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A Journal For Military Defense Counsel
THE ADVOCATE

U.S. Army Defense Appellate Division

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THE ADVOCATE

Volume 10, Number 5

September-October 1978

CHIEF, DEFENSE APPELLATE DIVISION

COL Edward S. Adamkewicz, Jr.

EDITORIAL BOARD

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Ms. Maureen Fountain
Ms. Ann King

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TRANSITION

As the first decade of The Advocate draws to a close, we present an issue which came into existence through the joint efforts of members of the bench, the military, and the civilian bar. In Volume 10, Number 3, we solicited articles for a special "civilian-military symposium" issue. The response from civilian lawyers was greater than expected, and, unfortunately, several articles could not be published simply because of space limitations. We believe that this issue, which explores the military and civilian defense counsel relationship from different viewpoints, will be beneficial to uniformed defense lawyers, as well as their civilian counterparts.

Former Editor-in-Chief Andy Maron provides personal thoughts on the relationship between military and civilian defense counsel. Mr. Donald Timm expands this theme to the peculiarities of that relationship in an overseas setting. Mr. Aubrey Daniels and CPT William Ramsey present some thoughts on the role of the civilian lawyer in the military appellate process.

Adequacy of representation is addressed by our Articles Editor, Pete Nolan. Judge Nancy Hunter gives her observations on new defense counsel from the other side of the bench, and Attorneys Steven Trecker and Steven Rosenberg provide some helpful suggestions on conducting voir dire examination of a military jury.

* * * * *

COMING UP IN THE ADVOCATE

Proposed topics for future issues include The Jencks Act, Former Jeopardy, Finance and the Convicted GI, Collateral Relief, Post-Trial Interviews with Jurors, the "Plain Smell" Doctrine, and a cumulative Ten Year Index, utilizing the West key-number system. Remember that your ideas, suggestions, and articles are always invited.

THE ATTORNEY - ATTORNEY RELATIONSHIP:
KEY TO AN EFFECTIVE DEFENSE

Andrew W. Maron, Esq.*

When a serviceman hires a civilian attorney, he undoubtedly expects a better defense than he would normally have with just his military counsel. Unfortunately, this is not always the case. Such a situation may be caused by a number of factors, but primary among them is the failure of the civilian and military lawyers to establish a good attorney-attorney relationship. Only through a clearly defined association between counsel can the client receive the full benefit of their experience and knowledge and thus receive the most effective defense.

Why do accused servicemembers hire civilian defense attorneys when they are entitled to free representation by a military lawyer? Although it is not expressed very often, the most common reason may be the accused's distrust of the entire military system, including his military defense counsel. While this distrust is unfortunate, it is certainly understandable at a time when the accused faces criminal charges within the military. Other expressed reasons for retaining civilian counsel are that a paid counsel will do a better job, the desire to "spare no expense" to defend oneself against a serious charge, the feeling that "two heads are better than one," or a lack of confidence in the individual military lawyer. Each of these reasons is relatively distinct, and often may be an important indication to both civilian and military counsel about how best to work with the accused. For that reason, it would be wise for both counsel, especially the civilian attorney, to attempt to determine why the client feels the need to retain a civilian lawyer.

* Mr. Maron is an associate with Short, Cressman & Cable in Seattle, Washington. He holds a B.S. from the U.S. Military Academy, a J.D. from the University of South Carolina, and an LL.M from the University of Virginia. While in the Army JAG Corps from 1974-78, Mr. Maron attended the advanced course, served at Fort Lewis, Washington for two years as a defense counsel and senior defense counsel, and was assigned for one year to DAD as an appellate defense attorney and Editor-in-Chief of The Advocate.

Retained civilian attorneys fall into two general categories. Many are knowledgeable about the military justice system because of past experience as a JAG officer or as a civilian lawyer in courts-martial. Others are totally unfamiliar with the military system, either because they have never been exposed to courts-martial or because their previous experience was years ago, prior to many significant changes mandated by statute, code or court decisions. The civilian attorney's past experience, both in the military justice system and with civilian criminal law, will have a significant impact on the relationship that will be developed between the civilian lawyer and the military counsel.

When the accused decides to hire a civilian attorney, the military counsel assumes the status of associate counsel. At that stage, he is clearly secondary to the civilian lawyer. Though he retains some responsibility to the client, the precise nature of that responsibility is unclear. This status is most unusual, occasionally awkward, and varies with each case and counsel.

Nevertheless, the alliance of the two attorneys can be an effective one. To insure constructive communication between counsel, it is recommended that at the very beginning both counsel clearly plan and discuss the defense of the case and both counsel's role in the preparation of it. This discussion will permit the groundwork for the defense to be firmly established at the outset, clearly define the duties of each counsel, and allow for scheduling by both attorneys. This latter point should not be overlooked, for it is often a cause of friction. Both lawyers have other clients and responsibilities. Understanding and working with each other's schedule will permit a more coordinated defense.

The defense team can be established in several different ways. With the consent of the accused, the civilian lawyer can dismiss the military counsel and handle the entire case himself, or he can retain the associate military counsel and only consult him about military procedures. These associations seem to me to be the least effective, because they provide no real advantage to the client.

A more frequently established relationship is one in which both counsel participate in pretrial preparations, while only the civilian attorney handles the actual in-court

proceedings. This is certainly an acceptable technique and one that may be favored by some clients. Another variation of this association would be the separation of the in-court proceedings so that the civilian attorney would be responsible for the findings and the military attorney would handle the presentation during the sentencing phase. This relationship, again, is certainly acceptable, but should be used only if the civilian lawyer is totally familiar with the military justice system and if there is constant communication between both counsel to insure that both presentations are coordinated.

The last type of relationship that could be formed between the military and civilian lawyers is perhaps the best. Counsel can form a true "defense team," in which both attorneys share the workload and the decisions. Such a relationship provides the accused the best defense possible -- two attorneys blending their training, experience, and knowledge together to provide a prepared, coordinated defense. The formation of such a team, of course, depends upon a number of factors, not the least of which is the personality of each of the two lawyers. But when possible, a close attorney-attorney relationship can make a tremendous difference in the preparation and presentation of the defense.

