soon as possible.

_____

IT IS RECOMMENDED THAT SUCH A REQUEST FOR DISCOVERY BE SPECIFICALLY TAILORED TO THE DETAILED NEEDS OF THE DEFENSE.

FORMAT FOR WRITTEN MOTION FOR APPROPRIATE RELIEF/TO DISMISS

NAVY-MARINE CORPS TRIAL JUDICIARY
_____ CIRCUIT

UNITED STATES	)	
	)	
V.	)	_____ Court-Martial
	)	(MOTION FOR APPROPRIATE RELIEF)
(Name of Accused)	)	(MOTION TO DISMISS)
(Rate/Rank)	)	
(SSN)	)	
U.S. (Navy)(Naval Reserve)	)	
(Marine Corps)	)	

1. Nature of motion. (This is a motion to dismiss Specification 3 of Charge II on the grounds that the specification fails to state an offense in that . . .)

2. Summary of facts. (Insert here a statement of the case and, if appropriate, a brief summary of the facts giving rise to or supporting the motion. If none, so state. Do not include argument in this paragraph.)

3. Evidence. (No evidence will be presented in support of this motion.) (The accused proposes to offer the following evidence in support of this motion . . .)

4. Discussion. (This paragraph should contain a discussion of the law supporting the motion, including argument and conclusions, and citations and quotations from legal authorities. A separate memorandum of points and authorities may be filed with the motion, if desired.)

5. Relief requested. (The accused requests that the court dismiss Specification 3 of Charge II.) (. . . . that the court order the trial counsel to issue a subpoena to compel the attendance of . . . . . A proposed order and subpoena are attached to this motion.)

6. Oral argument. The accused (does)(does not) desire to make oral argument on this motion.

_____
Defense Counsel

_____
Date

- -

I certify that a true copy of the above was served on counsel for the Government this _____ day of _____, 19__.

_____

NAVY-MARINE CORPS TRIAL JUDICIARY
_____ CIRCUIT

UNITED STATES)
)
V.)
)
_____)
(Accused's Name))
)
_____)
(Rate/Rank))
)
_____)
(SSN))
)
_____)
(Armed Force))

SPECIAL/GENERAL COURT-MARTIAL
NOTICE OF MOTION TO SUPPRESS
SECTION III EVIDENCE

****

In response to the notice of disclosure that there is Section III evidence in this case which may be used at trial, notice is hereby given to the trial counsel of a motion to suppress (none of the evidence). (_____

_____

_____.

For the following specific grounds:

_____

_____

_____).

A brief in support of the motion will (not) be filed at a later time.

A copy of this disclosure has been provided to the military judge.

_____ _____
(Date) DEFENSE COUNSEL

SAMPLE DEFENSE BRIEF IN SUPPORT OF A MOTION TO SUPPRESS

NAVY-MARINE CORPS TRIAL JUDICIARY
WESTPAC NORTH JUDICIAL CIRCUIT

UNITED STATES	)	
	)	
V.	)	GENERAL COURT-MARTIAL
	)	MOTION TO SUPPRESS
(Name of Accused)	)	
(Rate/Rank)	)	
(SSN)	)	
(Armed Force)	)	

****

The defense hereby moves to suppress all statements made by (accused) to agents of the Naval Investigative Service during interrogations conducted by them on (date(s)).

****

STATEMENT OF FACTS

The accused, _____, was apprehended on _____ by agents of the Naval Investigative Service.

The accused, _____, was taken directly upon his apprehension to NIS Headquarters where he was interrogated.

After the interrogation, _____ was taken to the Naval Brig, Yokosuka, where he spent the night.

The following morning, (Date), _____ was taken from the Naval Brig back to NIS Headquarters for another session of interrogation.

_____ was not presented before a magistrate for a hearing to determine whether there was probable cause to believe that he had committed an offense until _____, four days later.

MEMORANDUM OF LAW

Upon his apprehension, a person accused of a crime is entitled to a hearing before a neutral and detached party to determine whether confinement prior to trial is justified by probable cause. Gerstein v. Pugh, 420 U.S. 449, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). This constitutional mandate is, of course, applicable to the military. Courtney v. Williams, 2 M.J. 267 (C.M.A. 1976). It is implemented in the Navy by the Military Magistrate Program as established in SECNAVINST 1640.10, which provides that promptly after a servicemember is ordered into pretrial confinement (and in any event no less than 72 hours thereafter) the officer ordering pretrial confinement shall provide the military magistrate with sufficient information to permit a factual review of the factual basis of

the confinement decision. The magistrate is promptly to hold a hearing to determine inter alia if there is probable cause to believe that an offense has been committed and if the servicemember has committed it. If such a hearing is not held within the prescribed time limitation, then pretrial confinement cannot lawfully continue.

The right to such a hearing is of constitutional dimensions. Gerstein v. Pugh, supra; Courtney v. Williams, supra. It is a right which is to be afforded the accused as soon as possible after he is taken into custody.

The failure of the government to grant to the accused, upon deciding to confine him, a prompt probable cause hearing is of importance to this court in determining the admissibility of any statements elicited from him while in a custodial status. Omnibus Crime Control and Safe Streets Act, 18 U.S.C. 3501(c). Congress therein has provided:

> In any criminal prosecution by the United States .... a confession made or given by a person .... who was under arrest or other detention in the custody of any law enforcement officer or law enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States .... and if such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided, that the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

The failure of the government to present the accused for such a hearing within six hours is not grounds per se to exclude any confession. (The act at section(e) defines confession to include any self-incriminating statement made or given orally or in writing.) It is, however, one of a number of factors to be considered in determining the voluntariness of any statements sought to be introduced against the accused. United States v. Mayes, 552 F.2d 729 (6th Cir., 1977); United States v. Bear Killer, 534 F.2d 1253 (8th Cir., 1976); United States v. Edwards, 539 F.2d 689 (9th Cir., 1976); United States v. Monroe, 397 F.Supp. 726 (D.D.C., 1975).

It is clear from these cases, and from a host of others, that the government is obliged to justify any delay in excess of six hours in presenting the accused before a magistrate. It must justify this request as reasonable in upholding its burden of establishing the voluntariness of a confession. It must demonstrate that the confinement itself was not by its nature so coercive as to diminish the voluntariness of the confession. United States v. Bear Killer, supra, is particularly instructive in this regard. Bear Killer, an Indian, was arrested on 9 July 1975 at Pine Ridge

Indian Reservation. He was driven that afternoon, following a preliminary investigation, to Rapid City, South Dakota, a distance of approximately one hundred miles. He arrived there at 1725, too late for presentment to a magistrate. He made a statement that evening. Presumably, for the record is unclear on this point, he was so presented the following day.

In considering Bear Killer's claim that such delay rendered involuntary the statement he had made, the court considered ". . . the Supreme Court's admonition that the simple fact of custody is coercive. The Circuit Court cited Schneckloth v. Bustamonte, 412 U.S. 218, 247, 36 L.Ed.2d 854, 857 (1973), wherein the Supreme Court remarked that techniques of police questioning and the nature of custodial surroundings produce an inherently coercive situation. It is a subtle form of pressure that plays against the will of a suspect, the effects of which are most difficult to measure. A statement given while in custody is not admissible if it is the product of an improper encroachment on the right to an initial appearance before a magistrate." United States v. Bear Killer, supra at 1257.

The court in Bear Killer ultimately admitted the statement of the defendant. It based its ruling on the showing by the government that the delay in compliance was due not to an attempt by the government to compel Bear Killer to incriminate himself but to the local practice of allowing intoxicated arrestees to become sober before presentment and from the fact that approximately one hundred miles had to be traveled before a magistrate could be obtained.

The reasoning enunciated in Bear Killer is opposite in the instant case. _____ first was detained by law enforcement authorities at approximately 1500, _____. He was confined that night. The following morning he was reinterrogated from approximately 0900 until noon. Although interrogation ceased at that time, he was not presented to a magistrate until four days after his apprehension.

The government at this point has a burden in justifying its failure to present _____ to a magistrate for a probable cause hearing while holding him in custody for nearly four days. Such a justification is difficult to envision if probable cause legitimately existed at the time of apprehension. There were located aboard the very same naval facility five judge advocates who possessed the qualifications to act as a magistrate. Another qualified judge advocate was located at NAF Atsugi, no more than a few hours away. Transportation for either the accused or for the magistrate himself could have presented no difficulty, the majority of these persons being located within walking distance from each other.

This situation, i.e., the close physical location of law enforcement authorities, the magistrate and the accused is not a novel one. It was encountered in United States v. Erving, 388 F.Supp. 1011 (W.D. Wis., 1975). Faced with a delay of eleven hours and twenty minutes in presenting a defendant located approximately one hundred yards from the magistrate, the court found the delay so unreasonable as to render the statement inadmissible. The delay in the instant case is similarly unreasonable. Accordingly, the statement obtained from him must be considered inadmissible.

Oral argument is requested.

****

WHEREFORE, the defense requests that the motion be granted.

_____ (Date)

_____ Detailed Defense Counsel

****

CERTIFICATE OF SERVICE

The defense certifies that a copy of this motion was served on counsel for the Government on this the _____ day of _____, 19__.

_____

U.S. NAVY COURT OF MILITARY REVIEW

_____ (Accused's Name)	
_____ (Accused's SSN)	
_____ (Rate/Rank)	_____ COURT-MARTIAL
_____ (Armed Force)	PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF _____
PETITIONER	
v.	Miscellaneous Docket No. _____
_____ Convening Authority RESPONDENT	

****

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF MILITARY REVIEW

PREAMBLE

The Petitioner hereby prays for an order directing the respondent _____ to

HISTORY OF THE CASE

STATEMENT OF FACTS

STATEMENT OF ISSUE

THE RELIEF SOUGHT

REASONS FOR GRANTING WRIT

THIS HONORABLE COURT HAS JURISDICTION UNDER THE ALL WRITS ACT, 28 U.S.C. 1651(a).

_____
Appellate Counsel

_____
(Detailed Defense/Trial Counsel)

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were served on _____(defense/trial counsel) and _____, respondents and _____ this _____ day of _____ 19__.

_____

CHECKLIST OF POST-TRIAL OPPORTUNITIES FOR RELIEF

Appellate review procedures _____

Request for deferment of confinement at hard labor. R.C.M. 1101(c) _____

Submission of matters by accused and appellate brief by defense counsel to convening authority for consideration. R.C.M. 1105(b) _____

Examination of the SJA/legal officer recommendation for error and submission of appropriate response. United States v. Goode, 23 U.S.C.M.A. 367, 50 C.M.R. 1 (1975). R.C.M. 1106f _____

Petition to OJAG in SPCMs not involving a BCD. Art. 69, UCMJ _____

Desirability of representation by appellate defense counsel in cases before the Navy Court of Military Review _____

Powers of the Navy Court of Military Review with respect to findings and sentence. Art. 66, UCMJ _____

Powers of the Court of Military Appeals and procedure for petitioning for review. Art. 67, UCMJ _____

Appellate leave _____

REQUEST FOR DEFERMENT OF SENTENCE

DATE:

From: (accused)
To: (convening authority)

Subj: REQUEST FOR DEFERMENT OF SERVICE OF SENTENCE TO CONFINEMENT IN THE CASE OF UNITED STATES V. _____

Ref: (a) MCM, 1984, R.C.M. 1101(c)
(b) United States v. Brownd, 6 M.J. 338 (C.M.A. 1979)

1. Pursuant to reference (a), it is hereby requested that service of the sentence to confinement adjudged in the subject case be deferred until the action of the convening authority, at which time such deferment shall be rescinded.

2. In accordance with reference (b), deferment is requested for the following reasons: (state grounds for request)

3. Other factors that you should consider include: (state "E&M" grounds which support request)

4. It is requested that this request and your response be attached to the record of trial.

_____
(Signature of accused)

APPELLATE RIGHTS STATEMENT (See JAGMAN, § 0152b)

From: _____

To: Judge Advocate General

Subj: APPELLATE RIGHTS STATEMENT

1. I was convicted and sentenced by a _____ court-martial on _____ at _____. Pursuant to Article 70, Uniform Code of Military Justice, and R.C.M. 502(d)(6), R.C.M. 1105, and R.C.M. 1110, Manual for Courts-Martial, 1984, my defense counsel, _____ has advised me of my appellate rights and the review process of the record of my court-martial as follows:

a. The convening authority will take action on the sentence and may, in his discretion, take action on the findings. The action to be taken on the findings and sentence is within the sole discretion of the convening authority. The determination of the action to take on findings and sentence is a matter of command prerogative. The convening authority is not required to review the case for legal errors or factual sufficiency. In taking action on the sentence, the convening authority may approve, disapprove, commute or suspend the sentence in whole or in part. The convening authority is not empowered to reverse a finding of not guilty; however, the convening authority may change a finding of guilty to a charge or specification to a finding of guilty to a lesser offense included within that charge or specification, may disapprove a finding of guilty and order a rehearing, or may set aside and dismiss any charge or specification. Under no circumstances may the convening authority increase the severity of the sentence as adjudged. I have been advised by my defense counsel that it is counsel's responsibility to represent me during the convening authority's action stage of my court-martial conviction. In this regard, my defense counsel has advised me of my right to request deferment of any sentence to confinement, and of counsel's obligation to advise and assist me in preparing matters for submission to the convening authority for consideration prior to his taking action. I understand that I have 30 days after the sentence was announced in which to submit matters to the convening authority; however, the convening authority may not take action prior to 7 days after a copy of the authenticated record of trial has been provided to me or, if it is impractical to provide me with such copy or if I request, to my defense counsel. The convening authority may, for good cause, extend the 30-day period or the 7-day period for not more than 20 additional days or 10 additional days, respectively. It is also understood that the failure to submit matters within the times prescribed waives the right to submit matters. I also may expressly waive, in writing, my right to submit matters, and such waiver may not be revoked. My defense counsel has also advised me of his or her responsibility to examine the record of trial and to note any errors and to examine the post-trial recommendation by the staff judge advocate or legal officer for error or omissions and to reply within 5 days from the date of receipt of such recommendation. The convening authority may, for good cause, extend this time period for up to an additional 20 days.

b. If, after action by the convening authority, my sentence includes dismissal or a punitive discharge (as applicable) or confinement at hard labor for one year or more, I understand the record of trial will be forwarded to the Judge Advocate General for referral to the U.S. Navy-Marine Corps Court of Military Review in Washington, D.C. for review. It

is understood that the U.S. Navy-Marine Corps Court of Military Review is limited to reviewing the findings and sentence as approved by the convening authority and may not reverse a finding of not guilty, approve findings of guilty previously disapproved, or approve a sentence more severe than that previously approved. In this regard, it is understood that no findings of guilty approved on review below may be affirmed by the U.S. Navy-Marine Corps Court of Military Review unless that court is satisfied that each element of the offense or offenses of which I was convicted is established beyond reasonable doubt by legal and competent evidence of record. It is further understood that if the U.S. Navy-Marine Corps Court of Military Review approves a finding of guilty with regard to one or more offenses, then that court is required to determine the appropriateness of the sentence as approved on review below, and that the court may not affirm a sentence as approved on review below unless the court finds that it is a legal, adequate, and appropriate punishment in view of all the circumstances.

c. If the U.S. Navy-Marine Corps Court of Military Review affirms the findings and sentence, in whole or in part, I understand that I have the right to seek further review of my court-martial conviction before the U.S. Court of Military Appeals. In this regard, I understand that the U.S. Court of Military Appeals is composed of three civilian judges and is located in Washington, D.C. Insofar as further review before the U.S. Court of Military Appeals is concerned, I understand that, whereas the review process described in the preceding paragraphs is automatic, I must request review before the U.S. Court of Military Appeals by filing a petition for grant of review within sixty (60) days from the earlier of the date of being notified of the decision of the U.S. Navy-Marine Corps Court of Military Review; or the date on which my copy of the decision of the U.S. Navy-Marine Corps Court of Military Review, after having been served on my appellate counsel of record, (if any), is deposited in the United States mails for delivery by first-class certified mail to the address provided by me; or, if I fail to provide such an address, to the latest address listed by me in my service record. Furthermore, I understand that a petition for grant of review before the U.S. Court of Military Appeals does not have to be granted by that court. I understand that such a petition is granted only on good cause shown and that whether good cause is shown is determined by the U.S. Court of Military Appeals. I understand that, if the U.S. Court of Military Appeals should grant my petition for review, its review of my case is limited solely to questions of law, and its review will also be limited to those questions of law concerning which review was granted. I understand that the U.S. Court of Military Appeals generally must accept the facts as found at trial or during the prior review of my case and that it has no power to amend the sentence as affirmed by the U.S. Navy-Marine Corps Court of Military Review, except in very limited circumstances.

d. If the U.S. Court of Military Appeals reviews my case, or otherwise grants relief, I understand that I may further petition the U.S. Supreme Court for review of the U.S. Court of Military Appeal's decision by writ of certiorari. It is further understood that the grant or denial of a writ of certiorari is within the sole discretion of the U.S. Supreme Court and that the application for a writ of certiorari must be filed in accordance with, and within the time limits prescribed by, the rules of the U.S. Supreme Court.

e. My defense counsel has further advised me that I may waive the appellate review as just explained to me or I may withdraw the appeal of my case from such review. If I do waive the review or withdraw my appeal, then my case will be reviewed by a judge advocate. This judge advocate review must be in writing and set forth conclusions as to whether (1) the court had jurisdiction over me and the offense(s), (2) the charge(s) and specification(s) stated an offense, and (3) the sentence was within the limits prescribed as a matter of law. The judge advocate must also respond to each allegation of error made by me or my defense counsel in writing. If the judge advocate determines that corrective action is required or if the sentence includes dismissal, a punitive discharge or confinement for more than 6 months, the record of trial and the judge advocate's review and recommendation will be sent to the officer exercising general court-martial jurisdiction for action. The officer exercising general court-martial jurisdiction may disapprove or approve the findings or sentence, in whole or in part, may order a rehearing on the findings or the sentence, or on both, or may dismiss the charges.

f. It is my further understanding that the portion of my sentence providing for a punitive discharge or dismissal may not be ordered executed until the court-martial conviction is final and the sentence as finally approved includes the punitive discharge or dismissal. A court-martial conviction is final when review is completed by the U.S. Navy-Marine Corps Court of Military Review and:

(1) I fail to file a petition for grant of review before the U.S. Court of Military Appeals within sixty (60) days after notification or the date of certified mailing, as appropriate, of the U.S. Navy-Marine Corps Court of Military Review's decision in my case;

(2) My petition for grant of review is denied or otherwise rejected by the U.S. Court of Military Appeals;

(3) My case is not otherwise under review by the U.S. Court of Military Appeals; or

(4) Review is completed in accordance with the judgment of the U.S. Court of Military Appeals and:

(a) A petition for a writ of certiorari is not filed within the time limits prescribed by the U.S. Supreme Court;

(b) A petition for a writ of certiorari is denied or otherwise rejected by the U.S. Supreme Court; or

(c) Review is otherwise completed in accordance with the judgment of the U.S. Supreme Court.