Whatever relationship is eventually formed between the civilian and military lawyers, an early discussion of each attorney's respective roles in the defense is essential. This will clarify each counsel's status, and should help alleviate the military lawyer's two most common complaints about civilian defense attorneys. The first is the occasional lack of preparation of the civilian counsel for the trial. The second complaint involves the tendency of some civilian counsel to expect the military lawyer to handle pretrial matters while the civilian attorney becomes active only at the last minute. The former problem may be the result of the civilian counsel's unfamiliarity with the court-martial system and the standards of competence therein, while the latter complaint often stems from the civilian attorney's misunderstanding of the role of the associate military counsel. In both these respects, the shortcomings can be greatly reduced by early, frequent, and thorough communications between the civilian and military lawyers.

THE MILITARY AND CIVILIAN DEFENSE TEAM OVERSEAS

Mr. Donald A. Timm, Esq.*

Defense counsel in an overseas area often encounter many problems which are practically non-existent in the continental United States. One of the more common problems arises simply because of the larger area from which requests for representation come. In the United States, where qualified civilian and military counsel are readily available, it is unusual for a servicemember to seek a lawyer outside the immediate area of his base. Thus, civilian counsel in the States is usually engaged in "home town" practice, even when he accepts a military client, and military counsel rarely sees the inside of the court room of any jurisdiction besides his own. Overseas, however, where American attorneys are, to say the least, scarce, civilian counsel might take cases throughout an entire country, as in Europe, or throughout several countries, as in Asia, and from all branches of the service. Similarly, military counsel's duties can hardly be called "localized."

The scattered nature of the units presents another problem overseas. An attorney in Seoul, for example, might try a case in Seoul, even though it arises from a unit several hundred miles away. Additionally, detailed and individual counsel might be separated by the same distance. The problem is even further compounded in areas where transportation is primitive and unreliable.

Another difficulty in handling cases overseas is the postal system. In the States, despite its criticisms, the postal system is fairly expeditious and dependable. International

* Practicing law in Seoul, Korea, Mr. Timm has served as individual civilian counsel in numerous courts-martial, at both the trial and appellate level. A magna cum laude graduate from the University of Iowa College of Law, he is admitted to practice before the Supreme Court of the United States, the Supreme Court of Iowa, the Court of Claims, the Court of Military Appeals, and the Army Court of Military Review.

mail is not, however. A letter mailed first class from CONUS to Korea enters surface mail channels upon leaving the States, and arrives in Korea by water, at times months later. Unfortunately, there are times when character letters from home arrive after the trial is over.

The absence of libraries at nearby courthouses or law schools to which counsel has access also presents problems, especially when complex legal issues arise. Finally, connection between civilian and military telephone systems is usually so inadequate that there are times when it is actually impossible to call a military unit from the civilian sector.

For obvious reasons, the above problems are even more aggravating to the individual civilian counsel. Due to the invaluable assistance which can be obtained by military defense counsel, these problems are not insurmountable, however. While the military attorneys should never be used as mere "gofers," they provide invaluable aid in meeting logistical problems head-on. Not only are military counsel quite helpful in generally acting as liaison between civilian counsel and the command, but, with advance notice, they are willing to aid in providing transportation, getting witnesses available for interviews, and even arranging meals and lodging.

Military counsel also give civilian counsel much relief when they assist in obtaining access to military telephone lines, which helps solve some of the interface problems referred to above. Similarly, military counsel's willingness to post and receive correspondence through the military postal system helps alleviate the mail problems inherent in a foreign country's system.¹

1. In this regard, DA Message DAJA-IA 282130Z November 1972 advises:

The case-related mail of individual civilian defense counsel in connection with court-martial cases is considered to be mail for the use of U.S. armed forces within the meaning of the status of forces agreements. As such, civilian defense counsel should have access to mail facilities with respect to case-related correspondence. To limit the volume of mail matter and

Being afforded use of the military law library, which has reference materials not available in the civilian, is a major aid. Moreover, military counsel can provide access to expert witnesses, such as physicians from the Armed Forces Institute of Pathology. Foreign expert witnesses are often very hard to find.

The most valuable service that the military attorney can provide to his civilian counterpart overseas, however, revolves around his own legal capabilities. He usually provides an excellent forum for discussing trial tactics and strategy. He often knows the "track record" of the military judge and trial practices of the prosecution, and may have had prior experience with prospective members, or be familiar with their reputations. All of these matters, of course, must be considered in planning trial strategy.

It should be apparent that the relationship between civilian and military counsel will determine the degree of success which will be achieved in meeting the dilemmas discussed above and the overall service which can be rendered to the client-accused. The following are the author's personal thoughts on what the nature of the relationship should be. My practice is to explain to the client and to military counsel that it is entirely up to them whether military counsel takes an active part in the preparation and trial of the case. I advise them that I am prepared to investigate and try the case by myself, but I would be more than appreciative if the military counsel would continue on the case, since I consider his assistance a learning experience, as well as a forum for discussion, where each of us can learn from the

1. (continued)

to minimize the possibility of abuses, civilian counsel should be required to give sealed case-related correspondence to the military defense counsel or staff judge advocate for mailing through the military postal system. Such mail may be forwarded as official mail in an official envelope. Arrangements should be made for receipt of incoming case-related correspondence in a similar manner.

See Assistance to Civilian Defense Counsel, The Army Lawyer, January 1973, at 15.

other. If the accused wants to excuse his military lawyer, I will explain to the accused the advantages and indeed the necessity of keeping him, especially if the accused is not located in the same area as my office. The final decision is up to the accused, of course, but my feeling is that, if he has retained me, he should give great weight to my advice in this area.

Even if the military counsel participates actively in the case, however, civilian counsel should do most of the work, as he is the one chosen by the client, and he has the primary responsibility for the conduct of the defense. An important thing for civilian counsel to keep in mind at all times is the duty he owes to military counsel. Again, military counsel is neither his subordinate nor his clerk, but rather his professional associate. While civilian counsel may be chief counsel, he should still discuss strategy and tactics with military counsel. Military counsel usually is familiar with the military judge, the prosecutor and the command, and may have had prior experience with prospective members, or at least be familiar with their reputation.

On my part, I have always made it a practice to share my research with military counsel upon request, even if I am not retained on that specific case, and I am willing to discuss issues with military counsel and provide copies of my briefs on an issue upon request. I find that this improves my briefs and research files, since military counsel often supply a critique or analysis which had escaped me.

In summary, although being overseas places many logistic difficulties on the defense attorney, the relationship between the civilian and military attorney is much the same as that in the United States. As long as each respects the other and conducts himself in a professional manner, it can be both enjoyable and a learning experience for both parties.

RESPONSIBILITIES OF MILITARY DEFENSE COUNSEL
TO CIVILIAN COUNSEL

The unique working relationship between military and civilian defense counsel frequently raises questions about the support that military counsel can provide. The following two TJAG letters set forth guidelines on the assistance to be provided civilian counsel.

I

DAJA-MJ 1972/12661, dated 23 August 1972
SUBJECT: Assistance to Civilian Defense Counsel

1. There has been some confusion concerning the appropriate assistance to be furnished to civilian counsel retained to defend military personnel. The general policy should be full cooperation with civilian defense counsel in order to grant to the accused every opportunity for complete representation. Unless circumstances clearly require, civilian defense counsel should be afforded no less favorable treatment than that received by military defense counsel. The following are suggested guidelines:

a. Civilian defense counsel should be given access to all relevant information regarding the case, including a complete case file.

b. Civilian counsel should be given access to law libraries used by military defense counsel.

c. Civilian counsel should have ample opportunity to meet with clients in circumstances which preserve the confidential nature of the attorney-client relationship.

d. Witnesses should be made available, and civilian counsel given the opportunity to confer with them in private.

2. Additionally, some problems are much greater in overseas areas. The following are suggested guidelines for overseas commands:

a. Civilian counsel should be given access to available military transportation when the use of such transportation is

related to defense of an accused and when alternate commercial transportation is not reasonably available.

b. Civilian counsel should be allowed use of the military postal system for case-related correspondence,

c. Civilian counsel should be afforded temporary military billeting and messing on a reimbursable basis, when such facilities are available and alternate facilities are not reasonably available. Moreover, they should be given access to snack bars and similar facilities.

3. Problems may arise concerning classified information and restricted areas. Where it is necessary for a civilian defense counsel to have access to classified information or classified areas in order to represent his client adequately, every effort should be made to obtain necessary clearances.

4. Possible unfavorable experiences will be eliminated if these suggestions are implemented.

II

DA Message DAJA-MJ 1972/12681, dated 25 August 1972
SUBJECT: Obligations of Military Trial Defense Counsel to
Civilian Defense Counsel

1. It has come to my attention that there continues to be misunderstanding of some of our judge advocates concerning their responsibilities to their clients and to civilian counsel when civilian counsel has been retained. The following thoughts are offered to reconcile some of the problems.

2. When an accused has retained civilian counsel, the detailed defense counsel will act as associate counsel if the accused so desires. Article 38b, Uniform Code of Military Justice; paragraph 48b, Manual for Courts-Martial, United States, 1969 (Revised edition). The duties of detailed defense counsel as associate counsel "are those which the individual counsel may direct." Paragraph 46d, Manual, supra. Detailed defense counsel must be at trial unless he is expressly excused by the accused. Paragraph 46d, supra. When the case has been

referred to trial, it is the duty of detailed defense counsel to inform the accused immediately that he has been detailed to defend him. He must also advise the accused of his right to counsel and inform the convening authority if the accused desires individual military counsel. He should assist the accused in obtaining civilian counsel if the accused desires.

3. Even though the accused desires individual counsel, civilian or military, the detailed counsel will begin the preparation of the defense immediately, unless the accused desires otherwise. Paragraph 46d, Manual, supra. The United States Army Court of Military Review had an opportunity to discuss the duties of detailed counsel when civilian counsel has been retained in United States v. Kimball, [45 CMR 687] (ACMR 1972). The accused testified that he had attempted to get military counsel for some six weeks while he was in pretrial confinement. Finally, he hired a civilian counsel who eventually represented him through the arraignment. When the accused's detailed counsel contacted the confinement facility, he was informed that the accused was represented by civilian counsel. The detailed counsel neither visited nor, in any other way, contacted the accused. After the civilian counsel withdrew, the detailed military counsel entered the case and defended the accused at the trial on the merits. The court held that there had been no prejudice but in a footnote observed that the military counsel and his superiors misconceived the duty of detailed counsel. The court said, in effect, that the detailed military counsel has an obligation to investigate the case, interview witnesses, and otherwise prepare for trial, just as if the accused had not retained civilian counsel, unless instructed not to do so by civilian counsel.

4. Even though detailed counsel is required to perform such duties as the individual counsel may designate, the detailed counsel should not consider himself bound to countenance any matter at variance with the pertinent Canon of Ethics. For example, Canon 5 of the Canons of the Code of Professional Responsibility of the American Bar Association, states that: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." Ethical consideration number 5-12 of that Canon states: "Inability of co-counsel to agree on a matter vital to the representation of their client requires that their disagreement be submitted by them jointly to their client for his resolution, and the decision of the client

shall control the action to be taken." It is apparent then that the detailed counsel should exercise his own independent judgment in the preparation and trial of his case. He is under no obligation to follow any directions given by the civilian counsel, if the detailed counsel's independent professional judgment is that such directions are not in the best interest of the client, unless, of course, the problem has been submitted to the client in the manner mentioned above. The military associate counsel does not become a subordinate or clerk of the individual civilian counsel. The civilian counsel must treat his associate as an equal if he desires his continued participation in the case. United States v. Williams, 27 CMR 670 (ACMR 1959).

5. Detailed counsel's duty to take directions from the individual counsel must remain within the bounds of the law. Canon 7 states: "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." Disciplinary Rule 7-102 sets forth rules on the subject of representing a client within the bounds of the law. The pertinent part of this rule states:

(A) In his representation of a client, a lawyer shall not:

* * * *

- (3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
- (4) Knowingly use perjured testimony or false evidence.
- (5) Knowingly make a false statement of law or fact.
- (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.
- (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.
- (8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

It is clear from this that the presence of a civilian counsel in a case does not alter the detailed counsel's obligation to operate in a lawful manner.