Additionally, if I have waived review of my case by the U.S. Navy-Marine Corps Court of Military Review or withdrawn my appeal from that court, my court-martial conviction is final when review by a judge advocate is completed and action is taken by the officer exercising general court-martial jurisdiction approving the findings and sentence. If my sentence includes a dismissal, approval by the Secretary of the Navy or

such Under or Assistant Secretary as is designated is further required. If my sentence, as finally approved, includes a punitive discharge or dismissal, it is understood that I will be discharged or dismissed in accordance with the approved punishment.

2. In view of the foregoing, and should my court-martial be referred to the Navy-Marine Corps Court of Military Review under Article 66 or Article 69, Uniform Code of Military Justice, I have been informed that I am entitled to representation before the United States Navy-Marine Corps Court of Military Review, the United States Court of Military Appeals, and the U.S. Supreme Court by appellate defense counsel who is a lawyer qualified in accordance with Article 27(b) of the Uniform Code of Military Justice, designated by the Judge Advocate General of the Navy, and provided at no expense to me. Although I am entitled to such representation, I understand that I must request such representation. In this regard, I understand that I may, if I wish, waive representation by appellate defense counsel by indicating such desires below. Moreover, I understand that if I waive my right to appellate representation I am relinquishing many of the traditional benefits associated with the right to counsel, including examination of the record of trial by a qualified appellate advocate whose sole responsibility is the protection of my interests and the preparation of assignments of error and other pleadings which might benefit me. I also understand that, in addition to or in lieu of my designated appellate defense counsel, I may retain a civilian counsel to represent me before the U.S. Navy-Marine Corps Court of Military Review, the U.S. Court of Appeals, and the U.S. Supreme Court, but that the services of a civilian counsel would be at my own expense and at no expense to the Government.

3. Having fully discussed the foregoing with my defense counsel:

_____ I do desire to be represented by appellate defense counsel, and I hereby request the Judge Advocate General of the Navy to designate an appellate defense counsel to represent me.

_____ I do <u>not</u> desire to be represented by appellate defense counsel. In making this choice I hereby acknowledge that I do so only after being informed by my trial defense counsel, whose signature appears below as witness to this statement, that I am relinquishing many of the traditional benefits associated with my right to counsel.

4. For administrative purposes, the following information is provided:

a. A civilian counsel was/was not retained to represent the accused at trial. If civilian counsel was retained to represent the accused at trial, civilian counsel should indicate whether civilian counsel's services have/have not been retained insofar as appellate review of the case is concerned. Civilian counsel's name, address, and telephone number are as follows:

_____

_____

_____

_____

Telephone: _____(_____)_____

b. The services of an individual military counsel were/were not utilized. Individual military counsel's mailing address and telephone number are as follows:

_____

_____

_____

_____

Telephone: _____ (_____) _____

c. Detailed defense counsel's address and telephone number are as follows:

_____

_____

_____

_____

Telephone: _____ (_____) _____

d. Principal trial defense counsel in this case was _____

e. I understand that in order for my defense counsel or any successor counsel properly to represent me, I must keep counsel informed of my current mailing address. In this regard, the following permanent address and phone number are provided at which I may be contacted:

_____

_____

_____

_____

Telephone: _____ (_____) _____

f. I further agree to forward any change of address to:

Director, Appellate Defense Division
Navy-Marine Corps Appellate Review Activity
Office of the Judge Advocate General
Washington Navy Yard
Washington, D.C. 20374

_____ _____

(Date) (Signature of Accused)

Witnessed by:

_____

(Signature)

_____

(Name of Counsel)

COUNSEL'S STATEMENT

1. Subsequent to trial I have counseled _____ as follows:

a. I have informed him concerning the appellate review process including the various intermediate reviews subsequent to trial and his right to representation throughout appellate review. In this regard, I have informed him of his right to request clemency and deferment of any confinement adjudged. Furthermore, I have advised him that I will examine the record of trial as well as the staff judge advocate's post-trial review thereof; that I will prepare an appropriate reply to the staff judge advocate's post-trial review; that I will note for further consideration by any attorney designated to relieve me any errors which occurred at trial and which I believe may be reasonably raised on review; and that I will/will not prepare a brief concerning these matters pursuant to Article 38(c), Uniform Code of Military Justice.

b. I have familiarized myself with the issues, if any, which I believe should be urged on review.

c. I have informed him that I will continue to assist him concerning this court-martial until such time as I am properly relieved by competent authority.

2. Having examined the record of trial, I believe the following issues are worthy of consideration:

3. For administrative purposes the following information is recorded:

a. A civilian counsel was/was not retained to represent the accused before court-martial. (At present this counsel informs me that his services have/have not been retained to represent the accused during appellate review of this court-martial.) Civilian counsel's name, address, and telephone number are as follows:

_____

_____

_____

_____

Telephone: (___)_____

b. The services of an individual military counsel were/were not utilized. Individual military counsel's mailing address and telephone number are as follows:

_____

_____

_____

_____

Telephone: (___)_____

c. Detailed defense counsel's address and telephone number are as follows:

_____

_____

_____

_____

Telephone: (___)_____

DISCHARGE UPGRADE ADVISEMENT

REVIEW AND APPEAL OF YOUR DISCHARGE

The following information concerns two ways in which you may attempt to administratively change either (1) the reason why you were discharged to a more favorable reason for discharge, and/or (2) to upgrade your type of discharge.

This information will help you know where to start, and what you can expect, should you at some future date decide that you did not receive a fair or appropriate discharge. While you may want nothing to do with the Navy now, you may have serious regrets about your discharge in the future. It is therefore very important that you always keep this information for your own personal records. If you do have such regrets in the future, the place to start is the Navy Discharge Review Board.

1. Purpose and scope of the Navy Discharge Review Board

(a) References:

MILPERSMAN 5040200
MARCORPSEPMAN 6001.6
To United States Code 1553

(b) The Navy Discharge Review Board, consisting of five members, was established pursuant to 10 U.S.C. 1553 in order to review, on its own motion; or upon the request of any former member of the Navy or Marine Corps; or in the case of a deceased member or former member of the Navy or Marine Corps, upon request of his surviving spouse, next of kin, or legal representative, or if incompetent by his guardian; the type and nature of final discharges in order to determine whether or not, under reasonable standards of naval law and discipline, and type and nature of the discharge should be changed, corrected, or modified, and if so, to decide what change, correction or modification should be made. The board may also issue a new discharge in accordance with the facts presented to it.

(i) The Navy Discharge Review Board may review all final separations from the naval service, irrespective of the manner evidenced or brought about, except either a discharge awarded by a general court-martial or a discharge executed more than 15 years before an application for review is submitted. Such review is based on all available records of the Department of the Navy pertaining to the former member, and such evidence as may be presented or obtained by the board. The former member's service record book is but one of the records of the Department of the Navy which may be considered by the board.

(ii) The Navy Discharge Review Board has no authority to revoke any executed discharge; or to reinstate any person in the military service subsequent to discharge; or to recall any person to active duty; or to waiver prior disqualifying discharges to permit enlistment in the naval service or any other branch of the armed forces; or to cancel enlistment contracts; or to determine eligibility for veterans' benefits. The board may, in its discretion, however, record a recommendation for reenlistment

as part of its decision in any case, but such recommendation is not binding upon the Commandant of the Marine Corps or the Secretary of the Navy.

(iii) Review of the board of the type and nature of a discharge is subject to review only by the Secretary of the Navy. Unless otherwise authorized by the Secretary of the Navy after final adjudication, further proceedings before the board are permitted only upon the basis of newly discovered relevant evidence not previously considered by the board, and then only upon the recommendation of the board and approval by the Secretary of the Navy.

(iv) Relevant and material facts concerning the former member concerned found by a general or special court-martial, or by a court of inquiry or board of investigation where the former member was in the status of a defendant or an interested party, as properly approved by the reviewing authorities, on the appeal shall be accepted by the board as established facts in the absence of manifest error or unusual circumstances clearly justifying a different conclusion. Relevant and material facts stated in a specification to which the former member concerned pleaded guilty before a general or special court-martial, or where, upon being confronted by such a specification, the former member elected to request discharge for the good of the service, shall be accepted by the Board as established facts in the absence of manifest error or unusual circumstances clearly justifying a different conclusion, or unless the former member shall show to the board's satisfaction, or it shall otherwise appear, that arbitrary or coercive action was taken against him at the time, which action was not apparent to the reviewing authority from the face of the record.

(v) The evidence before the board which may be considered in connection with a particular discharge document will normally be restricted to that which is relevant and material to the former member's particular term of service terminated by that discharge document, or to the former member's character, conduct, physical condition, or other material matters as revealed at the time of his entry into that particular term of service or during that term of service, or at the time of his separation therefrom.

(vi) In order to warrant a change, correction or modification of the original document evidencing separation from the Navy or Marine Corps, the former member concerned must show to the satisfaction of the board, or it must otherwise satisfactorily appear, that the original document was improperly or inequitably issued under standards of naval law and discipline existing at the time of the former member's original separation, or under other standards which, subsequent to his separation, were made expressly retroactive to separations of the type and character had by the former member.

(vii) Please understand that this board, like the Board for Correction of Naval Records to be discussed next, is not a clemency board. It is not empowered to change a discharge to a more favorable one based on exemplary conduct/character since the receipt of the discharge. Only information relevant and material to conduct while in the Navy/Marine Corps is to be considered by the board.

2. Purpose and scope of the Board for Correction of Naval Records

(a) References:

MILPERSMAN 5040200
MARCORPSEPMAN 6001.7
10 United States Code 1552

(b) The Board of Correction of Naval Records, consisting of not less than three members, was established pursuant to 10 U.S.C. 1552 and considers all applications properly before it for the purpose of determining the existence of an error or an injustice, and to make the appropriate recommendations to the Secretary of the Navy. Application may be made by member, former member, his heir or legal representative on such purpose. The Board for Correction of Naval Records, unlike the Navy Discharge Review Board, may review discharges awarded by a general court-martial. Other types of cases reviewed by this board include, but are not limited to, elimination of discharge and restoration to duty, requests for physical disability retirement; the cancellation of a physical disability discharge and substituting, in lieu thereof, retirement for disability; the removal of derogatory material from an official record; the review of nonjudicial punishment; and the restoration of rank, grade, or rating. Also, this board will review the case of a person who is in a Reserve component and who contends that his release from active duty would have been honorable, rather than under honorable conditions. When the relief sought in a case has been denied by the Navy Discharge Review Board, application for relief may then be filed with the Board for Correction of Naval Records.

(i) The law requires that application be filed with the Board for Correction of Naval Records within three years of the date of the discovery of the error or injustice. However, the board is authorized to excuse the fact that the application was filed at a later date if it finds it to be in the interests of justice to consider the application. The board is empowered to deny an application without a hearing if it determines that there is insufficient evidence to indicate the existence of probable material error or injustice to the respondent.

(ii) No application will be considered by this board until the applicant has exhausted all other effective administrative legal remedies as the board shall determine are practical and appropriately available to the applicant.

(iii) An application to the board for the correction of a record shall not operate as a stay of any proceedings being taken with respect to the person involved.

(iv) The board will consider the applicant's case on the basis of all the material before it, including but not limited to, the application for correction filed by the applicant, and documentary evidence filed in support of such application, and any brief submitted by or in behalf of the applicant, and all available pertinent records in the Department of the Navy. The applicant's service record is but one of the records which may be considered by the board.

(v) The record of proceedings of the board will be forwarded to the Secretary of the Navy, who will direct such action in each case as he determines to be appropriate.

3. In connection with review of executed discharges by both the Navy Discharge Review Board and the Board for Correction of Naval Records, there is no law or regulation which provides that an unfavorable discharge may be changed to a more favorable discharge solely because of the expiration of a period of time after discharge during which the respondent's behavior has been exemplary. To permit relief, an error or injustice must be found to have existed during the periods of enlistment in question and the respondent's good conduct after discharge, in and of itself, is not sufficient to warrant changing an unfavorable discharge to a more favorable type of discharge.

4. Applications for review and explanatory matter may be obtained by writing the Board of Correction of Naval Records, or the Navy Discharge Review Board, as appropriate, Department of the Navy, Washington, D.C. 20370.

5. If the relief you requested has not been granted after applying to both boards, you will have exhausted your administrative remedies. If you still wish to try to change your discharge it will then be necessary to hire a lawyer and seek judicial relief in any appropriate federal court.

UNITED STATES	)	_____ COURT-MARTIAL
	)	
V.	)	PETITION FOR CLEMENCY
	)	
Accused's Name	)	
Rank	)	
SSN	)	
Armed Force	)	

****

1. In the above styled case tried by _____ Court-Martial on _____ at _____, pursuant to Court-Martial Convening Order _____, the accused received the following sentence:

_____

_____.

2. Pursuant to R.C.M. 1105(b), MCM, 1984, the undersigned recommend that the convening authority only approve so much of the sentence as provides for _____

_____.

3. The following matters are submitted in support of this petition:

a. The accused is only _____ years old.

b. The accused is _____.

c. This is the accused's first conviction by court-martial and he has no previous disciplinary record.

d. (State other "E&M" grounds).

4. Although the undersigned are aware of the seriousness of the offense for which the accused has been convicted, we believe that justice will best be served by the recommended clemency.

_____
Defense Counsel

_____
(Court member)

_____
(Court member)

_____
(Court member)

_____
(Court member)

_____
(Court member)

_____
(Court member)

RELIEF OF DEFENSE COUNSEL FROM RESPONSIBILITIES OF RECEIVING POST-TRIAL STAFF JUDGE ADVOCATE'S REVIEW

I, _____, understand that my defense counsel, _____, should normally be
(Name of Defense Counsel)
served with the Staff Judge Advocate's post-trial review of my court-martial unless a truly extraordinary circumstance rendered him/her actually unavailable to receive such review. Understanding this, I relieve _____
_____ of his/her responsibilities to receive the Staff
(Name of Defense Counsel)
Judge Advocate's post-trial review and to make comments thereon, and I hereby relieve the United States of America from the responsibility of serving such review on my defense counsel.

I hereby acknowledge that _____ has been appointed as Substitute Defense Counsel to represent my interests, insofar as they are affected by the Staff Judge Advocate's post-trial review of my court-martial in accordance with Manual for Courts-Martial, 1984, R.C.M. 1106(f)(2). I hereby consent to the appointment of _____
(Name of Substitute
_____ as my Substitute Defense Counsel for such purpose, and state I
Counsel)
have formed an attorney-client relationship with him/her. I further agree that the United States of America may serve a copy of the Staff Judge Advocate's review upon my Substitute Defense Counsel, and that such service will be in all manner equivalent to service of such review of my original defense counsel, named above. I hereby charge my Substitute Defense Counsel with the responsibility to receive the Staff Judge Advocate's

post-trial review of my court-martial, to study such review and the record of trial in my case, and to prepare and submit such response to that review as he/she, in his/her professional opinion and discretion, deems appropriate.