6. Where the associate military counsel determines that the civilian counsel is conducting himself contra to the Canons of Ethics or violating the law, he should first discuss the problem with the civilian counsel. If the matter cannot be resolved, it is the duty of the military counsel to inform the accused of the civilian counsel's actions. The military counsel should inform the civilian counsel of his intention to discuss the matter with the accused. If the accused approves of the civilian counsel's conduct, the military counsel must inform the accused that he will request an Article 39(a) session and ask the military judge to relieve him of his responsibilities as counsel. The military counsel must also inform the accused that, as an officer of the court, he has a duty to report to the court any unethical behavior, fraud on the court, or any other violation of the law.

7. It is clear from the above that military counsel is neither forced nor expected to act in any way that is inconsistent with the high traditions of the legal profession or the Judge Advocate General's Corps.

ADEQUACY OF DEFENSE COUNSEL

Captain Peter A. Nolan*

Military accused are entitled to be represented at a special or a general court-martial by counsel.¹ This right to counsel has been held to mean the right to the effective assistance of counsel.² Whether the counsel be civilian or military, he is held to the same standard of reasonable competence.³ The Court of Military Appeals has rejected the idea that to be considered ineffective, the attorney's efforts must have been so poor as to have rendered the trial a farce or a mockery. The counsel must not only be competent, but he must also exercise that competence throughout the trial.⁴

Civilian counsel face the added burden of keeping abreast of the vagaries and changes in military law. An attorney can not provide effective assistance unless he adequately understands military law and procedure.⁵ The military appellate courts generally refrain from second-guessing strategic or tactical choices of trial defense counsel unless the questionable choices appear to be made because of ignorance of military law or procedure or the facts of the case. As a general rule, the civilian counsel is the chief lawyer and spokesman for the defense. The detailed military counsel remains in the case only as an associate and only with the consent of

* Captain Nolan received a J.D. degree from the University of Texas in 1975. He has served as both the chief trial counsel and chief defense counsel at Fort McNair and is now assigned to the Defense Appellate Division. Captain Nolan is also the Articles Editor of The Advocate.

1. Article 27(a), Uniform Code of Military Justice, 10 U.S.C. §827(a).
2. *United States v. Rivas*, 3 M.J. 282 (CMA 1977); *United States v. Walker*, 21 USCMA 376, 45 CMR 150 (1972); see also *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *Cooper v. Fitzharris*, 551 F.2d 1162, 1164 (4th Cir.1977).
3. *United States v. Walker*, supra; *United States v. Breece*, 46 CMR 1319 (ACMR 1973).
4. *United States v. Gaillard*, 49 CMR 471 (ACMR 1974).
5. Id. at 475.

the accused.⁶ Civilian counsel should therefore be aware of the peculiar pretrial, trial, post-trial and appellate procedures in the military, as they are expected to provide adequate representation at every stage of the proceedings.

Specific examples of inadequate representation will probably provide as much light on the parameters of adequate representation as possible.⁷ Failure to conduct voir dire or to reply to extensive opening and closing argument by trial counsel has been held to demonstrate inadequate representation.⁸ Failure to present to the court all claims of a client unless they are known to be false also demonstrate inadequate representation.⁹ The defense counsel should generally decline to represent more than one client except where it is clear that there will be no conflict of interest and the several accused consent to the multiple representation.¹⁰ The defense counsel's responsibility does not end with the findings of guilty. The obligation continues through the imposition of sentence and is not satisfied by simply obtaining a pretrial agreement with the convening authority which limits the sentence to be approved.¹¹ All defense counsel are charged with the responsibility of appealing to the conscience of the court with respect to assessing the sentence.¹² In this respect, any documents or witnesses that would be favorable to the accused must be brought before the court during the sentencing portion of trial, even if other

6. United States v. Maness, 23 USCMA 41, 48 CMR 512 (1974).

7. For a general discussion of the standards required for adequate representation, see Finch, Actions Which Deny An Accused's Right to Counsel, The Advocate, Vol. 9, No. 6, p. 19 (Nov.-Dec. 1977).

8. United States v. McMahan, 6 USCMA 709, 21 CMR 231 (1956).

9. United States v. Oakley, 25 CMR 624 (ABR 1957).

10. Where a possible conflict of interest arises during trial, the military judge is required to take certain steps to protect the rights of the accused. See United States v. Davis, 3 M.J. 430 (CMA 1977). See also Para. D-2a, App. D., Army Reg. 27-10, Military Justice (C 17, 15 Aug. 1977) which expresses a strong policy against representation of multiple co-accused by a military attorney, barring unusual circumstances.

11. United States v. Broy, 14 USCMA 419, 34 CMR 199 (1964).

12. Id.

favorable matters were introduced on the merits.¹³ After the trial is over, the effective counsel is required to inform the client of his appellate rights, take action on the post-trial review, and present the accused's pleas for clemency to the convening authority, if appropriate. The defense counsel is also charged with familiarizing himself with any grounds for appeal and passing this on to the appellate defense counsel. The attorney-client relationship is maintained until the trial defense counsel is released by the accused or replaced by an appellate defense counsel.¹⁴

The standard for adequate representation is as high in the military as in any of the federal circuits. The Court of Military Appeals has held that a military accused is entitled to more than a competent counsel. He is entitled to a counsel who exercises that competence without omission throughout the trial.¹⁵ In Rivas, the court labeled the assistance of counsel ineffective because of a single lack of objection to rebuttal testimony. The court found no advantage to the silence on defense counsel's part. Other than the obvious instances of inadequate preparation or ignorance of the law, allegations of inadequate representation most often occur because the civilian defense counsel is not aware of, and thus does not take advantage of, favorable military procedures, or because of multiple representation. If a disgruntled client maintains that his trial attorney was inadequate on appeal, the counsel will be contacted by appellate counsel for a full discussion of the matter.¹⁶ If counsel follows the American Bar Association Standards for the Defense Function, as do the current appellate courts for the military justice system, he has little to fear from an adequacy attack and can concentrate his full energies on the defense of his client.¹⁷

13. United States v. Hall, 44 CMR 656 (ACMR 1971).

14. United States v. Palenius, 2 M.J. 86 (CMA 1977). See the separate opinions of Chief Judge Fletcher and Judge Perry in United States v. Jeanbaptiste, 5 M.J. 374, 378 (CMA 1978), both stating that civilian and military defense counsel have similar responsibilities under the Palenius decision.

15. United States v. Rivas, 3 M.J. 282 (CMA 1977)

16. For appellate counsel procedure on raising the issue on inadequacy of trial defense counsel, see Raising The Adequacy Of Trial Defense Counsel, The Advocate, Vol. 9. No. 3. p.1 (May-June 1977).

17. See e.g. United States v. Davis, supra; United States v. Rivas, supra; United States v. Palenius, supra; and United States v. Crooks, 4 M.J. 563 (ACMR 1977).

FROM THE OTHER SIDE OF THE BENCH:
A MILITARY JUDGE'S PERSPECTIVE OF NEW
MILITARY COUNSEL AND CIVILIAN DEFENSE COUNSEL

Lieutenant Colonel Nancy A. Hunter, JAGC*

Probably the most important thing to keep in mind is that a court-martial is not that much different from the usual misdemeanor or felony case tried downtown last week. We do have a few offenses unknown to any civilian criminal code; the accused, witnesses, and jurors will be dressed the same, and people are called by rank instead of "Mr. or Miss," but general trial tactics remain the same. The following are some short discussions of possible tactics/techniques which I have observed used successfully by new attorneys, both military and civilian, appearing in courts-martial.

Many military judicial circuits will have local rules of court in addition to those promulgated for service-wide application¹ covering such matters as when and how motions are to be filed, docketing procedures, etc. You will find that motions practice is somewhat more informal in the military than it is in most civilian courts. Only the unusual matter is formally briefed; on run-of-the-mill motions you need only give written notice to the judge and opposing counsel of the nature of the motion(s) and indicate whether evidence and/or argument will be presented.² The Military Judges'

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1. Appendix H, Military Judges' Guide, DA Pam 27-9 (May 1969) [hereinafter cited as Military Judges' Guide]. See also United States v. King and Wright, 49 CMR 297 (ACMR 1974) concerning limitations on enforcement of rules 33 and 34 thereof.

2. A sample motions checklist may be found at Appendix H, Military Judges' Guide.

Guide³ is used as the basic source of instructions. There is no requirement that you submit written instructions for the judge on all matters raised in the course of trial, if such instructions are already contained in the Guide. However, if your review of the standard instructions leads you to believe it is not appropriate for the evidence you anticipate will be presented, you can submit special instructions,⁴ and/or suggested tailoring for the standard instruction.⁴ The better practice is to submit these in writing, preferably prior to, or early in the trial, if possible. The chances of having the proposed instruction accepted are materially enhanced if your reasons for believing your instruction more accurately reflects the law are explained in the request. There is no requirement that citations be limited to federal and/or military appellate decisions; but if state cases are cited, a brief resume of the case will be much appreciated. If civilian counsel does not have a Military Judges' Guide, it is strongly suggested that a copy be borrowed from military co-counsel, even if she/he will be excused from attendance at the trial by your client. Also, since the Guide is somewhat dated, insure that you have an updated copy.⁵ If do not have the changes, obtain them from the military judge serving the installation, the Criminal Law Division, Office of The Judge Advocate General, or the Chief Trial Judge of the applicable armed force.

3. Both the Army (DA Pam 27-9) and Air Force (AF Manual 111-2) publish Military Judges' Guides. The former is used by both the Army and Navy, as well as by some Air Force Judges. Copies of the Army Pamphlet can be obtained by writing HQDA (DAAG-PAG-W), Forrestal Bldg., Room GA007, ATTN: Miss Lacey, Wash., D.C. 20314. The cost of reproduction is 1¢ per page plus a \$2.00 processing fee.

4. If you are involved in a case where the charged offense(s) contain many lesser-included offenses, a request that the prosecutor prepare a tailored findings worksheet for use by the court members will normally inure to your benefit and make argument easier. See Appendix B, Military Judges' Guide, for a sample of the standard findings worksheet. A sample sentence worksheet is contained at Appendix C.

5. E.g., Chapter 6 of the Army Guide (instructions on self defense) was updated by Military Judge Memo 89, dated 27 August 73; Chapter 7, dealing with mental responsibility, has been materially updated in Trial Judge Memo 5-77, dated 30 August 77, as a result of the adoption of the ALI standards on sanity in *United States v. Frederick*, 3 M.J. 230 (CMA 1977).

Terms of Address. Contrary to most civilian jurisdictions, a military defendant is referred to as the "accused." Jurors are referred to as "members" and/or "the court", the senior member acting as the "president" instead of the "foreperson." All parties are addressed by name and rank. If civilian counsel is unfamiliar with military ranks and grades, it is suggested that she/he obtain a list of them from the military co-counsel. Military personnel have worked for their ranks, and appreciate being addressed correctly; in addition, it makes one appear better prepared. The military judge is addressed the same as a civilian judge--i.e., Your Honor, or Judge _____. The prosecutor is referred to as the "Trial Counsel;" civilian defense counsel and co-counsel are referred to as "Defense Counsel."

Pretrial Matters. In cases other than general courts-martial, you will probably be pleasantly surprised at the extent of the pretrial discovery. Although the Jencks Act⁶ has been held applicable to courts-martial,⁷ military trial counsel, investigators, and witnesses are usually more than willing to reveal information to defense counsel prior to trial. The best general advice I can give in the area of pretrial discovery is to ask. A general motion for continuing discovery, filed early in the case, is also suggested. If a problem arises, further assistance can be sought from the convening authority and/or the military judge.

Insofar as trial docketing is concerned, you will find as a general matter that offenses are tried much sooner after charges are preferred than is normally true in the civilian sector. This is particularly true if your client is in pretrial confinement, since the military is required to bring such an accused to trial within 90 days after confinement, absent a very limited range of circumstances.⁸ Most trial counsel

6. 18 U.S.C. §3500.