_____
(Name of Accused)

_____
(Date)

Witness: _____
Substitute Defense Counsel

(Rank, Name) [United States Navy, Marine Corps] Petitioner	)	
V.	)	_____ COURT-MARTIAL
UNITED STATES, Respondent	)	PETITION FOR NEW TRIAL [AND BRIEF IN SUPPORT]*

TO (THE JUDGE ADVOCATE GENERAL OF THE NAVY) [THE JUDGES OF THE UNITED STATES (NAVY-MARINE CORPS OF MILITARY REVIEW)(COURT OF MILITARY APPEALS)]:

Preamble

The undersigned [petitioner][counsel, pursuant to a Power of Attorney granted by the petitioner (Appendix A),] hereby prays in accordance with Article 73, Uniform Code of Military Justice (hereinafter UCMJ), 10 U.S.C. §873 (1976), and R.C.M. 1210, Manual for Courts-Martial, 1984, [hereinafter MCM, 1984], that he be granted a new trial for the reasons set forth infra.

Statement of the Case

Petitioner was tried at [place of trial], before [a military judge sitting as a (general)(special) court-martial][a (general)(special) court-martial composed of officer (and enlisted) members][a summary court-martial] on [date(s) of trial]. [Pursuant to (his)(her) plea(s)][Contrary to (his)(her) plea(s)], (he)(she) was found guilty of _____

_____,

in violation of Article(s) _____, UCMJ, 10 U.S.C. §(§§) _____ 1976), (respectively). (He)(She) was sentenced to (a) (dishonorable)(bad-conduct) discharge, confinement at hard labor for _____

---

* At the Court of Military Appeals and Courts of Military Review, a brief in support of a petition for new trial is required by Rules 22(a) and 20d, respectively. Additionally, at the United States Court of Military Appeals, a final brief may be required under Rule 22(b).

(years)(months), forfeiture of (all pay and allowances)($_____ pay per month for _____ (years)(months), and reduction to (the grade of E-____)(the lowest enlisted grade). On [date of action], the convening authority approved (and ordered executed)(the sentence)[approved (and ordered executed) only so much of the sentence as provides for _____

_____

_____].

[Also include in this paragraph any and all subsequent modifications or clemency action taken. Also state if, and when, any supervisory review has been completed in accordance with Article 65(c), UCMJ.]

The petitioner's conviction [is presently pending review by the United States (Navy-Marine Corps Court of Military Review)(Court of Military Appeals)][has been affirmed pursuant to Article(s)(66)(and 67)(69), UCMJ] [and his petition for grant of review was (granted)(denied) on [date]].

Jurisdictional Statement

This petition is being filed within two years after the convening authority's approval on [date of action] of the petitioner's court-martial's findings and sentence.

Statement of Facts

[Furnish herein a full statement of the newly discovered evidence or fraud on the court which is relied upon for the remedy sought. Attach as appendices all affidavits which support these facts. Also attach as appendices all affidavits of persons whom the petitioner expects to present as witnesses in the event of a new trial. Each witness' affidavit should set forth briefly the relevant facts within the personal knowledge of the affiant.]

Statement of Issue

[Briefly describe any finding and/or sentence believed to be unjust. For example,

WHETHER THE FINDING OF GUILTY OF AGGRAVATED ASSAULT (SPECIFICATION 1, CHARGE II) RESULTED FROM THE PERJURED TESTIMONY OF THE ALLEGED VICTIM.

AND:

WHETHER THE PETITIONER IS ENTITLED TO A NEW TRIAL BASED ON THE NEWLY DISCOVERED EVIDENCE OF PETTY OFFICER WALTER'S PAST CRIMINAL MISCONDUCT AND CONVICTION FOR MAKING FALSE OFFICIAL STATEMENTS.]

Argument in Support of Issue

[Furnish a complete argument, including, if applicable, citations of legal authorities in support of the argument.]

Conclusion

WHEREFORE, for the foregoing reasons, the petitioner prays that he be granted a new trial.

_____
(Name of Petitioner)

[By] _____
(Signature of Petitioner)
(Signature block of counsel)
(Title)
(Address and Phone)

Sworn to and subscribed before me on this _____ day of _____ 19___, by the said _____ at _____, _____.

My appointment expires:

_____

_____
(Name)
(Rank, if applicable)
[Notary Public]
10 U.S.C. § 936

CERTIFICATE OF SERVICE*

I, the undersigned, herewith certify that an original and four copies of the foregoing were mailed or delivered to the Office of The Judge Advocate General of the Navy and a copy to Appellate Government Counsel on _____ 19____.

_____

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* Only necessary if the case is presently pending review before either the Court of Military Review or Court of Military Appeals.

Note: See JAG Manual art. 0154 for further guidance on petitions for new trial.

U.S. NAVY COURT OF MILITARY REVIEW

UNITED STATES	)	NCM No.
	)	
V.	)	General court-martial convened
	)	by Commandant, Twenty-third
Danny SQUID	)	Naval District, at Naval Station,
123-45-6789	)	Brookly, Iowa
Boatswain's Mate Seaman	)	
Recruit	)	MOTION REQUESTING RELIEF
U.S. Navy	)	FROM RESPONSIBILITY OF POST-TRIAL
	)	REPRESENTATION OF APPELLANT

COMES NOW trial defense counsel, pursuant to Rule 21, and requests this Honorable Court to relieve trial defense counsel of the responsibility for the post-trial representation of the appellant. Appellant requested appellate representation by appellate defense counsel, and _____ has been designated to represent appellant before this Honorable Court and has assumed that duty. Trial defense counsel has performed all of his post-trial duties in appellant's case, including examination of the staff judge advocate's review.

WHEREAS trial defense counsel respectfully requests that the relief sought be provided to him.

I. A. M. GOOD
Lieutenant, JAGC, USNR
Trial Defense Counsel

TRIAL COUNSEL RELATED FORMS

DUTIES AND RESPONSIBILITIES OF TRIAL COUNSEL

1. General duties - R.C.M. 502(d)(5)

   A. Prosecute in the name of the United States

      1. Get "fired up" but don't take it personally, i.e., don't develop an "insatiable prosecutorial lust"

      2. Be prepared to litigate - never let your opponent outprepare you

   B. Duties prior to trial

      1. Develop working relationships with the CA

         a. Go and meet him/her

         b. Keep him/her informed of the trial's progress - earn their confidence

         c. Keep in contact through memos and classes (NLSO/SJA update briefings)

      2. Examine the file

         a. Get the necessary administrative corrections going ASAP

            -- Make sure supporting documents and evidence accurate

         b. Serve the accused ASAP

      3. Prepare for trial

         a. Review the checklists in Aids to Practice

         b. Prepare a speedy trial chronology if it could become necessary - ask for 39a sessions when necessary. R.C.M. 707.

         c. Prepare and route pretrial information report

4. Notify and arrange for the appearance of the necessary parties

   a. Witnesses

      (1) Administrative burden is upon you. Vouchers, subpoenas, accounting date -- it's all yours.

      (2) Since the administrative burden is so great, you must prepare for trial immediately because once the defense begins to make its requests you will have much less time to prepare your case

   b. Members - inform them:

      (1) Time

      (2) Uniform

      (3) Place of trial

   c. Secure enlisted members if necessary - modify convening order

   d. Military judge, court reporter - get the case docketed and make sure the courtroom is ready

      -- Arrange for R.C.M. 802 conference if desired

5. Legal research - do it early, don't forget available resources

   a. FLITE

   b. OJAG

   c. NJS

   d. Use these after exhausting local resources - like the trial shop and local library

6. Consider the inadvisability of going to trial on insufficient specification or where proof is lacking

   -- Discuss recommendations with CA

7. Protect the CA - make sure no PTA's are signed or agreed to without your assistance/recommendations

8. Brief the bailiff on his/her duties before trial

   a. Calling court to attention

   b. Summoning witnesses

9. Ensure accused prepared to be present (brig/command)

C. Duties during trial

1. Fight tooth and nail, but seek justice

2. Better to develop a "tough but fair" reputation than either "pushover" or "unfair"

3. Review checklists in Aids to Practice

4. Assist all witnesses - even defense

   -- Inform of time, place, uniform, decorum

5. Continue to fulfill all administrative duties

   -- Provide all parties with copies of charge sheets, convening orders, investigations, etc.

6. If there is no bailiff, it is TC's duty to say "All rise" everytime MJ and/or members enter or leave courtroom and to bring witnesses into court

7. If members are anticipated, make name signs for their seats in the courtroom

   -- Coordinate with court reporter shop

8. Make sure the reporter is not having difficulty

   -- Get to know reporter as a valuable resource and for assistance

9. Keep your cool - even when the DC is wringing your neck

   -- Military bearing: poker face

10. Protect the record

    a. Insure the Trial Guide being followed

    b. If the providency inquiry is inadequate, ask the MJ for additional questions

    c. Judges sometimes forget things - help them

11. Know the rules of evidence cold or where to find them fast

12. Keep the military judge informed when court is ready to go after recesses and of the causes for delay

    -- Don't wander off during recesses or arrive late from recesses

13. If there are members, there are additional preparations

    a. Additional copies of documentary evidence

    b. Name tage for seats at panel arranged by seniority

    c. Findings and sentencing worksheet prepared

    d. "Clean" copy of convening order AND charges for each member

D. Duties after trial

1. Immediately inform the CA (telephonically if possible) of trial results

    -- Follow up with written memo or results/case report - check Aids to Practice for form: NAVJAG 5813.4

2. Instruct bailiff/chaser on what to do with the accused

    a. Tell who is going to sign the confinement order and make arrangements in advance if the trial is going to run late

        -- Meals, transportation, and a chaser have to be available

    b. Give the defense counsel some time to soothe the accused if the accused is going to the brig, don't just bundle him/her off

c. Oversee the preparation of the record and make sure the reporters have their priorities down

-- Work through the senior legalman and the XO. Don't bypass the chain of command.

d. Read the record and get the typo's out. Monitor the record's progress until it leaves the command.

E. Practice pointers

1. Treat each case as though it's a speedy trial loser

a. Keep records and record everything

b. Use checklists to ensure minor but important items are not overlooked

c. Make sure the command generates required 7-day letter as well as 30/60 day letters when an accused is confined

d. Be knowledgeable of the initial review procedures in pretrial confinement cases - *R.C.M. 304 and 305*

2. Prepare a trial notebook/case file and use it

-- Matter of individual taste - but develop a system that works and take it to every session

3. Know the CA's

a. Let them know you are working on their case and maintain contact

b. Rely on your reputation and not your verbosity

c. Meet ships at the pier if your schedule permits

d. Don't wait for afloat units to come to you, find out who is coming to your port and find out by message if they have any cases

4. Relationship with the defense

   a. The adversary - but keep it professional at all times

   b. Meet them and "go one better" in the area of discovery - give them what they are entitled to before they ask

      -- It is NOT necessary to do the defense counsel's legwork. The evidence needs to be "available" to them.

   c. Never discuss anything with an accused outside of the defense counsel's presence

   d. Never discuss anything with military judge, defense counsel, court members in accused's presence without the accused being able to hear

      -- There are no side bars in the military

   e. Don't be afraid to assist the DC - in many cases, it's your duty to do so

   f. Do not have conversations with DC while in court

      -- Ask for a recess if you need to clear something up with the defense

TRIAL COUNSEL CHECKLIST

Case name:

Date assigned to case:

Chronology begun: (See example in this Manual)

Date charges received:

Dates charges served on accused:

Review convening order:

a. In form prescribed by MCM, 1984, Appendix 6

b. Dated and serialized

c. CA's name, rank, title, and unit

d. Signed personally by CA

e. CA has power to convene court

f. All modifications refer to basic order

g. All verbal modifications confirmed in writing

Review charge sheet:

All personal data on page 1 are correctly and completely stated

Charges and specifications:

a. Each charge matches its specification

b. Specifications state offenses in accordance with samples in the MCM

c. Alterations are initialed and do not exceed permissible limits. R.C.M. 603

d. Offenses are service-connected - jurisdictional factors are alleged as necessary

e. Adequate jurisdictional foundation is apparent from the specification (i.e., "... United States Naval Reserve, on active duty ..." or "having been involuntarily called to active duty ...")

Preferral and referral:

a. Properly preferred and referred (particular care is warranted for additional or amended charges and specifications)

b. Proper accuser has signed under oath and sworn to charges

c. Oath administered by eligible person

d. All required signatures are affixed

e. Date of first endorsement referral is no earlier than date of convening order

f. First endorsement referral correctly refers to date and serial number of convening order

g. First endorsement referral signed by CA personally

h. Date of service upon accused is not earlier than date of first endorsement

i. Charges served on accused at least three (SPCM) or five days (GCM) before trial, or accused elected to waive statutory delay. (R.C.M. 602)

Review reports of investigation:

a. Any further work desired

b. Touch base with investigator handling case and determine his/her availability

Review service record:

-- Provide SRB/copy to defense

Witnesses essential for presentation of Government case on merits:

Name	Duty Station or Address	Phone	Date Interviewed	Attendance Arranged

Give defense notice of any section III (Mil.R.Evid.) evidence:

Confessions/admissions:

Search/seizure:

Pretrial identifications:

Respond to requests from defense:

Speedy Trial

Discovery

Exculpatory Evidence (Note: This material should be provided even in the absence of a defense request.)

Requests for Witnesses/IMC

Witnesses essential to defense:

Name	Duty Station or Address	Phone	Date Interviewed	Attendance Arranged if requested

Review charges in view of evidence and witness availability and contact convening authority regarding necessary amendments:

Proposed trial date to DC (NAVJAG 5813/4):

Reviewed NAVJAG 5813/4 Pretrial Information Report when DC forwarded it, noting:

DC's proposed trial date

Court composition

Pleas

Motions

Respond to any motions raised by DC:

Researched:

Briefs prepared and answers filed IAW rules of practice:

"E&M" and rebuttal witnesses:

Name	Duty Station or Address	Phone	Date Interviewed	Attendance Arranged

Documentary/real evidence reviewed and objections/foundations prepared:

_____

_____

_____

Stipulations to be utilized: (Reduce to writing)

Discussed with DC:

Signed by all parties:

If pretrial agreement offered:

Discussed all "non-boilerplate" terms in detail with DC and CA:

Accepted/rejected by CA:

Signed: (Date)

If submitted, signed trial by MJ alone request and returned to DC:

If submitted, contacted CA about detail of enlisted members to court:

-- Ensure request signed by accused

Date of trial fixed by military judge:

Notified CA (or his representative) of trial date, time, location, uniforms for members, accused and bailiff

If needed, arrangements for bailiff and chasers made

Members notified of trial date, etc.

Court reporters notified of trial date

Opening statement outlined

Arguments outlined

Voir dire questions prepared (See Aids to Practice)

Trial notebook prepared

At trial

Obtain the same trial guide the military judge is using

All persons named in convening order are accounted for as present or absent (R.C.M. 803)

Accused present for all court sessions or waiver of presence clearly indicated (if trial in absentia, record contains affirmative proof of accused's arraignment and voluntary absence thereof)

Reporter identified and sworn (JAGMAN, § 0120c, 0126d)

Accused informed of rights to counsel

a. Civilian counsel
b. Individual military counsel (opportunity to request retention of detailed counsel)
c. All prior defense counsel present or excused

Civilian counsel stated qualifications and address

Accused afforded rights of voir dire MJ/members

Accused afforded rights of challenge MJ/members

Accused advised of right to trial by members and declined, or personally selected in writing a trial by military judge alone (UCMJ, Art.16; R.C.M. 903)

Accused personally requested in writing, or declined, enlisted membership on court

Enlisted court members belong to unit other than accused's and are senior to the accused

Military judge, counsel, and court members sworn (JAGMAN, § 0120, 0126) and qualified (Art. 26(b) and (c), Art. 27(b) and Article 42a of UCMJ)

Accused offered opportunity to present motions before pleading

Motions and objections -- ruling of military judge correctly based on:

a. Issues

b. Prosecution submission

c. Defense submission

d. Burden

e. Legal authorities

f. Special findings of fact made as required or requested (e.g., Mil.R.Evid. 304 and 311)

Request continuance for R.C.M. 908 appeal if necessary

Accused arraigned

Pleas properly entered (R.C.M. 910)

-- Make sure pleas to specifications by exceptions and substitutions still state an offense

After arraignment, any absence of military judge, counsel or court member adequately accounted for (R.C.M. 813, 805, 901)

Quorum requirements for court members are met (R.C.M. 805)

Correct names of court members used throughout record

Opportunities for opening statements utilized or waived

Merits:

Accused possessed requisite mental capacity at time of trial and mental responsibility at time of each offense committed [R.C.M. 916(f)]

Statute of limitations does not preclude trial of offenses

Guilty plea:

a. Accused advised of:

(1) Meaning and effect of guilty plea

(2) Right to plead not guilty

b. Waiver of constitutional rights:

(1) Rights against <u>self-incrimination</u>

(2) Right to confront and cross-examine witnesses

(3) Right to trial on facts

c. Each element of each offense in specification must be proven beyond a reasonable doubt by government

d. Providency inquiry covered each element of each offense

e. Accused advised of maximum permissible sentence and such advice is correct

f. Judge states for record --

(1) Plea made voluntarily with full knowledge of meaning

(2) Accused has <u>knowingly</u>, <u>intelligently</u>, <u>consciously</u> waived rights against self-incrimination, trial of facts and confrontation of witness

(3) Acceptance of pleas <u>and</u> findings

Pretrial agreement - each provision individually explained

a. Initiated by defense

b. Voluntary

c. Accused understands all terms

d. Judicial inquiry into terms (U.S. v. Williamson, 4 M.J. 708, 710 (N.C.M.R. 1977)

(1) Is there a pretrial agreement?

(2) Did the judge go over each provision with the accused and paraphrase the contents in his own words, and explain the ramifications of each provision?

(3) Did the judge obtain from the accused a statement of concurrence with the judge's explanation?

(4) Did the judge strike all provisions that violate appellate case law, public policy, or the judge's own notion of fundamental fairness?

(5) Did the judge make a statement on the record that the judge considers all remaining provisions to be in accord with appellate case law, public policy, fundamental fairness, etc.?

(6) Did the judge ask TC and DC: Does this encompass all understandings?

(7) Did the judge ask TC and DC: Is your understanding the same as my understanding?

Not guilty plea:

a. All witnesses sworn

b. All evidence correctly and actually admitted

c. Previous convictions qualified for admission

d. Instructions were correct and complete, including:

(1) Elements of each offense

(2) LIO's raised

(3) Affirmative defenses in issue

(4) Definitions of terms of art

(5) Voluntariness of confessions or admissions

(6) Evidence admitted for limited purpose

(7) Misconduct not charged

(8) UCMJ, Article 51c

(9) Voting procedures

e. Findings announced in correct form

f. Evidence established guilt of each offense beyond reasonable doubt

Findings (as approved) are correct in law and fact

-- Findings worksheet prepared if members present

Sentence:

Accused advised of right to present matters in extenuation and mitigation

Personal data on page 1 of charge sheet read aloud (or reading waived) and data certified correct by defense counsel

Prior NJP's admitted into evidence are within allowable time limits

Booker requirements met:

-- Accused advised of right to consult with attorney prior to acceptance of NJP

Previous convictions admitted into evidence are final, within allowable time limits, and satisfy criteria of United States v. Alderman, 22 U.S.C.M.A. 298, 46 C.M.R. 298 (1973), and R.C.M. 1001

Personal records correctly admitted - JAGMAN, § 0133; R.C.M. 1001

Defense counsel presented adequate evidence in mitigation. United States v. Rowe, 18 U.S.C.M.A. 54, 39 C.M.R. 54 (1968).

Rebuttal evidence properly characterized

Opportunities for arguments utilized or waived

Sentence worksheet prepared if members present

Instructions correct and complete, including:

a. Maximum sentence

b. Summary of aggravation

c. Summary of extenuation and mitigation

-- Specific mention of pretrial restraint if applicable

d. Multiplicity

e. Voting procedure

Military judge (where sitting alone) acknowledged multiplicity and pretrial restraint

Military judge ordered administrative credit be given for an illegal PTC where required. United States v. Larner, 1 M.J. 371 (C.M.A. 1976).

Sentence announced in correct form -- forfeitures expressed in even dollars in per month form

Sentence is legal in amount and nature

(See Defense Counsel Checklist for other matters.)

PRETRIAL INFORMATION REPORT
NAVJAG 5813/4 (REV. 7-69)
0N 0105 LF 100 0100

REPORTS SYMBOL JAG 5813-3

DATE _____

FROM: TRIAL COUNSEL
TO: HEAD, U. S. NAVY-MARINE CORPS JUDICIARY, BRANCH OFFICE _____
VIA: DEFENSE COUNSEL

SUBJ: CASE OF UNITED STATES V. _____ (NAME AND GRADE) ☐ GCM ☐ SPCM

1. CONVENING AUTHORITY _____

2. GEOGRAPHICAL LOCATION OF TRIAL _____

3. DATE CHARGES SERVED ON ACCUSED _____

4. ACCUSED ☐ CONFINED ☐ RESTRICTED SINCE _____

5. RELATED CASE(S) _____

6. TENTATIVE DATE OF TRIAL _____ 7. EXPECTED DURATION (DAYS) _____

8. INDICATE BELOW ANY ISSUES WHICH MAY JUSTIFY AN ARTICLE 39a SESSION:
   A. MOTION(S) TO DISMISS WITH REFERENCE TO SPECIFICATION(S) IN QUESTION AND SHORT FORM STATEMENT OF BASIS FOR MOTION:

   B. MOTION(S) FOR APPROPRIATE RELIEF:

   C. MOTION(S) OF A NATURE TO SURPRESS OR OBJECTION TO EVIDENCE TO BE OFFERED BY OPPOSING COUNSEL:

9. ARTICLE 39a SESSION PRIOR TO CONVENING OF COURT IS REQUESTED BY ☐ TC ☐ DC

10. GUILTY PLEAS ANTICIPATED AS TO SPECIFICATIONS _____

TRIAL COUNSEL:

_____
(NAME, GRADE, ADDRESS, TELEPHONE)

DEFENSE COUNSEL:

_____
(NAME, GRADE, ADDRESS, TELEPHONE)

DATE/TIME REPORT RECEIVED FROM TRIAL COUNSEL: _____

TRIAL DATE ASSIGNED BY MILITARY JUDGE _____

INSTRUCTIONS ON REVERSE SIDE

PRETRIAL INFORMATION REPORT

INSTRUCTIONS

1. TRIAL COUNSEL SHOULD COMPLETE THIS REPORT AND FORWARD SAME VIA THE DEFENSE COUNSEL TO ARRIVE JUDICIARY BRANCH OFFICE PRIOR TO REQUEST OF THE LATTER FOR ASSIGNMENT OF A CERTAIN DATE OF TRIAL. THE DEFENSE COUNSEL MAY ADD SUCH INFORMATION AS HE WISHES RELATING TO ISSUES WHICH SHOULD BE TREATED AT AN ARTICLE 39a SESSION. ALL COUNSEL ARE ENCOURAGED TO MAKE A FULL AND MUTUAL DISCLOSURE OF LEGAL ISSUES SO AS TO AVOID A NEED TO CALL UNEXPECTED WITNESSES AND OTHER CIRCUMSTANCES WHICH OTHERWISE MAY PROMPT A DELAY OF THE PROCEEDINGS. THE TRIAL COUNSEL MUST ATTACH A COPY OF THE CHARGES AND SPECIFICATIONS TO THIS FORM IF A COPY HAS NOT PREVIOUSLY BEEN SUPPLIED TO THE JUDICIARY BRANCH OFFICE SUPPLYING MILITARY JUDGE FOR THE TRIAL OF THE CASE.

2. THE DEFENSE COUNSEL SHALL FORWARD THIS REPORT WITHIN TWENTY-FOUR HOURS OF RECEIPT FROM TRIAL COUNSEL.

3. EITHER COUNSEL MAY SUBMIT A WRITTEN BRIEF IN SUPPORT OF OR IN OPPOSITION TO A MOTION OR EXPECTED MOTION, BUT THE SUBMISSION OF THIS REPORT WILL NOT BE POSTPONED TO ACCOMMODATE THE TRANSMITTAL OF SUCH BRIEF OR BRIEFS. THE LATTER MAY BE FORWARDED BY SEPARATE MAILING AND SHOULD SHOW SERVICE OF COPY UPON OPPOSITE COUNSEL.

4. IF DEFENSE COUNSEL AND THE ACCUSED DESIRE THE IMMEDIATE ATTACHMENT OF ARTICLE 39a JURISDICTION, OR FOR ANY OTHER REASON CONSIDER IT TO BE IN THE ACCUSED'S BEST INTERESTS, THE DEFENSE COUNSEL MAY ENTER A STATEMENT AT THE BOTTOM OF THIS REPORT TO THE EFFECT THAT THE ACCUSED WAIVES THAT PERIOD OF DELAY TO WHICH HE IS OTHERWISE ENTITLED UNDER THE PROVISIONS OF UCMJ, ARTICLE 35.

5. THE TRIAL COUNSEL SHOULD BE ALERT TO THE NEED TO NOTIFY THE JUDICIARY BRANCH OFFICE IN THE EVENT DEVELOPMENTS OCCURRING SUBSEQUENT TO THE SUBMISSION OF THIS REPORT INDICATE A CHANGE IN THE EXPECTED DURATION OF THE TRIAL. FOR EXAMPLE, IF CASE THAT WAS EXPECTED TO REQUIRE THREE DAYS FOR TRIAL ON A NOT-GUILTY PLEA BECOMES THE SUBJECT OF A NEGOTIATED PLEA AND SUSCEPTIBLE TO HANDLING WITHIN A SINGLE DAY, TWO ADDITIONAL TRIAL DATES ARE AVAILABLE FOR ASSIGNMENT IF TIMELY NOTICE IS PROVIDED. FREQUENTLY ANOTHER TRIAL COUNSEL AT THE SAME LOCATION CAN UTILIZE THE TRIAL DATES THUS MADE AVAILABLE

COURT-MARTIAL CASE REPORT
NAVJAG 5813/2 (Rev. 11-00)
S/N 0108-LF-108-8140

RCS JAG 5813-1

Report Date _____

Case Number SPCM _____

INSTRUCTIONS: See TRIJUDICINST 5400.1 (Series)

GCM _____

☐ Interim Report

1. ACCUSED NAME *(Last, First, Middle)*

PAY GRADE

E- O- ☐ NAVY ☐ MARINE CORPS

2. CONVENING AUTHORITY

3. CHARGES

CH I: ART.
SPEC I:

PLEAS	FIND-INGS	WITH-DRAWN	DIS-MISSED	

4. TRIAL INFORMATION

a. Referral Date _____

b. Military Judge *(Name)*

c. Trial Counsel *(Name, Unit)*

d. Defense Counsel *(Name, Unit)*

e. Individual Counsel *(Name, Unit/Business Address)* ☐ None

f. Related Cases ☐ None

g. Trial Location

h. Trial Date _____

i. ☐ Bench Trial
☐ With Members ☐ Enlisted Members

j. Hours in Court _____

k. Hours in Judge Travel _____

l. Tango Number _____

5. MOTIONS

	GRANTED	NOT GRANTED
☐ None Made		
☐ Speedy Trial	☐	☐
☐ Suppression of Search/Seizure	☐	☐
☐ Suppression of Confession/Admission	☐	☐
☐ Mental Capacity/Responsibility	☐	☐
☐ _____	☐	☐
☐ _____	☐	☐
☐ _____	☐	☐

6. WAS ANY SPECIFICATION CONTESTED

☐ Yes ☐ No

7. SENTENCE

☐ DD
☐ BCD
☐ CHL for _____
☐ Total Forfeiture
☐ Forfeiture of $ _____ for _____
☐ Reduction to E- _____

Factors Affecting Sentence: _____

8. WAS THERE A PRETRIAL AGREEMENT?

☐ Yes ☐ No

Terms:

SIGNATURE OF MILITARY JUDGE

9. COMMENTS

REPORT OF RESULTS OF TRIAL

To: Distribution List

1. Pursuant to R.C.M. 1101(a) (R.C.M. 1304(b)(2)(E)(v)), MCM, 1984, notification is hereby given in the case of United States v. _____ _____.

2. Trial by _____ court-martial at _____, convened by _____.

3. Offenses, pleas, and findings:

Charges & Specifications	Pleas	Findings

4. Sentence Adjudged:

5. Date sentence adjudged: _____

6. Credits to be applied to confinement, if any:

a. Pretrial Confinement: _____ days

b. Judicially ordered credits: _____ days

Total credits: _____ days

7. Terms of pretrial agreement concerning sentence, if any:

_____

_____

_____
TRIAL COUNSEL/
SUMMARY COURT-MARTIAL

Distribution List:
Convening authority
Commanding Officer of accused
CO/OIC of brig/confinement facility (if confinement adjudged)
Record of trial

NAVY-MARINE CORPS TRIAL JUDICIARY
_____ JUDICIAL CIRCUIT

UNITED STATES v. _____ (Accused's Name) _____ (Rate) (Unit) _____ (Armed Force)	)	_____ COURT-MARTIAL REQUEST FOR ARTICLE 39(A) SESSION

THE GOVERNMENT moves the court for the setting of an Article 39(a) session in the above entitled case in accordance with R.C.M. 803 and JAG Manual 0127a, in order to arraign the accused and to set a date for the trial of the case. The GOVERNMENT has earlier submitted a pretrial information sheet setting forth the particulars of the charge(s) and other relative information; however, the DEFENSE, to date, has failed to respond. Accordingly, IT IS REQUESTED that the session be set for _____.

_____
TRIAL COUNSEL

THE BELOW SIGNED hereby certifies that a true copy of the above was served upon the defense counsel for the accused, _____, JAGC, USN(R) on _____, 198__.

_____
TRIAL COUNSEL

FORMAT FOR REPLY (ANSWER) TO MOTION FOR APPROPRIATE RELIEF/TO DISMISS

NAVY-MARINE CORPS TRIAL JUDICIARY
_____ CIRCUIT

UNITED STATES	)	
	)	
v.	)	_____ COURT-MARTIAL
(Name of Accused)	)	ANSWER TO
(Rate/Rank and Unit)	)	(MOTION FOR APPROPRIATE RELIEF)
U.S. (Navy) (Naval Reserve)	)	(MOTION TO DISMISS)
(Marine Corps)	)	

1. Nature of answer. (This answer is in opposition to a motion to dismiss Specification 3 of Charge II on the ground that the specification fails to state an offense.)

2. Summary of facts. (The answer may concur with the facts set out in the motion or may set forth the government's view of the facts.)

3. Evidence. (The United States proposes to offer the following evidence in opposition to the accused's motion to dismiss . . .)

4. Discussion. (This paragraph should set forth the position of the government in response to the motion, including a discussion of the law, argument, conclusions and citations and quotations from pertinent authorities. A separate memorandum of points and authorities may be filed with the answer, if desired.)

5. Relief requested. (The United States requests that the motion to dismiss Specification 3 of Charge II be denied.)

6. Oral argument. The United States (does)(does not) desire to make oral argument in opposition to the accused's motion.

_____ _____
(Date) (Signature of Trial Counsel)

A true copy hereof was served this _____ day of _____, 19__ on counsel for the Defense.

_____

NAVY-MARINE CORPS TRIAL JUDICIARY
_____ CIRCUIT

UNITED STATES	)	
	)	
v.	)	SPECIAL/GENERAL COURT-MARTIAL
	)	
_____	)	DISCLOSURE OF SECTION III
(Accused's Name)	)	EVIDENCE
_____	)	
(Rate/Rank, Unit)	)	
	)	
_____	)	
(Armed Force)	)	

****

PURSUANT to Section III of the Military Rules of Evidence, the Defense is hereby notified under:

A. Military Rules of Evidence 304(d)(1), that there are (no) relevant statements, oral or written, by the accused in this case, presently known to the trial counsel (and they are appended hereto as appendix _____); and

B. Military Rules of Evidence 311(d)(1), that there is (no) evidence seized from the person or property of the accused or believed to be owned by the accused that the prosecution intends to offer into evidence against the accused at trial [(and it is described with particularity in appendix _____) (and described as follows:_____
_____
_____)].

A copy of this disclosure has been provided to the military judge.

_____ _____
(Date) (Trial Counsel)

SAMPLE GOVERNMENT BRIEF IN REPLY (ANSWER) TO MOTION TO SUPPRESS

NAVY-MARINE CORPS TRIAL JUDICIARY
WESTPAC NORTH JUDICIAL CIRCUIT

UNITED STATES	)	
	)	
v.	)	GENERAL COURT-MARTIAL
	)	REPLY TO MOTION TO SUPPRESS
(Name of Accused)	)	
(Rate/Rank and Unit)	)	
(Armed Force)	)	

****

The Government in the above entitled case hereby makes the following reply to the Motion of the Defense to suppress evidence.

STATEMENTS OF FACTS

1. During the month of February, 1985, _____ rented an apartment at 351 Hirasuka, Yokosuka, Japan, and signed a lease under which she took sole possession of the premises as a lessee. She moved into the apartment in March, 1985, and lived alone until September, 1985, when _____, the accused, then moved in with her.