7. See, e.g., United States v. Heinel, 9 USCMA 259, 26 CMR 39 (1958).

8. Compare United States v. Burton, 21 USCMA 112, 44 CMR 166 (1971) with United States v. Cole, 3 M.J. 220 (CMA 1977).

will discuss with you possible trial dates before they formally docket the case for trial; however, they are normally looking for a mutually agreeable date within ten to twenty days of the conversation. Once a case is docketed, you will find most judges reluctant to grant further delays without good reason--e.g., a material witness who will be unavoidably absent. Also, although an accused can elect to obtain civilian counsel as late as the date of arraignment and thus normally obtain a forced continuance for a reasonable period to retain civilian counsel, such a decision should be made as soon as possible, to afford maximum preparation time. If civilian counsel is caught in the "waiting for his payday and my retainer" bind, but expects to represent the accused, it is suggested that he let the military co-counsel know of his predicament and work with him and the trial counsel in setting a trial date which will be acceptable to both sides whether or not civilian counsel is actually retained by the accused.

Military co-counsel. As other articles in this issue explore this special relationship, it will not be addressed here. Suffice it to say that there are many important benefits to be derived from the accused's retaining the military co-counsel on the case. If military co-counsel is retained for the trial, it is very important that the defense present a unified appearance. If co-counsel is retained, check with the judge before trial to see whether she/he will restrict examination and objections to the testimony of a witness to only one counsel (the usual procedure), or allow both counsel to object. Many of the civilian attorneys who have appeared in my court made a point of consulting with military counsel during the trial, if for no other purpose than to suggest to the judge and/or court that their accused was not "anti-military."

Trial Tactics. Where civilian counsel is retained, one good question I've heard asked on voir dire is whether any court member would be in any way offended by the fact that the accused had elected to be represented by civilian counsel rather than solely by a military lawyer. Also, many civilian attorneys will apologize early on for possibly misaddressing the jury and/or witnesses. However, as with ice cream, too much of the "I'm just a poor old country civilian lawyer who wandered in here" attitude can become nauseating. Or, as a fellow judge put it, discussing poor presentation of motions and lack of familiarity with procedural rules, the "greenhorn syndrome," is not effective for long.

To a much greater extent than in many civilian courts, compliance with the standards of conduct⁹ will be required. Civilian counsel may be suprised at the high degree of adherence to the ethical standards by military counsel as well as their knowledge of ethical proscriptions. I suggest consulting with knowledgeable military co-counsel to determine the judge's predilictions and degree of enforcement of the rules of court and standards. For example, are you required to address the court and examine witnesses standing, or may counsel remain seated while addressing their person? Judges who tell you they "can't hear you, counsel" are normally not hard of hearing--they're trying to tactfully tell you to stand. Use of the personal pronoun in opening statements and arguments will cause many military judges to twitch spasmodically, since standard 7.8, The Defense Function, is rigorously enforced.

In regard to trial procedure, going directly into the sentencing determination after a finding of guilty is returned is probably one of the things differing most from civilian practice of sentencing hearings held a few days or weeks after findings, as is the fact that, unless a bench trial has been requested, a jury will be determining punishment. Since the accused is hopefully appearing before his/her first court-martial, this is a matter he/she should be warned about beforehand. All judges will appreciate defense counsel having verified with your client the personal information on page one of the charge sheet (DD Form 458) before the trial counsel reads it aloud in court at the beginning of the sentencing portion of the trial. This includes date of birth, pay grade and basic pay, and any restriction of liberty prior to trial. Also, if the trial counsel intends to introduce the personnel records of the accused (a standard procedure), defense counsel should have gone over it prior to trial to insure it is accurate and complete, particularly those sections dealing with awards and decorations, and type of prior discharge, if any. If records of nonjudicial punishment¹⁰ and/or prior convictions by courts-martial will be

9. See, e.g., ABA Standards, The Prosecution Function (1971); The Defense Function (1971); The Function of the Trial Judge (1972); Fair Trial and Free Press (1968).

10. Referred to as Article 15s in the Army and Air Force; NJP or "Captain's Mast" in the Navy.

introduced, they should be carefully scrutinized to insure there are no objections to admissibility.¹¹

Trial tactics in the military probably do not vary much from civilian practice. The approach with which you are comfortable is the one to follow. In a court-martial, counsel are normally dealing with what would be considered a "blue-ribbon" panel in civilian communities, since the jurors are generally college educated, with at least one year military service. To discuss whether it is advantageous to an enlisted client to request enlisted membership on the panel or remain with an all-officer panel, or request bench trial is to delve into an area in which there are as many opinions as there are lawyers. Whatever the decision, I recommend asking the judge to handle challenges for cause and peremptory challenges in an out-of-court hearing or at a side-bar, so as to minimize any possible antagonizing of court members. Most judges briefly instruct the court panel before voir dire by prosecution and defense. As in any trial, counsel going over the same questions in voir dire probably irritates the jury panel.¹²

Contrary to most civilian jurisdictions, any acts of uncharged misconduct which arise in the course of trial will require that the military judge instruct concerning the limited purpose for which such evidence is admitted, regardless of your request that no such instruction be given.¹³ Objections to such evidence should be made at the time the prosecution seeks to admit it, and your examination of witnesses should be carefully tailored to minimize the possibility of such evidence being placed before the fact finders. If such information is unavoidably presented, be sure to note it at the time for mention during the instructions discussion.

11. See, in particular, *United States v. Booker*, 3 M.J. 443 (CMA 1977), republished, 5 M.J. 238, opinion on reconsideration 5 M.J. 246 (CMA 1978).

12. See Trecker and Rosenberg, 10 The Advocate 250 (1978).

13. *United States v. Grunden*, 2 M.J. 116 (CMA 1977). The Judge Advocate General of the Army has certified a case to the Court of Military Appeals wherein this ruling is being re-examined. *United States v. Fowler*, Docket No. 35,263, certificate filed 30 November 1977. See also *United States v. James*, 5 M.J. 382 (CMA 1978) as to when an instruction on other acts of misconduct is not required.

As in any trial, a motion for a directed verdict is best made out of the jury panel's hearing, since a denial of the motion does not help the defense case. Most military judges are akin to their civilian counterparts in requesting that only the grounds for an objection be stated, unless argument is requested from the bench.

While there are some uniquely military rules and offenses, most trial techniques that have been developed in civilian practice can be used in military trials. There is, therefore, no reason to be apprehensive about appearing in a court-martial. As in civilian court appearances, courtesy and consideration toward witnesses and fact-finders, solid preparation, and clarity of presentation are the keystones to successful representation of your military client.

Welcome to our court, counselor.

* * * * *

SAMPLE INSTRUCTION QUESTIONED

It has been pointed out to us that the sample instruction in 10 The Advocate 200 (1978), dealing with illegal pretrial confinement, does not take into consideration the case of United States v. Larner, 1 M.J. 371 (CMA 1976). In Larner, the Court of Military Appeals held that the proper corrective action for illegal pretrial confinement served by an accused was to adjudge an otherwise appropriate sentence, and then judicially order an administrative "credit" for the number of days served illegally in pretrial confinement. Thus, under Larner, where there has been illegal pretrial confinement the military judge, or appellate authorities, will order the administrative credit.

Notwithstanding the administrative credit requirement of Larner, we believe that the military judge continues to have the duty to tailor his instructions on sentence to include matters in extenuation and mitigation, United States v. Wheeler, 17 USCMA 274, 38 CMR 72 (1967) and that illegal pretrial confinement is a proper factor to be before the court in mitigation requiring appropriate instructions thereon. See United States v. Kimball, 50 CMR 337 (ACMR 1975). For example, as suggested in the sample instruction, illegal pretrial confinement can be considered by the sentencing body in determining whether a punitive discharge is appropriate.

Our thanks to Bruce E. Kasold, a FLEP captain serving at Fort Rucker, Alabama, for bringing this matter to our attention. We encourage critical analysis of our articles and appreciate your comments on them.

DEVELOPING AN EFFECTIVE RELATIONSHIP
BETWEEN DEFENSE COUNSEL AND
COURT MEMBERS DURING VOIR DIRE EXAMINATION

Steven J. Trecker*
and
Steven Jon Rosenberg, Esqs.**

During voir dire examination the task of military and civilian defense counsel practicing in the military justice system is a difficult though crucial one. In a trial by court-martial, as with any criminal justice system, voir dire is the point where the advocates and the jurors first meet face-to-face, thereby actualizing the significance and finality of the dispute at stake. At this juncture, it is incumbent upon counsel to establish a favorable rapport with the jurors as quickly as possible and to maintain and enhance this rapport throughout trial. The magnitude of the task is often increased when the setting involves defense counsel and military court members, because they frequently bring to the courtroom inbred suspicions of each other. Further, most experienced practitioners in military forums would probably agree that a significant portion of military jurors have a greater distrust for civilian defense counsel than for his uniformed counterpart. The immediate challenge facing the defense attorney is one of overcoming or neutralizing this distrust to whatever extent it exists. The larger task is to establish a favorable relationship, wherein the court-members view the defense attorney not as an intruder, but as a reasonable and forthright advocate who is not only doing his job but is concerned that justice is done.

The intent of this article is to discuss the military and civilian defense counsel's role during the voir dire and

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challenges stages of a court-martial. Many of the observations and comments proffered will undoubtedly be applicable to both military and civilian advocates. In addition, many of the principles espoused should be followed by counsel in their pretrial and post-trial relationships with the military personnel they encounter in the military justice system.

The following are some important defense principles which are recommended for application by defense counsel in conducting voir dire and making challenges in courts-martial:

1. Initially, counsel should make an early request for a copy of the convening order and should press trial counsel for completed questionnaires from all court members.¹ Armed with general information about each member provided by the questionnaires, counsel would be well advised to develop a good working knowledge of the military occupational specialties of every prospective member. This will enable counsel to communicate more effectively with each member on that member's level and preferably in the jargon used in his or her field. Counsel's ability to voir dire a member about his specific duties, his role in maintaining discipline within his command, etc., may result in enhancing that member's respect for counsel and, concomitantly, lessening any feelings the member may have that counsel is an "outsider/intruder" into the military system. Additionally, by way of general preparation counsel should begin formulating a strategy concerning the type of juror he desires for the particular case to be tried. If he feels enlisted personnel would be helpful they must be requested in writing. If there are to be enlisted personnel on the court, counsel should consider how this will affect his approach to voir dire examination.

1. Most commands request that court members complete questionnaires with certain basic information concerning age, rank, education, marital status, duty assignment and military occupational specialties (MOS). Even where such questionnaires are not provided by the government as a matter of course, a motion to discover this information should be made prior to trial to determine whether the criteria of Article 25, UCMJ, regarding selection of court members, have been complied with. See para. 4, Manual for Courts-Martial, United States, 1969 (Revised edition). See also United States v. Crawford, 15 USCMA 31, 35 CMR 3 (1964); United States v. Greene, 20 USCMA 232, 43 CMR 72 (1970).

2. Try to obtain more specific background concerning each member. This can often be done at an early stage in the trial preparation. For example, when interviewing witnesses to the offense or character witnesses for the accused, if they are attached to the same command as the court member, ask the witness questions about the member's attitudes toward the offense involved, discipline within the command, or whether the court member tends to give minimum range or maximum-range punishments when imposing same under Article 15, UCMJ. Counsel may also want to ask prospective character witnesses and other individuals he encounters in the pretrial phase their own opinions regarding the offense or defenses to be raised. This will serve to give him a better perspective on how the particular offense or defense is viewed by military personnel in general.

3. During an Article 39(a), UCMJ, session prior to commencing voir dire, request the opportunity to conduct part of the voir dire of each member individually and out of the presence of other members. Individual voir dire will increase the prospects for obtaining candid responses from each member and avoid the possibility that one member will merely adopt another member's answer as his own. It will also minimize any negative carryover effects to other court members when any hostility, bias or other basis of challenge surfaces during voir dire of a particular member. However, the advantages of group voir dire should not be overlooked. Group voir dire can be a subtle but effective educational tool. Also, the presence of other court members may, in some cases, tend to encourage candor among all of the members. Usually, a combination of group and individual voir dire will be most effective.