2. On 2 November 1985, _____ married the accused.

3. The accused's name was added to the lease as a co-tenant in October; however, _____ name continued to be listed thereon as well.

4. _____ left her husband because of marital difficulties on 12 or 13 January 1986 and temporarily resided with _____. When she left the apartment she did not remove any of her belongings save a change of clothing. _____ kept a key to the apartment.

5. On 15 January 1986, _____ came to the Fleet Activities Yokosuka, Japan, security office, where she reported that she had "reason to believe" that "stolen goods" were in her house (referring to the apartment at 351 Hirasuka) and gave her voluntary written permission to the security officials with whom she was talking to conduct a search of the apartment.

6. At the time this consent was given, _____ said that she wished to remove some of her "personal effects" from "my house." The search was scheduled for the afternoon of the same day.

7. At approximately 1600 of that day, _____ returned voluntarily to the security office, where she once again gave her written permission for a search of "my (her) house."

8. Security officers accompanied _____ to the apartment. _____ opened the door with her own key. The accused was not there at the time. While the security officers examined the apartment's common areas, _____ secured some, but not all nor even the majority, of her personal effects. The security officers recorded serial numbers of various items in plain view, including a portable tape player, but did not seize anything. All parties then departed.

9. The next day it was discovered that the serial number of the tape player seen at the apartment matched that of a player allegedly stolen from building G-110 on 12 January 1986.

10. _____ was then contacted and appeared voluntarily at the offices of the Naval Investigative Service [hereinafter referred to as NIS], which had assumed jurisdiction of the case. _____ once again gave written voluntary permission to _____ of NIS to search "my residence located at 351 Hirasaku, Yokosuka City, Japan." She agreed to, and did in fact, accompany _____ to the apartment, where she once again opened the door with her key and permitted _____ to search the common premises.

11. _____ checked the serial number of the tape player previously mentioned, found that it matched that of the player allegedly stolen from building G-110 earlier, and seized it after telling _____ that he intended to do so. _____ voiced no objection and removed several items of personal clothing before the premises were secured. The accused was not present at the time.

In support hereof, attachments 1 through 6 are offered.

* *

POINTS AND AUTHORITIES

I

The Fourth Amendment to the Constitution of the United States prohibits only those searches which are "unreasonable." "What is a reasonable search is not determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmus paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case." United States v. Rabinowitz, 339 U.S. 56, 63 (1980). It requires no citation of legal authority to support the contention that searches conducted with the voluntary consent of an individual empowered to give that consent are reasonable. Such searches are accordingly lawful. "A search of one's person with his freely given consent, or of property with the freely given consent of a person entitled in the situation involved to waive the right to immunity from unreasonable search, such as an owner, bailee, tenant or occupant as the case may be under the circumstances, is lawful." J. Munster and M. Larkin, Military Evidence 422 (2d Ed. 1978).

II

It is also a well accepted principle that a third person having sufficient interest in property may consent to a search of that property. For example, in United States v. Mathis, 16 U.S.C.M.A. 522, 37 C.M.R. 142 (1967), the Court of Military Appeals upheld a search of a house where the owner, a woman with whom the accused had been living, granted permission for the search. And, in United States v. Green, 29 C.M.R. 868 (A.F.B.R. 1960), it was held that a wife could consent to the search of her husband's property. See also United States v. Boyce, 3 M.J. 711 (A.F.C.M.R. 1977). In the leading case of United States v. Matlock, 415 U.S. 164 (1974), the Supreme Court held that the prosecution could "show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." Id. at 172. In an explanatory footnote, the Court said that the "authority which justifies the third party consent . . . rests rather on mutual use of the property by persons generally having joint access or control for most purposes . . .". Id. Thus, one who possesses "common authority over" or "other sufficient relationship to" the property can give lawful consent to a search of that property. It follows that, "a wife who enjoys joint occupancy or custody of property with her husband may consent to a search of such property, and a search pursuant to such consent freely given will be valid even as to her husband . . .".

III

The consenting individual need not reside on the premises "full time" in order to possess the requisite authority to consent. Nor must he/she always list the premises in question as his/her "permanent address" in order to grant lawful consent. In Wright v. United States, 389 F.2d 996 (8th Cir. 1968), the person who gave the consent to search was held to have had the legal authority to do so even though he did not sleep at the apartment every night, used his mother's address as his permanent address, spent time at his mother's house and had no family relationship to the accused, the other occupant of the apartment. The consenting individual need not be "at home" at the time the consent is given, nor must he/she accompany the searching officials. And the fact that the marital home has disrupted is of no consequence. In Stein v. United States, 166 F.2d 851 (9th Cir. 1948), the marital bliss was shattered by a "violent disagreement" which caused one spouse to abandon the premises, lock up the house, and move to his mother's. The other spouse granted permission to search and, because she had no key, broke the window to gain entry and allow the police officials access. The court therein held the consent to be lawful.

IV

Applying these principles to the facts at hand, it is evident that _____ could and did give lawful authority, vis a vis her voluntary consent, to the law enforcement officials who made the challenged searches and resultant seizures. First, it is apparent that she did not "abandon" the premises at 351 Hirasaku, Yokosuka, or her authority over them. She may have abandoned her husband, but not the premises nor her authority. This is evidenced by her retention of her name on the apartment's lease and of the key to the apartment. It is also demonstrated by her referral to the apartment on three separate "consents to search" forms as "my house." It is also shown by her storage of considerable personal property in the apartment and her ability to move or remove such property at will. Second, _____ had common control and authority over the premises. This is evident from her legal interest in the property or lessee (in fact, the original lessee) as well as her maintenance and use of her key to the apartment. _____ could have excluded anyone, other than _____, from the apartment at her will. She did not have to be sleeping in the apartment every night in order to exercise her right of exclusion. Conversely, she also had the right to grant access to the property. Third, _____ had such "other sufficient relationship" to the property that she could consent to a search thereof. She could have reoccupied the premises at any time, she had an unlimited right of access, and she used the property to store her effects, if for no other reason. These factors alone constitute more than "sufficient" relationship to the property to permit _____ _____ to lawfully grant authority to search the premises. Fourth, the accused had no reasonable expectation of exclusive authority in the premises for not only did _____ maintain complete access to the property, but he desired and actively sought _____ _____'s immediate permanent return to the domestic home as well. Thus the consent of _____ was sufficient authority for the challenged searches to have been lawfully undertaken. The searches were not unreasonable.

Oral argument is requested.

* *

WHEREFORE, the Government requests that the motion be denied.

_____
Trial Counsel

* *

A true copy of the above was served on counsel for the defense this _____ day of _____.

_____

OATHS USED AT TRIAL

(All oaths, except the oath to counsel, will be administered by the trial counsel. Oaths for an escort and deposing officer will be found in R.C.M. 807(b), discussion, MCM, 1984.)

COUNSEL

"Do you, _____(Name)_____, swear that you will faithfully perform the duties of _____ counsel in the case now in hearing, so help you God."

REPORTER

"Do you swear that you will faithfully perform the duties of reporter to this court, so help you God."

WITNESS

(When a witness is recalled to testify in the same case, he need not be resworn, but should be reminded by the trial counsel that he is still under oath, e.g., "_____, I want to remind you that you have been previously sworn in this case and you are still under oath.")

"Do you swear that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth, so help you God."

(Use the word "affirm" instead of "swear" and delete the phrase "so help you God" when administering affirmation.)

INTERPRETER

"Do you swear that in the case now in hearing you will interpret truly the testimony you are called upon to interpret, so help you God."

SAMPLE SPEEDY TRIAL CHRONOLOGY (R.C.M. 707)

NAVY-MARINE CORPS TRIAL JUDICIARY
_____ CIRCUIT

UNITED STATES	)	
	)	
v.	)	_____ COURT-MARTIAL
	)	
(Name of Accused)	)	STIPULATION OF FACT
	)	
(Rank/Rate) (Unit)	)	
	)	
(Armed Force)	)	

****

It is hereby agreed by and between trial counsel and defense counsel, with the express consent of the accused, that the following chronology of pretrial events in the above-entitled case is true:

CHRONOLOGY OF EVENTS

Total Days Elapsed	Days Elapsed Between Events	Date	Event
0	0	20 OCT	Accused confined for safekeeping at Brig. Preliminary inquiry prepared by parent unit. Accused advised of charges against him and right to counsel. Case referred to Bn CO (Ship CO).
2	2	22 OCT	Initial review hearing held. Accused kept in confinement.
4	4	24 OCT	Preliminary inquiry reviewed by Bn CO. Accused advised of charges and right to counsel. Bn CO referred case to article 32 investigation, and a lawyer, within the meaning of Art. 27(b), UCMJ, made available as accused defense counsel. Lawyer within the meaning of Art. 27(b), UCMJ, advised accused in accordance with ALMAR 64. 7-day letter forwarded.
6	2	26 OCT	Request for legal services forwarded to OSJA and returned to Bn Legal.
7	1	27 OCT	Charge sheets prepared by OSJA and returned to Bn Legal.

Total Days Elapsed	Days Elapsed Between Events	Date	Event
13	6	2 NOV	Bn Co submits eight-day letter in accordance with Art. 33, UCMJ. CG approves request for pretrial confinement.
17	4	6 NOV	Defense counsel interviews accused.
18	1	7 NOV	Formal art. 32 investigation commenced.
19	1	8 NOV	Defense requests speedy trial.
22	3	11 NOV	Veterans Day holiday.
25	5	14 NOV	Formal art. 32 pretrial investigation continues. Trial counsel presents testimony of 12 witnesses.
33	8	22 NOV	Accused requested mast to Co CO and granted temporary release and telephone call to home.
35	2	23-24 NOV	Thanksgiving holiday.
39	4	28 NOV	Formal art. 32 investigation completed.
40	1	29 NOV	Bn CO requests CG's approval of pretrial confinement in excess of 30 days.
46	6	5 DEC	OSJA recommends approval of pretrial confinement beyond 30 days and endorses request to CG.
47	1	6 DEC	CG approves request for continued pretrial confinement.
52	5	11 DEC	Accused requested mast with Co CO and granted temporary release and telephone call to civilian lawyer.
60	8	19 DEC	Bn CO requests CG's approval of pretrial confinement beyond 60 days. Art. 32 Investigating Officer Report completed and forwarded, recommending trial by general court-martial.
61	1	20 DEC	OSJA recommends approval of request for continued pretrial confinemen , and forwards to CG.

Total Days Elapsed	Days Elapsed Between Events	Date	Event
62	1	21 DEC	CG approves request for pretrial confinement beyond 60 days. Bn CO recommends referral of case to general court-martial, and forwards art. 32 package with endorsements to OSJA.
63	1	22 DEC	Trial counsel notifies civilian defense counsel in writing of proposed docket date.
66	3	25 DEC	Christmas holiday.
70	1	29 DEC	Defense counsel notifies trial counsel of motion to dismiss for lack of speedy trial.
73	3	1 JAN	New Year's holiday.
81	8	9 JAN	CG refers case to general court-martial convening order.
82	1	10 JAN	Accused personally served with copy of charge and specifications in presence of military defense counsel.
83	1	11 JAN	Civilian defense counsel notified in writing of exact docket date and furnished with copy of charge and specifications, the art. 32 report, the convening order, and a list of probable government witnesses. Docket date set for 20 January .
87	4	15 JAN	Bn CO requests CG's approval of pretrial confinement beyond 90 days.
88	1	16 JAN	OSJA forwards pretrial confinement request to CG, recommending approval.
89	1	17 JAN	Defense submits motion and brief requesting dismissal for lack of speedy trial.

Total Days Elapsed	Days Elapsed Between Events	Date	Event
90	1	18 JAN	CG approves request for continued pretrial confinement beyond 90 days in light of docket date of 20 January 1973.
91	1	19 JAN	Civilian defense counsel requests delay until 22JAN. CG approves defense delay request, and case docketed for 22JAN.
94	3	22 JAN	Trial

NOTE: This sample chronology is merely suggestive of the minimum events which should transpire in the prosecution of a case at a general court-martial.

MISCELLANEOUS FORMS

WITNESS INTERVIEW FORM

NAME: DATE INTERVIEWED:
RANK:
ORGANIZATION:
LOCAL TELEPHONE NUMBER:
YEARS IN SERVICE _____ TIME IN PRESENT UNIT _____
PREVIOUS DUTY STATIONS:

HOW LONG AND IN WHAT CAPACITY DOES WITNESS KNOW THE ACCUSED:

OPINION AS TO MILITARY CHARACTER:

OPINION AS TO TRUTHFULNESS:

DO YOU KNOW THE FOLLOWING WITNESSES? (This should include witnesses from both sides)

_____ HOW LONG _____ OPINION AS TO TRUTHFULNESS/ HONESTY/PEACEFULNESS/ MILITARY CHARACTER

_____ HOW LONG _____ OPINION AS TO TRUTHFULNESS

_____ HOW LONG _____ OPINION AS TO TRUTHFULNESS

_____ HOW LONG _____ OPINION AS TO TRUTHFULNESS

WRITTEN REQUEST FOR TRIAL BEFORE MILITARY JUDGE ALONE

NAVY-MARINE CORPS TRIAL JUDICIARY
_____ CIRCUIT

UNITED STATES OF AMERICA	)	
	)	
v.	)	_____ Court-Martial
	)	Request for Trial Before
	)	Military Judge Alone
	)	
	)	
_____	)	

_____

I have been informed that _____ is the military judge detailed to the court-martial to which the charges and specifications pending against me have been referred for trial. After consulting with my defense counsel, I hereby request that the court be composed of the military judge alone. I make this request with full knowledge of my right to be tried by a court-martial composed of (commissioned) officers (and enlisted personnel).

_____, 19____
(Date)

_____
Accused

Prior to the signing of the foregoing request, I advised fully the above accused of his right to trial before a court-martial composed of (commissioned) officers (and of his right to have such court consist of at least one-third enlisted members not of his unit upon his request).

_____, 19____
(Date)

_____
Defense Counsel

Argument is (not) requested.

_____
Trial Counsel

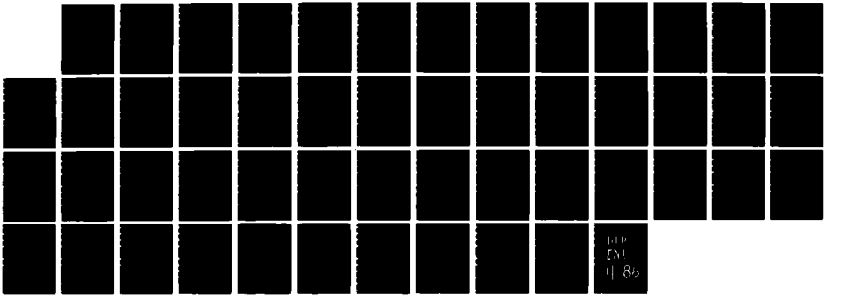
I approve (disapprove) the foregoing request for trial before me alone.

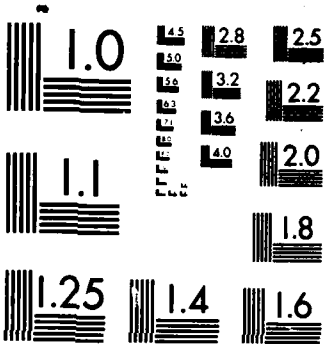
_____, 19____

_____
Military Judge

AD-A165 312 AIDS TO PRACTICE(U) NAVAL JUSTICE SCHOOL NEWPORT R I 3/3
JAN 86

UNCLASSIFIED F/G 5/2 NL





MICROCOPY RESOLUTION TEST CHART
NATIONAL BUREAU OF STANDARDS-1963-A

REQUEST FOR CONTINUANCE

NAVY-MARINE CORPS TRIAL JUDICIARY
_____ CIRCUIT

UNITED STATES)
)
v.)
) _____ COURT-MARTIAL
_____)
(Name of Accused)) MOTION FOR CONTINUANCE
)
_____)
(Rate/Rank) (Unit))
)
_____)
(Armed Force))

****

The _____ in the above entitled case requests that this case (or the next session thereof) be rescheduled for trial to commence (or resume) on _____. Said case is presently scheduled to commence (or resume) on _____. The reason for this request is that

A true copy of this request was served this date on _____ counsel.

Date: _____ _____
_____ Counsel

****

_____ Counsel for the _____ notes the request for a continuance made by the _____ and does (not) oppose the same. (An article 39a session is requested to litigate the matter.)

A true copy of this response was served this date on counsel for the _____.

Date: _____ _____
_____ Counsel

****

It is hereby ordered that the above entitled case be commenced (resumed) at _____.

Date: _____ _____
Military Judge (or Clerk of Court)

Copy to:
Trial Counsel
Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
_____ CIRCUIT

UNITED STATES		)	
		)	
v.		)	_____ COURT-MARTIAL
		)	
(Name of Accused)		)	STIPULATION OF FACT
		)	
(Rate/Rank)	(Unit)	)	
		)	
(Armed Force)		)	

****

It is hereby agreed by and between trial counsel and defense counsel, with the express consent of the accused, that the following facts are true:

_____	_____	_____
Trial Counsel	Accused	Defense Counsel

_____
Date

BEFORE CONSIDERING THE STIPULATION, MAKE SURE THE MILITARY JUDGE CONDUCTS THE REQUIRED INQUIRY ON THE RECORD. (See R.C.M. 811c)

NAVY-MARINE CORPS TRIAL JUDICIARY
_____ CIRCUIT

UNITED STATES	)	
	)	
v.	)	_____ COURT-MARTIAL
	)	
(Name of Accused)	)	STIPULATION OF EXPECTED TESTIMONY
	)	
(Rank/Rate) (Unit)	)	
	)	
(Armed Force)	)	

****

It is hereby stipulated by and between trial counsel and defense counsel, with the express consent of the accused, that if (name of witness, unit, armed force or address) was called before the court as a witness and placed under oath, he would testify as follows:

_____	_____	_____
Trial Counsel	Accused	Defense Counsel

_____
Date

BEFORE CONSIDERING THE STIPULATION, MAKE SURE THE MILITARY JUDGE CONDUCTS THE REQUIRED INQUIRY ON THE RECORD. (See R.C.M. 811c)

FORMAT FOR PROPOSED WRITTEN INSTRUCTIONS

NAVY-MARINE CORPS TRIAL JUDICIARY
_____ CIRCUIT

UNITED STATES	)	
	)	
v.	)	
	)	_____ COURT-MARTIAL
(Name of Accused)	)	
	)	GOVERNMENT/DEFENSE
(Rank/Rate) (Unit)	)	PROPOSED INSTRUCTION
	)	
U.S. (Navy)(Naval Reserve)	)	
(Marine Corps)	)	

****

It is respectfully requested that the following instruction be given to the members (with respect to the offense charged by the specification of Charge _____ and all lesser included offenses):

Military Judge's Benchbook, DA Pam 27-9 (May 1982), par. ____ pg. ____, (Title, e.g., Self-Defense) ____.

Paragraph 1: Include following (defense)(government) contention and significant evidentiary factors: "It is the contention of the defense/government that _____ and that the following facts support this contention (e.g., the testimony of the accused that _____.

Paragraph 2: Include: "_____."

Paragraph 3: Include: "_____."

Paragraph 4: Include: "_____."

Paragraph 5: Verbatim, no modifications.

Paragraph 6: Omit.

_____ _____
Date Signature of trial/defense counsel

****

A true copy hereof was served on counsel for the _____ this _____ day of _____ 19__.

_____

OBJECTIONS

I. Purposes of objecting

A. Inadmissible evidence

B. Improper forms of interrogation

C. Improper opening statement or closing argument

D. Improper or unfair behavior

E. Tactical device

II. When to object

-- When it helps your case

1. Will answer hurt you?

2. Reaction of court members?

3. Protect the record?

III. Recognizing objections

A. Anticipate

B. Form or substance

C. Common objectives

1. Objections to questions

a. Hearsay (Mil.R.Evid. 801 et seq)

b. Leading (Mil.R.Evid. 611)

c. Repetitive (asked and answered) (Mil.R.Evid. 611)

d. Narrative (Mil.R.Evid. 611)

e. Improper opinion (Mil.R.Evid. 701 et seq)

f. Conclusion (Mil.R.Evid 701)

g. Speculative

h. Argumentative

i. Compound question

j. Beyond the scope (Mil.R.Evid. 611)

k. Assumed facts not in evidence

l. Misstates evidence

m. Confusing, misleading or vague

2. Objections to answers

a. Irrelevant (Mil.R.Evid. 401 et seq)

b. Hearsay

c. Improper opinion

d. Conclusion

e. Narrative

f. Nonresponsive

3. Opening statements

a. Argumentative

b. Mentioning inadmissible evidence

c. Mentioning unprovable evidence

d. Discussing opponent's evidence

4. Closing argument

a. Misstating evidence

b. Misstating law

c. Personal opinions

d. Prejudicial arguments

IV. Making objections

A. Timeliness - do it quickly, before the answer is given

1. Consider appropriate limiting instruction

2. Ask judge to strike impermissible answer if necessary

B. Address the military judge

C. What to say

1. "Objection"

2. Legal basis

3. Argument - only with permission

D. Objections before members may require a 39a session to "hash" out

V. Responding to objections

A. Response

1. Address military judge

2. If permitted by judge, give argument

B. Make the judge rule

-- Ask for a ruling before proceeding

C. Clarification of ruling

VI. Objections overruled

-- They are <u>already</u> noted for the record

VII. Objection sustained

A. Opposing counsel may request opportunity to make an offer of proof (Mil.R.Evid. 103)

1. By counsel

-- Efficient

2. Using witness

-- Complete

B. Limit purpose of evidence - instruction

VIII. Avoiding objections

A. Preparation

1. Review your questions and listen to them

2. Avoid objection "buzz words"

B. Lay proper foundations (see Evidentiary Foundations)

COURT-MARTIAL MEMBER QUESTIONNAIRE
(Please Print Clearly)

_____
Date Prepared

1. Full Name: _____
Last First Middle

2. Rank/Rate: _____

3. Date of Rank/Rate: _____

4. (For Officers Only) Designator: _____

5. (For Officers Only) Source of Commission: _____

6. Branch of Service: _____

7. Have you served in another armed force?

_____ Yes _____ No

a. Armed Force: _____

b. Dates: _____

c. Rank/Rate: _____

8. Years of active duty: _____

9. (For Officers Only) Have you had any enlisted service?

_____ Yes _____ No

a. Number of years of enlisted service: _____

b. Rate and highest grade attained: _____

10. Date of birth: _____

11. Place of birth: _____

12. Home of record: _____

13. a. Present resident address: _____

_____

b. Telephone: _____

14. Marital status: ___Single ___Married ___Divorced ___Separated

15. Age and sex of children (e.g., female, 12):

_____

_____

16. Present duty station (do not abbreviate):

_____

_____

17. Present billet or job assignment (be specific):

_____

_____

18. Are you a high school graduate:

_____ Yes _____ No

a. Location of high school (city and state only):

_____

b. Year graduated: _____

19. Have you attended college (undergraduate):

_____ Yes _____ No If "Yes," indicate the following:

	First College	Second College
a. Name of college:	_____	_____
b. Location:	_____	_____
c. Years of attendance:	_____	_____
d. Major field:	_____	_____
e. Minor field:	_____	_____
f. Degree awarded:	_____	_____

20. Have you attended post-graduate school:

_____ Yes _____ No If "Yes," indicate the following:

	First University	Second University
a. Name of University:		
b. Location:		
c. Years attended:		
d. Field of study:		
e. Degree awarded:		

21. Have you attended law school or taken any law courses? (Include Navy schools)

_____ Yes _____ No If "Yes," indicate the following:

	SCHOOL ATTENDED	DATES ATTENDED	COURSE TOPIC	LENGTH OF COURSE
a.				
b.				
c.				

22. Summary of military career (last 10 years, plus any significant or unusual billets).

From/To	Command	Specific Assignment

(continue on last page if necessary)

23. Have you, or any close relative or close friend, ever been involved in any of the following:

_____ Crime Prevention (Police, sheriff, detective, etc.)

_____ Medicine (Doctor, Nurse, Pharmacist, etc.)

_____ Mental Health (Psychiatrist, Psychologist, etc.)

_____ Law (Judge, attorney, law student, etc.)

24. Have you ever served as a legal officer?

_____ Yes _____ No If "Yes," indicate as follows:

Date Started	Command	Period of Time Served
_____	_____	_____
_____	_____	_____

25. Have you ever convened:

			Number
a. Summary Court-Martial			
	_____ Yes	_____ No	_____
b. Special Court-Martial			
	_____ Yes	_____ No	_____
c. Article 32 Pretrial Investigation			
	_____ Yes	_____ No	_____
d. General Court-Martial			
	_____ Yes	_____ No	_____

26. Have you ever served as a Trial Counsel or Defense Counsel?

_____ Yes _____ No If "Yes," indicate as follows:

Approximate number of times served: _____

Dates (years only) served: _____

27. Have you ever served as a summary court-martial officer?

_____ Yes _____ No If "Yes," indicate as follows:

a. Number of times: _____

b. Dates (years only) served: _____

28. Have you ever imposed nonjudicial punishment under Article 15?

_____ Yes _____ No

29. Have you been appointed as a member of a general or special court-martial within the last twelve months?

_____ Yes _____ No If "Yes," indicate as follows:

Case Name	Mo/Yr	SPCM	GCM

30. Have you had any experience as a member of a general or special court-martial prior to the past twelve months?

_____ Yes _____ No If "Yes," indicate as follows:

	How Many Times	Date (year only
SPCM:		
GCM:		

31. Have you, or any close relative, ever been the victim of a crime? (Do not include minor incidents.)

_____ Yes _____ No If "Yes," indicate the nature of the crime, how long ago it occurred, the relationship of the victim to you, whether the crime was reported to the authorities, and whether the perpetrator was ever arrested or convicted.

(continue on last page if necessary)

32. Have you ever served as a juror in a civilian trial? (Either State or Federal)

_____ Yes _____ No If "Yes," indicate for each:

Year	Civil or Criminal Case	State or Federal Court
_____	_____	_____
_____	_____	_____

33. Have you ever been a witness at a court-martial?

_____ Yes _____ No

34. To your knowledge, is there anything in your background or experience that might affect your ability to serve as a juror?

_____ Yes _____ No If "Yes," explain briefly:

_____

_____

_____

_____

_____

_____
(Signature)

PRIVACY ACT STATEMENT

1. AUTHORITY: 5 U.S.C. § 301 (1982); Executive Order Nos. 11,476, 11,835, and 12,018

2. PRINCIPAL PURPOSES: The information solicited is intended principally for the following purposes:

a. Determination of qualifications of individuals to sit as members of courts-martial.

b. Assist trial counsel, defense counsel, and the military judge at court-martial proceedings in determining areas of competence to be further explored by voir dire examination; and

c. Assist reviewing authorities in determining issues concerning the right to fair trial and individual due process.

3. ROUTINE USES: In addition to being used within the Department of the Navy and Defense for the purposes indicated above, these Court Member Questionnaires may be attached to the record of trial, which is a public record.

4. MANDATORY/VOLUNTARY DISCLOSURE - CONSEQUENCES OF REFUSING TO DISCLOSE: Disclosure is voluntary. Failure to provide the information requested may result in your being asked the same or similar questions during voir dire examination in open court. Failure to disclose may further result in your being challenged, in open court, as being disqualified to sit as a member of courts-martial.

LIST OF COMMONLY USED FORMS FOUND IN OTHER PUBLICATIONS

JAGMAN (SECNAVINST. 5800.7B)

GRANT OF IMMUNITY:
TRANSACTIONAL IMMUNITY: A-1-d(5)
TESTIMONIAL IMMUNITY: A-1-d(6)
ORDER TO TESTIFY: A-1-d(4)

PRETRIAL AGREEMENT:
GENERAL COURT-MARTIAL: A-1-e(1)
SPECIAL COURT-MARTIAL: A-1-f(1)

SPECIAL POWER OF ATTORNEY:
FOR AN ACCUSED WHO REQUESTS APPELLATE REPRESENTATION: A-1-j(1)
FOR AN ACCUSED WHO DOES NOT DESIRE APPELLATE REPRESENTATION: A-1-j(3)

REQUEST FOR IMMEDIATE EXECUTION OF DISCHARGE: A-1-l(1)

RECORD FOR AUTHORIZATION TO SEARCH: A-1-l(5)

REQUEST FOR AUTHORIZATION TO CONDUCT SEARCH/SEIZURE: A-1-l(5)

CONSENT TO SEARCH: A-1-m

SUSPECT'S RIGHTS/ACKNOWLEDGEMENT STATEMENT: A-1-n(1)

MILITARY JUDGE'S BENCHBOOK

CHECK LIST FOR DRAFTING FINAL INSTRUCTIONS: APPENDIX A

FINDINGS WORKSHEET: APPENDIX B
SENTENCE WORKSHEET: APPENDIX C

NAVMILPERSMAN
OTHER THAN HONORABLE DISCHARGE IN LIEU OF COURT-MARTIAL: Art. 3630650.3(b) (enlisted)

MARCORSEPMAN
OTHER THAN HONORABLE DISCHARGE IN LIEU OF COURT-MARTIAL: Par. 6419

COURTROOM DECORUM

(CONSULT LOCAL CIRCUIT RULES OF PRACTICE AND JAGMAN A-1-p UNIFORM RULES OF PRACTICE)

I. On your feet

A. When military judge or court members enter/leave courtroom

B. When you are speaking

C. When the judge or a member is speaking to you

D. When the accused is on feet if you are defense counsel

E. When you are being introduced to the members by the MJ

II. Giving the oaths -- TC does it for everyong

-- TC raise right hand also and stands facing witness

III. Assist the witnesses

A. Primarily TC's job

B. Tell them where to sit/stand

C. Remind them to remain standing until they are sworn

D. Be courteous even if they're not your witness

E. Instruct them to stop smoking/chewing gum, etc., before they enter the courtroom

F. Trial counsel will ask preliminary questions of all witnesses

1. Name and spelling of last name

2. Rank

3. Unit/armed force

4. If civilian, state name and address

IV. Moving about

A. Unless otherwise directed, ask permission of MJ to:

1. Approach the military judge

2. Approach the members

3. Approach the witness

4. Publish an exhibit

5. Set up a demonstrative exhibit

6. When in doubt -- ask permission

B. Describe your actions and any gestures by any witness

1. "I am handing to the military judge what has been previously marked appellate exhibit IV."

2. "The witness is indicating with her hands a distance of 12 inches."

UNIFORM RULES OF PRACTICE BEFORE
NAVY-MARINE CORPS COURTS-MARTIAL

PREAMBLE

These rules govern the trial of cases by Navy and Marine Corps courts-martial presided over by a military judge. These rules are intended to simplify and make uniform those court-martial procedures which the military trial judge has the authority to control under appropriate provisions of the Uniform Code of Military Justice, the Manual for Courts-Martial, United States, ~~1969 (Revised edition)~~ 1984, and such regulations as the Secretary of the Navy may prescribe.

Compliance with these rules will promote an orderly, expeditious and just disposition of court-martial cases, as well as ensure the efficient use of military judges. Nevertheless, the military judge may modify or suspend any rule as required by the facts of the case and interests of justice.

The American Bar Association's Code of Professional Responsibility has for some time been applicable to lawyers involved in court-martial proceedings in the Navy and Marine Corps by virtue of section ~~0142b~~ 0165b, Manual of the Judge Advocate General. In addition, the American Bar Association's Code of Judicial Conduct is applicable. The following American Bar Association Standards also apply to judges, counsel, and clerical support personnel of Navy and Marine Corps courts-martial, unless they are clearly inconsistent with the Uniform Code of Military Justice, the Manual of the Judge Advocate General, and applicable departmental regulations:

a. Fair Trial and Free Press

b. The Function of the Trial Judge

c. The Prosecution Function and the Defense Function

The provisions of section ~~0115~~ 0184, Manual of the Judge Advocate General, relating to release of information, are also applicable to all court-martial personnel.

A-1-p(1)

DECORUM OF COURTROOM

Rule 1. As a traditional mark of respect for the dignity of the military judicial system, as represented by the military judge, who is charged by law with presiding over the trial, all persons in the courtroom, without regard to grade, will rise when the trial judge enters or leaves.

Rule 2. The military judge, either at an early Article 39(a) session or at the time of assembling the court with members, should make known any special rules relating to conduct which the accused, the counsel, the witnesses, the members of the court, and others in the courtroom will be expected to follow in the courtroom, and which are not set forth in these rules, the Uniform Code of Military Justice, the Manual for Courts-Martial, or departmental regulations.

Rule 3. Except as otherwise provided by the president of the court or the military judge, all military personnel required to be present at trial, including court members, counsel, the accused, the reporter, the bailiff, and any guards, and all military witnesses, shall appear in appropriate service uniform. If a military witness is called unexpectedly, he may be permitted to appear in other than the appropriate service uniform to avoid unduly delaying the trial.

Rule 4. (Reserved.)

Rule 5. Spectators are encouraged to attend trial and shall be permitted to observe any trial unless otherwise determined by the trial judge. Spectators may enter and leave the courtroom during open sessions of the court-martial subject to rules established by the trial judge, but they will not be permitted to disturb or interrupt court proceedings by their conduct.

Rule 6. It is improper for a spectator, verbally, by facial expression, shaking or nodding of the head, or other conduct, to demonstrate agreement or disagreement with testimony or other procedures at a trial. Spectators who violate this rule may be ordered from the courtroom by the trial judge. Counsel is responsible for advising his client and his witnesses and friends of the demeanor that is expected of them.

A-1-p(2)

Rule 7. Smoking will not be permitted in the courtroom during open sessions of the court; nor will food and beverages, other than water, be permitted.

Rule 8. Photographs, sound recordings designed for public release, and radio and TV broadcasts shall not be made in or from the courtroom during sessions of the trial.

CONDUCT OF COUNSEL

Rule 9. Counsel owes a duty both to his client and to the court. Counsel shall assist the trial judge to maintain throughout the trial a quiet and dignified atmosphere in keeping with the highest traditions of judicial proceedings. He has the responsibility to know and observe the relationship and decorum that must exist between counsel and the trial judge. Counsel are obligated to acquaint accused and witnesses with appropriate courtroom procedures and decorum and, insofar as possible, ensure their adherence.

Rule 10. Unless otherwise authorized or directed by the trial judge, counsel shall stand when addressing the trial judge or court members and when conducting examination or cross-examination of witnesses. Defense Counsel and accused will rise when entering pleas and when findings and sentence are announced.

Rule 11. Counsel should refrain from any familiarity among themselves, with the trial judge, with members of the court, or with witnesses in the presence of the accused or while the court is in session. Colloquy or argument between counsel serves no proper purpose in the trial and shall not be permitted.

Rule 12. Counsel should conduct the questioning of witnesses and arguments to the court at a reasonable distance from the witness or court. At the discretion of the trial judge, counsel may be required to question witnesses and present arguments from a lectern, the counsel table, or other prescribed place. Except to present an exhibit, counsel should not approach a witness without asking the permission of the trial judge; nor should he position himself so as to block the view between witnesses and the other participants in the trial.

A-1-p(3)

Rule 13. During the argument of counsel, opposing counsel shall remain seated at his position at the counsel table. Counsel shall not walk about, talk to others, or otherwise conduct himself so as to divert the attention of the court or any member. Counsel will not leave the courtroom without permission of the trial judge.

Rule 14. Except with the permission of the trial judge, only one counsel for each side (or, if there are multiple accused, one counsel for each accused) may examine any one witness or address the court on any particular issue or motion.

Rule 15. When counsel initially enters an objection, he shall state only the objection and the basis for it. Before proceeding to argue an objection, counsel will request permission of the trial judge and ascertain whether argument will be entertained in open or in an out-of-court session. Although argument identifying legal issues and presenting authorities is ordinarily appropriate, an objection or argument for the purpose of making a speech, recapitulating testimony, or attempting to guide a witness is prohibited.

Rule 16. After the trial judge has announced his decision upon an objection, counsel shall not make further comment or argument except with the express permission of the trial judge.

Rule 17. All requests for rereading of questions or answers shall be addressed to the trial judge.

Rule 18. Counsel shall confine their opening statements to what they expect the evidence to prove. Counsel will not use the opening statement to argue the case or to instruct as to the law.

Rule 19. In a closing argument, counsel may make a reasonable comment on the evidence and may draw such inferences from the testimony as will support his theory of the case, but he shall not assert his personal belief in the justice of his cause or in the guilt or innocence of the accused; nor may he personally vouch for the credibility or lack of credibility of witnesses.

Rule 20. The trial judge may initiate the voir dire examination by referring to the charge against the accused, and by putting to the members questions touching qualifications, including impartiality, to serve as members of the court in the case.

A-1-p(4)

The trial judge shall also permit such additional questions by counsel as he deems reasonable and proper.

Rule 21. Witnesses should be treated with fairness and consideration; they should not be unnecessarily crowded, shouted at, ridiculed, humiliated, or otherwise abused.

Rule 22. A military witness should not salute the trial judge or the president of the court. Counsel should ensure that witnesses presented by them understand the physical setup of the courtroom, where they should go, and what they should do. Unsworn statements made by a defendant in mitigation and extenuation will be given from counsel table, or standing before the court.

Rule 23. The court will cooperate with commanders, senior staff officers, and doctors and other professional witnesses and may, in extraordinary circumstances, accommodate them by permitting them to appear and testify out of order. Counsel should discuss such arrangements in advance with opposing counsel and the trial judge.

Rule 24. Counsel will make arrangements before a session to ensure that his witnesses will be immediately available when they are called.

EXHIBITS

Rule 25. Any exhibit intended to be used or introduced at trial should be marked "For Identification" prior to trial to save time in open court. Prosecution exhibits will be numbered consecutively with Arabic numerals and defense exhibits with capital letters. Appellate exhibits will be consecutively numbered with Roman numerals and will contain the prefix "Appellate." In questioning a witness or addressing the court about an exhibit, counsel shall specify the exhibit number or letter.

Rule 26. If the proceedings will thereby be significantly expedited, counsel proffering an exhibit should have copies made for the trial judge and opposing counsel. Proposed prosecution exhibits should be shown to the defense counsel before trial. The defense counsel may follow the same procedure.

Rule 27. If an item of evidence cannot be included in the record of trial for any reason, counsel proffering it should arrange to have a suitable substitute provided. Such a substitute, however, shall include an accurate and detailed description, either pictorially or written, as to the exhibit's size, shape, weight, substance, color, and any other relevant physical characteristics.

Rule 28. If a copy of a document is to be substituted in the record of trial for a document that was proffered in evidence, only a permanent-type copy may be used, such as a Xerox copy. A nonpermanent-type copy, such as a Thermofax copy, may not be used.

SUPPORTING TRIAL PERSONNEL

Rule 29. Bailiff. A bailiff should be present at every trial to announce the opening and closing of the court, to obtain witnesses as they are called to testify, to ask everyone to rise when the trial judge enters or leaves the courtroom, and to take care of administrative errands during the trial. The trial counsel is responsible for briefing the bailiff as to his duties.

Rule 30. Guards. When appropriate, a guard shall be detailed to ensure proper custody of the accused and to assist the court in preserving order and decorum. Unless otherwise directed by the trial judge, guards, if necessary, shall not be permitted inside the bar of the courtroom. Arms or weapons, except when such are to be exhibits, or when otherwise authorized by the trial judge, will not be allowed inside the courtroom.

DOCKETING AND OTHER PROCEDURAL MATTERS

Rule 31. Each military judge, with the assistance of a docketing clerk, should maintain in his office an orderly trial calendar which will make efficient use of available time and provide for expeditious scheduling of trials when requested by the jurisdiction in which he serves.

Rule 32. When a trial judge must try cases in more than one jurisdiction, a term of court system may be used. This system will require a jurisdiction to plan the trial of cases during designated periods. In jurisdictions which normally have a great number of uncontested cases (i.e., AWOL), such cases should be consolidated for trial at a continuous session of the court on one or more designated days of the week.

Rule 33. Setting trial date.

a. As soon as practicable after referral of charges for trial, the trial counsel will cause the charges to be served on the accused. Thereafter, proceeding by means of an exchange of memorandums with the defense counsel as specified in paragraph 6 of JAGINST 5813.4D, the trial counsel will determine the earliest available trial date and will request assignment of a trial judge and a firm trial date from the U. S. Navy-Marine Corps Judiciary Activity or appropriate Judiciary Branch Office. Immediately thereafter the trial counsel will furnish the trial judge with the following:

(1) A copy of the charge(s) and specification(s),

(2) An advance copy of the Pretrial Information Report (NAVJAG 5813/4), and

(3) A copy of the convening order and all modifications thereto.

b. As preparation for trial proceeds, the trial counsel will keep the trial judge informed of any changes in the estimated duration of trial, and if known, whether the case will be contested. If there is any valid reason why a trial cannot be held on the assigned trial date, the trial judge may grant an enlargement of time on an informal basis upon seasonable application of either counsel; otherwise he shall call an Article 39(a) session for the purpose of requiring counsel to show cause why the trial should not proceed as scheduled.

c. If within 10 days following the referral of charges to trial by general court-martial, or five days following referral to a special court-martial, the trial and defense counsel have not presented the trial judge with a firm date of trial, the trial judge will call an Article 39(a) session on his own motion.

Rule 34. Preliminary matter - motions and hearings. Counsel shall be prepared to dispose of all motions at one preliminary hearing during an Article 39(a) session. As soon as practicable after service of charges, and prior to the expiration of the time period prescribed in Rule 33, a defense counsel who wishes to present motions will complete Pretrial Information Report (NAVJAG 5813/4) and forward it to the trial judge with a copy to the trial counsel listing those motions to be presented and indicating thereon whether the hearing will involve argument only or the presentation of evidence. As soon as counsel have determined that a preliminary hearing is necessary, they will arrange with the trial judge for a mutually satisfactory date.

Rule 35. Stipulations. If the defense anticipates moving for dismissal of any charge on the basis that the accused has been denied his right to a speedy trial, counsel for both sides should endeavor prior to trial to enter into and prepare a stipulation of fact as to the chronology of events. In any case in which trial counsel anticipates that the defense may raise an issue of speedy trial, trial counsel shall prepare a chronology of pretrial events in the case, even if the defense is not willing to stipulate to such facts. In such case, trial counsel should also be prepared to present evidence to prove the pretrial events.

If a motion or any other issue involves only a dispute between the parties as to the law or ultimate question of fact, and not as to the underlying facts, counsel should endeavor to enter into and prepare, prior to trial, a stipulation of fact or a stipulation of expected testimony covering these matters. Counsel may enter into such a stipulation for the limited purpose of obtaining a ruling on a motion or other pleading.

Rule 36. Instructions. In a trial with members, if either counsel desires any specialized instructions, including any summarization of the evidence, or any instructions not contained in the Military Judge's Guide, DA Pam 27-9, he should submit such instructions to the trial judge in writing prior to the commencement of the Article 39(a) instruction conference. If

either counsel desires a modification of a standard instruction from DA Pam 27-9, he shall also submit his proposed modification to the trial judge in writing.

Rule 37. (Reserved.)

Rule 38. Civilian Counsel. In each case in which a civilian attorney is retained by the accused, the detailed defense counsel shall furnish a copy of these rules to that civilian attorney and request, if not previously accomplished, a written entry of appearance as counsel of record for the defendant, addressed to the convening authority, with a copy to the trial judge.

THE BAILIFF'S HANDBOOK

PREAMBLE

The trial is the most visible of all those procedures that, while dedicated to the proposition of equal justice under law, are designed for the protection of the community. A trial should be conducted in such a manner as to command the respect of the members of the community it serves and to assure them that law is functioning in a manner which will preserve order. Anything that detracts from an atmosphere of respect for the law and the authority of the court is to be avoided.

The trial of a case should not be burdened with resolution of frivolous or petty administrative matters. Every party to the trial should know what is expected of him, and the military judge and trial counsel should receive the assistance of a bailiff who has been carefully instructed in the performance of his duties.

The bailiff may look to the trial counsel for specific instruction as to his duties and for directions before and after each session of the court. While the court is in session, the bailiff is under the supervision of the military judge and will assist the military judge and counsel in the conduct of an orderly trial. The bailiff should be familiar with the location of the principal offices and facilities, such as the library, within the law complex in which he is serving.

DUTIES OF THE BAILIFF

Prior to Trial

1. The bailiff will report to the trial counsel in the uniform of the day with duty belt and appropriate cover at least thirty minutes before the commencement of each day's proceedings. Thereafter he will report to the military judge 15 minutes before the commencement of the day's proceedings.

2. The bailiff will see that the courtroom, including the spectator area and the deliberation room for court members, has a neat and orderly appearance, and will place the furniture in proper arrangement.

3. The bailiff will ensure that the judge has the desk supplies desired and that the court members have pencils and pads of voting paper in their deliberation room.

Entry and Departure of Military Judge

4. When counsel for both sides, the accused, the reporter, and, when appropriate, the court members, are all present in the courtroom, the bailiff will notify the military judge and escort him to the courtroom. When the bailiff enters the courtroom he will state: "All persons please rise." When the military judge announces a recess or adjournment the bailiff will again state: "All persons please rise." If need be, he will also instruct the spectators to stand fast until the military judge has departed from the courtroom. The military judge will advise the bailiff in the event there is to be any departure from this procedure.

5. According to the instructions of the military judge, the court will be formally opened at the commencement of each day of the trial at which spectators are in attendance. On those occasions the bailiff will state:

"All persons please rise. A (general) (special) court-martial convened by _____ is now in session, Military Judge _____ (Captain) (Colonel) (Commander) (_____) U. S. (Navy) (Marine Corps) presiding."

Entry of Court Members

6. When the court members enter the courtroom, and also when the court members stand to be sworn, the bailiff will announce: "Everyone, please stand," in a voice that can be heard by all spectators (unless advised of a different procedure by the judge).

Spectators and Members of News Media

7. The bailiff should be aware that military trials are open and that spectators and members of the news media are welcome in the courtroom to hear and observe the trial proceedings (unless otherwise instructed by the judge). He should see that they can enter the courtroom, be seated and leave quietly while the court is in session.

8. As the law does not permit picture taking or any type of broadcasts in the courtroom, the bailiff will not permit that type of equipment to be taken into the courtroom. Any problems concerning this matter should be brought to the attention of the trial counsel without delay.

A-1-q(2)
Change 1

9. Courtroom rules do not permit spectators to eat, sleep, smoke, or engage in conversation while the court is in session. The bailiff should quietly and diplomatically inform the offenders of these rules.

10. Anyone talking, or making noise, in the halls that is distracting in the courtroom will be informed by the bailiff that the court is in session and they can be heard in the courtroom.

11. Rowdiness and violence are not unknown in the courtroom. The bailiff must be alert and prepared to take immediate steps to suppress unruly behavior.

Court Members - In Closed Session

12. When the court members are in closed session, only the members may be permitted in the deliberation room. Therefore, the bailiff will not enter that room or permit anyone else to enter during the closed session.

13. The bailiff is the only contact between the court members and the parties to the trial during the periods the court members are deliberating. The bailiff will be available to the court members outside their deliberation room and immediately notify the trial counsel, defense counsel, and military judge when the court members are ready for the court to be reopened.

14. If the bailiff is instructed to deliver any item or message to the court members in closed session, he must first inform the judge and obtain his approval.

Miscellaneous Duties During the Trial

15. The bailiff will be prepared to furnish the following services:

a. Summon the court members to the courtroom at the beginning of each session of court when advised by the military judge or trial counsel.

b. Collect written questions from the court members upon the judge's request and hand them to the judge or trial counsel as instructed.

c. Summon witnesses to the courtroom when requested by counsel.

A-1-q(3)

d. Deliver findings and sentence worksheets to the president of the court when instructed to do so.

e. Deliver items of evidence to the deliberation room, if instructed to do so by the military judge, when the court members retire to the deliberation room.

f. Perform administrative errands during the trial as requested by the military judge and trial and defense counsel.

Attitudes and Relation of the Bailiff to the Issues and Parties of the Trial

16. The bailiff should remain neutral throughout the trial of a case. That is, he should not assume a partisan attitude toward either side -- the prosecution or the defense. The bailiff should never participate in any discussion of the merits of the case and should never attempt to predict the outcome of the trial. He should also avoid making any comments on the performance of counsel for either side or on the testimony of witnesses.

A-1-q(4)

PART III

VOIR DIRE

SAMPLE VOIR DIRE EXAMINATION QUESTIONS

QUESTIONS CONCERNING LAW:

Q: Do you understand the rule of law that the accused is presumed to be innocent until his guilt is established beyond a reasonable doubt?

Q: Do you accept this presumption without any mental reservation?

Q: Do you understand the fact that charges were preferred against the accused does not warrant any inference of his guilt?

Q: Do you understand the convening authority's referral of these charges for trial warrants no inference of the accused's guilt?

Q: Do you, at this moment, presume the accused in this case to be innocent?

Q: Are you willing to follow the instructions of the military judge, although they may conflict with your recollection of what the law is or your belief as to what the law should be?

Q: Do you understand you cannot determine the accused's guilt or innocence until all the evidence is presented and you have been instructed by the military judge, and you are deliberating in closed session?

QUESTIONS CONCERNING MEMBERS' QUALIFICATIONS

Q: Are any of you under a physician's care at the moment?

Q: Are any of you taking medication?

Q: Do any of you have trouble hearing to the extent that you may not hear everything that is said in the courtroom?

Q: Do any of you suffer from a visual impairment that might prevent you from seeing all that takes place in the courtroom, including the observation of charts, sketches and maps?

Q: Are any of you suffering from any other health problem about which I have not asked you that may prevent you from being fully mentally alert all day over an extended period of time?

Q: Has any member of your family ever been convicted of (or arrested for) an offense, including a moving traffic violation?

If so: Who?

When?

Do you feel that the conviction (arrest) was fair?

Q: Do you know the convening authority? (In many instances, the convening authority will be the members' commanding officer.)

Q: (If the answer to the previous question is affirmative)
Have you discussed this case with the convening authority?

Q: Have you heard the convening authority discuss military justice in general?

Q: Do you believe the convening authority will be displeased if the accused is found Not Guilty?

Q: Do you have advance knowledge of the nature of the charges in this case?

Q: Have you discussed this case with anyone?

Q: Have you heard or read anything about this case?

Q: Have you had any training in military law?

Q: Have you ever performed duties as a legal officer or discipline officer?

Q: Have you ever held a summary court-martial?

QUALIFICATIONS

Q: The assembly of the members in this case has been rescheduled numerous times and certain of you may have had to reorganize your personal plans accordingly. Will any of you hold this personal inconvenience against either side?

Q: Will any of you be required or feel compelled to return to your office at the close of each day's sessions in order to catch up or maintain the office work flow?

Q: Are any of you working on special tasks that you feel require your expertise or presence at the office?

Q: Will you feel inclined to shorten the trial in order to return to your work or office?

Q: Are any of you experiencing any problems that you feel require your presence at home early each evening or which may preoccupy your thoughts during trial sessions?

Q: Have any of you ever acted as a trial or defense counsel?

If so, do you have an opinion about how one or the other should conduct his case? If so, what is that opinion?

Q: If you have acted as TC or DC, will anything that happened during those trials affect your perspective or actions here?

If so, what and how?

Q: Some of you have acted as members of a court-martial before. Will anything that happened during the course of those trials, or even before or after them, affect what you do during this trial?

If so, how?

Q: Did any of you know the victim in this case, _____? His/her family?

If so, when did you meet him/her or them?

Nature of relationship?

Will that influence your action in this case? How so?

QUALIFICATIONS

Q: Do any of you know the accused in this case, _____? His/her family?

If so, when did you meet him or them?

Nature of relationship?

Will that influence your action in this case? How so?

Q: Do any of you know the defense/trial counsel?

If so, when did you meet him?

Nature of relationship?

Will that influence your action in this case?

Q: Have you discussed this case with defense/trial counsel?

If so, what was the nature of discussion?

Q: Have any of you taken any official action regarding this case?

If so, what?

When?

In what capacity?

Q: Have any of you been otherwise involved in this case?

If so, what?

When?

In what capacity?

QUESTIONS CONCERNING EXPECTED EVIDENCE

Q: Would you give more weight to (or would you believe) the testimony of a policeman solely because he is a policeman?

Q: Would you give more weight to (or would you believe) the testimony of an officer solely because of his rank?

Q: Would you tend automatically to disbelieve (or give less weight to) the testimony of the accused solely because he is the accused?

Q: If a witness who is a/an (convict) (accomplice) testifies, will you still be able to weigh his testimony as allowed by law regardless of the (conviction) (complicity)?

Q: Does each of you understand that an accused can be found guilty beyond a reasonable doubt on circumstantial evidence alone? i.e., Do you believe an eyewitness or a confession are essential matters of proof before you can find an accused guilty?

Q: Do any of you believe that an accused should not be found guilty of _____ based on circumstantial evidence alone?

Q: Do any of you have the belief that policemen or NIS agents willfully distort the truth in order to "get their man"?

Q: Are any of you inclined to give the testimony of a young, enlisted female any less credence than you would any other witness solely because she is a young, enlisted female?

Q: Do any of you feel or believe that statements taken by agents of NIS are somehow suspect solely because they were taken by NIS?

Q: Do all of you agree that the intent of a person can be proven by circumstantial evidence; that is, by facts and circumstances from which you can reasonably infer the existence of the questioned intent?

Q: The following persons may be called to testify in this case:

Do you know any of these people?

QUESTIONS CONCERNING SENTENCE

Q: Would you feel obligated, regardless of extenuation and mitigation evidence, to adjudge a discharge because of the nature of the offense alleged?

Q: Would you vote to adjudge a discharge solely because the case has been referred to a general court-martial?

Q: Have you, or any member of your family, been the victim of a crime?

Q: Do you have any preconceived opinion as to what would constitute any appropriate sentence for the offense(s) alleged in this case?

Q: Do any of you feel that the imposition of (maximum punishment) is never appropriate under any circumstances?

Q: Do any of you believe that because the maximum permissible punishment in this case includes the imposition of life imprisonment (for _____ years) that the government must meet a higher standard of guilt than it otherwise must meet (which is, "beyond a reasonable doubt")? That is, do you believe that the government must prove its case beyond any doubt whatsoever?

Q: Do all of you realize that the question of punishment is determined only after an accused has been adjudged guilty?

Q: Do all of you believe that you could still vote for a finding of guilty if you believed beyond a reasonable doubt that the accused was guilty, knowing that by so voting you exposed the accused to possible imprisonment for _____?

Q: Would you vote for a sentence you believe to be appropriate even though others might consider it inappropriately lenient?

QUESTIONS CONCERNING PRETRIAL PUBLICITY

Q: Have any of you read, or had read to you, newspaper accounts of _____?

If so, what paper or papers?

How long ago?

Read in person or have read for you?

What do you recall?

Q: Have any of you otherwise heard any media discussion of this incident?

Q: Have any of you received any briefing from any military or law enforcement authority about this case?

If so, from whom?

In what context?

What was said?

When?

Q: Have any of you discussed this case with anyone?

If so, with whom?

When? In what context? What was said?

Q: If any of you have read an account of this case in the newspaper or anywhere else, will you be able to completely ignore what you have read and decide this case solely on the matter presented to you in this courtroom?

Q: If any of you have received some information about this case from any source whatsoever, will you be able to disregard that information and decide the issues that you must decide based solely on the matters presented to you in this courtroom?

Q: If any of you have heard or read some media account concerning this case, do you believe that that account is necessarily accurate?

Q: If you have heard or read some media account of this case, are you prepared to set aside completely such information and decide this case based solely on the facts that you determine from the material presented to you in this courtroom?

PRETRIAL PUBLICITY

Q: Do you place any credence in the media reports of this case with which you may be familiar?

If you do, to what extent?

How will this influence you?

Q: Do any of you believe that whatever prior information you may have about this case will influence your decisions?

If so, how?

Q: Do you believe that the media accounts with which you may be familiar are entitled to be considered by you in your decision making?

Q: Have any of you read or been privy to any non-media briefing, official or quasi-official, other than from a law enforcement authority?

If so, with whom?

When?

In what context?

What was said?

Q: Do all of you realize that this trial will be tried in this courtroom and not in the newspapers?

Q: If some material is presented to you in the courtroom and it happens to contradict or coincide with a media account of this incident with which you may be familiar, will you be able to disregard the media material entirely?

Q: Even if you accept as a general principle that material in newspapers and other news media is usually true, do all of you realize that you must totally disregard any information about this case that you do not receive from this courtroom when making decisions and evaluating the evidence?

Q: If any of you have read about or heard some information that pertains to this case, would you be willing to be tried by a member having that same information and state of mind that you do right now?

QUESTIONS CONCERNING MENTAL HEALTH ISSUES

Q: Do any of you know personally or have a family member who is a psychologist? (psychiatrist?)

If so, who and what is your relationship?

Q: Do you believe that psychology is an exact science?

Q: Have any of you ever worked in an institution for the mentally infirm?

Q: Have you otherwise come into contact with mentally infirm?

Q: Have any of you ever participated in psychological testing?

If so, when? Why? What were the results?

Q: Have any of you ever studied psychology?

If so, when? Why? What was your response to the course or courses?

Q: Do any of you believe that a professor is entitled to more credence than a practicing physician solely because he is a professor?

Q: Do any of you believe that the diagnosis of a psychologist or psychiatrist is infallible?

Q: Do any of you believe that a person who committed (the crime charged) must be insane?

Q: Do all of you understand that sanity is like any other fact and may be proved by the presentation of competent evidence?

Q: Will any of you disregard the opinion of a layman with respect to another's sanity solely because he is a layman?

Q: Do you agree that a layman's opinion regarding sanity is entitled to be considered even if expert testimony on the same subject is also presented?

Q: Do all of you agree that a person can be mentally ill and yet still be responsible and accountable for his behavior?

Q: Do all of you agree that a personality disorder is not a mental illness in the legal sense of the term?

Q: Have any of you ever sat on, or otherwise participated in, a sanity board?

Q: Do any of you believe that a person who demonstrates repeated anti-social behavior is necessarily insane?

MENTAL HEALTH

Q: Do you have any contact with psychologists or psychiatrists in your work?

If so, what is the nature of that contact?

Q: Have you or members of your family ever consulted a psychologist or psychiatrist professionally?

If so, why?

How did you feel about the psychologist's or psychiatrist's ability to identify the problem and treat it?

Q: In any of the trials in which you have previously participated as a member, or counsel, has the defense of insanity ever been asserted?

If so, was a sanity board convened?

What was the result of the trial?

GENERAL OPINIONS

Q: Is there any reason about which I may not have asked that you believe that you are predisposed to vote against the accused or the government at this point in time?

Q: LT _____, there are several officers of higher rank on the court than yourself. During the deliberations of the court, will you allow yourself to be influenced by the opinions of the senior members based solely on their superior rank?

Q: Should either counsel for the government or counsel for the defense pose an objection to any matter being presented, will any of you hold it against that counsel, even if he is overruled by the military judge?

Q: Both the accused and the government are entitled to members with free, fair, and unprejudiced minds. Do you feel as you sit here now that you have that frame of mind?

Q: Do all of you realize that you must determine the issues which are your function to determine based solidly on the facts and not on speculation or conjecture?

Q: What was you major in college?

Q: Is there anything about this case that makes you hesitate to sit as a member?

If so, what?

CHALLENGING - THE NUMBERS GAME

For those who desire to play "The Numbers Game," here is a concise chart which should be helpful. It indicates the number of members composing the court, number of votes required for a finding of guilt or innocence, the best ratio for either side, and indications of when to challenge.

Number of Members	5	6	7	8	9	10	11	12	13
For Guilty	4	4	5	6	6	7	8	8	9
For Not Guilty	2	3	3	3	4	4	4	5	5
Best for Prosecution		*	X	X	*	X	X	*	X
Best for Defense	*	X		*	X		*	X	

KEY: Best Ratio *

When to challenge X

PART IV

NJS MOOT COURT

The following examples and discussions are for use in the Naval Justice School moot court exercises. They merely represent one method for handling certain situations in court. To assist in the uniformity of grading, the examples in this part are the preferred method in the NJS moot courts and the students will be expected to follow these examples.

MARKING EXHIBITS

1. Appellate exhibits

   a. Appellate exhibits are normally those documents or real evidence used during a preliminary stage in the trial or on a motion. They are not evidence on the merits. For example, in a motion to suppress a confession, the written confession will normally be offered on the motion. It will be marked as an appellate exhibit. If the motion is denied, the confession will then be offered on the merits as a prosecution exhibit. In order to avoid confusion and assist the reviewing authorities, a duplicate original can be used at the motions stage and the original used on the merits. This avoids remarking the same document and possibly confusing the reviewer.

   b. Appellate exhibits are marked in the lower right-hand corner using "AE" and a Roman numeral, e.g., AE I. They are not marked "for identification."

   c. Appellate exhibits are never seen by members.

2. Prosecution exhibits

   a. Prosecution exhibits are those documents and real evidence used by the government during the merits portion and/or the sentencing portion of a trial.

   b. They are marked in the lower right-hand corner using "PE" and an Arabic number, e.g., PE 2. Prosecution exhibits are marked "for identification" until offered and admitted into evidence. Typically, then, a document would be marked "PE 3 for ID" until admitted into evidence, at which time the words "for ID" would either be lined out or erased.

   c. If an exhibit is offered but not admitted, the document retains the number assigned to it and is simply attached to the end of record of trial. They must be included within the record of trial. Reviewing authorities will be able to review the judge's decision to exclude the evidence. It is possible, then, to have gaps in the numbering sequence of prosecution exhibits as presented to the jury. This is easily explained, however.

   d. Real evidence is marked with a tag or a sticker. Normally, photographs or descriptions are substituted in the record and the real evidence is retained until the appeal process is complete.

   e. The numbering sequence continues into the sentencing portion of the trial.

3. Defense exhibits

a. Defense exhibits are those documents and real evidence used by the defense during the merits portion and/or sentencing portion of a trial.

b. They are marked in the lower right-hand corner using "DE" and letter designation, e.g., DE A. Defense exhibits are marked "for identification" and handled like prosecution exhibits, above.

HANDLING AND OFFERING DOCUMENTARY EVIDENCE

1. The military courtroom is one of the most formalized in the country. The handling of evidence in a military court requires words and actions which appear ritualistic and stilted in many cases. The following method of handling evidence is how you will be expected to handle evidence in the NJS moot court jurisdiction. The procedures at your new command might be more or less demanding and you should familiarize yourself with them upon your arrival. For purposes of grading in our moot court, however, the following procedures should be followed. Consult JAGMAN app. A-1-p.

2. Pre-marking exhibits. It is usually good practice to have your exhibits pre-marked by the court reporter before the trial begins. This will help the court-martial to progress smoothly. This is especially true of a guilty plea case where most exhibits are to be used for sentencing purposes. (See Aids to Practice, p. IV-1 regarding the proper marking of exhibits.)

3. Offering evidence

   a. The following is the proper method for offering evidence where an adequate foundation has been laid or is self-evident:

      "I have what has been previously marked as Prosecution Exhibit 3 for identification and I am now handing it to the defense counsel for his inspection."

      "May I approach the bench, your Honor?"

      "Let the record reflect that I have retrieved Prosecution Exhibit 3 for identification from the defense counsel and I now offer Prosecution Exhibit 3 for identification into evidence and ask that the words 'for identification' be stricken."

      The judge will then ask for any objections.

   b. If the document is a page from a service record book, the following should be added to the above "... and true copies substituted in the record, where appropriate ." Do not add this last phrase for all types of evidence. It does not make any sense if the original of the offered document will be used in the original record of trial.

   c. Once the document has been admitted, it is then simply referred to as Prosecution Exhibit 3.

4. Only evidence that has been previously admitted should be shown to the members. Therefore, evidence is normally offered and ruled upon prior to the members' entering the courtroom. Evidence that was not admitted must be removed from the members' view. Evidentiary objections, stipulations, and matters to be judicially noticed should be handled at a 39a session before the members are sworn.

PLEADING THE CLIENT

Assume the following charges and specifications.

Charge I: Violation of the UCMJ, Article 112a.

Specification 1: In that Seaman John W. Albright, U.S. Navy, Naval Education and Training Center, Newport, Rhode Island, on active duty, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 2 October 1984, wrongfully distribute 2 ounces, more or less, of marijuana to Seaman Paul Singer, U.S. Navy.

Specification 2: In that Seaman John W. Albright, U.S. Navy, Naval Education and Training Center, Newport, Rhode Island, on active duty, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 2 October 1984, wrongfully introduce 2 ounces, more or less, of marijuana.

Specification 3: In that Seaman John W. Albright, U.S. Navy, Naval Education and Training Center, Newport, Rhode Island, on active duty, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 3 October 1984, wrongfully possess 1 ounce, more or less, of marijuana.

Charge II: Violation of the UCMJ, Article 121.

Specification 1: In that Seaman John W. Albright, U.S. Navy, Naval Education and Training Center, Newport, Rhode Island, on active duty, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 24 April 1984, steal one Sony radio of a value of about $30.00, the property of Seaman James P. Keen, U.S. Navy.

Specification 2: In that Seaman John W. Albright, U.S. Navy, Naval Education and Training Center, Newport, Rhode Island, on active duty, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 28 April 1984, steal one wristwatch of a value of about $40.00, the property of Seaman William B. Smith, U.S. Navy.

Specification 3: In that Seaman John W. Albright, U.S. Navy, Naval Education and Training Center, Newport, Rhode Island, on active duty, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 28 April 1984, steal $100.00 in U.S. currency, the property of Seaman Sam B. Williams, U.S. Navy.

1. To plead guilty to everything -

"Your Honor, the accused, through his counsel, pleads guilty to all charges and specifications."

2. To plead guilty to some and not guilty to others -

"Your Honor, the accused, through his counsel, pleads as follows:

- To Specifications 1 and 2 of Charge I: Guilty.

- To Specification 3 of Charge I: Not Guilty.

- To Charge I: Guilty.

- To Charge II and all Specifications thereunder: Not Guilty (or Guilty)."

3. To plead by exceptions and substitutions -

"Your Honor, the accused, through his counsel, pleads as follows:

- To Specification 1 of Charge I: Guilty, except for the words and figures: "2 October," and substituting therefore: "30 September." To the substituted words and figures, Guilty. To the excepted words and figures, Not Guilty. To the specification as excepted and substituted, Guilty.

- To Specifications 2 and 3 of Charge I: Guilty.

- To Charge I: Guilty.

- To Charge II and all specifications thereunder: Not Guilty."

DTIC

END

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