4. A similar request should be made to allow counsel to make his challenges at an Article 39(a) session out of the presence of all members. Utilization of this procedure prevents the court members who remain on the jury from learning which side exercised the challenge. This will minimize any resentment caused by the implication that counsel believes one or more members cannot be fair and impartial to his client. The potential for such resentment should not be overlooked. Due to the fact that they are from the same command and frequently have a great deal in common, members of a court-martial are often better acquainted with each other than are their counterparts serving on most civilian

juries. Consequently, there is an enhanced risk that the remaining members will have a significantly different opinion of the fairness and impartiality of the challenged members than that held by counsel. These factors create a situation ripe for resentment toward counsel and in some instances may serve to engender or aggravate a feeling that counsel (especially a civilian) is an intruder, "attacking" the military system. This potential problem can be defused by the simple expedient of making challenges out of the presence of the members after completion of all voir dire.

5. Similarly, during voir dire, counsel should request an Article 39(a), UCMJ, session whenever an issue arises as to the propriety of a given question or series of questions. A debate among trial counsel, defense counsel and the judge about the reasons for and legality of such voir dire will often only serve to tip off the members as to the "proper" response if such a debate occurs in their presence.

6. During voir dire, counsel should make a concerted effort to portray himself as a reasonable and fair person. One method of accomplishing this is to obtain commitments from the court members that they will be able to be fair not only to the defense, but to the government as well. For example, when inquiring as to a member's tendency to attach greater credence to a prosecution witness due to the witness' status, e.g., military policeman, counsel might indicate that the member also should not attach greater credence to a defense witness who is a commissioned officer, assuming the situation is appropriate.

7. In general, during his voir dire questions, counsel should seek ways to relate to each juror on some common ground. For instance, if counsel is married and has children, which is often the case with the court members, the following type of question might be considered:

Captain Jones, you have indicated that you have two children. I also have two children, and to be honest, if this were a case involving the sale of drugs to a child, I would find it extremely difficult to be objective. Are any of the crimes alleged here the type of offenses about which you would have difficulty remaining

objective, either because of your concern for your children or due to any other factor in your background?

Besides establishing a common ground, this type of question has the added benefit of making the point that we all have certain prejudices and biases. The writers have found that it is often more effective to approach such sensitive areas by illustrating a particular bias or prejudice of counsel, or through some widely-known current event, than by way of directly challenging a member with a question that carries an insinuation that counsel is concerned about the member's ability to remain unbiased. More aggressive individual voir dire in this area can be undertaken if the need arises due to responses given to the type of question illustrated above.

8. Always remain tactful when questioning members in the key areas of their attitudes toward sentencing, their tendency to attach greater credence to a witness because of the witness' rank or status, and their ability to disregard rank in jury deliberations. For example, when propounding questions in the latter area, establish with a court member the fact that his military life has been governed by rank on a daily basis throughout his career. Proceed to point out that if he is a senior officer he may seek advice from his subordinates, but when a difference of opinion arises between the subordinate and himself, he is the final authority in making decisions. Then, attempt to get the member to agree with the proposition that any human being under such circumstances may find it difficult to completely set aside this pattern of experience if a disagreement about the evidence arose between himself and a lower ranking individual during court deliberations. Appropriate follow-up questions may be necessary. Furthermore, in this area, as with all areas, it should be obvious that counsel should avoid arguing with any member.

9. If a response of a particular member discloses a ground for challenge, counsel should object on the record to any attempt by trial counsel or the military judge to rehabilitate the member. In the case of United States v. Cagle, NCM 76 0466 (NCMR 17 January 1977), the trial counsel and the military judge attempted such a rehabilitation. The court indicated that the judge should excuse the member when

alerted to the latter's potential incompetence and impliedly rejected the rehabilitation efforts.

10. A strong argument should be made that the permissible scope of voir dire in military courts-martial should be much more extensive than allowed in civilian forums due to the potential for abuse inherent in the entire jury selection process in the military. The reader's attention is invited to an excellent discussion of this issue in Holdaway, Voir Dire -- A Neglected Tool of Advocacy, 40 Mil. L. Rev. 1 (1968). Additionally, language from the following cases can be cited for the principle that extensive voir dire should be allowed and, when there is a doubt as to the propriety of any question, it is better to allow it to be answered: United States v. Parker, 6 USCMA 274, 19 CMR 400,405 (1955); United States v. Kelly, 42 CMR 817,819-820 (ACMR 1970); and Aldridge v. United States, 283 U.S. 308,314, 51 S.Ct. 470, 75 L.Ed. 1054 (1931). See also Ginger, What Can Be Done to Minimize Racism in Jury Trials, 20 J. Pub. L. 371 (1971).

11. In the event the accused is convicted and sentenced, counsel should aggressively pursue post-trial conferences with each court member individually. The purpose of this procedure should be to seek clemency recommendations for the client. However, these conferences also help to give counsel a better understanding of the prevailing attitudes among jurors of the same rank and general background, which in turn will be helpful in the future. See ABA Code of Professional Responsibility, DR 7-108, EC 7-29. Finally, the responses of the member during an informal clemency conference after trial may be more open and candid than during voir dire. Although, of course, the purpose of the conference is not to correct an insufficient voir dire examination, it is possible that this session could reveal a disqualifying prejudice or bias, which simply did not come out at trial. In turn, this information may provide an adequate basis for an attack upon the verdict upon appeal.

In summation, all the techniques discussed above should be employed with the goal in mind of cultivating an attitude on the part of the court members that defense counsel is competent, fair and reasonable. An attorney who is able to accomplish this goal will undoubtedly earn the respect of the court members. It goes without saying that this, in the end, will inure to the benefit of the attorney's client.

THE RELATIONSHIP OF CIVILIAN AND MILITARY
APPELLATE DEFENSE COUNSEL

Aubrey M. Daniels, III, Esq.*
and
Captain William B. Ramsey, JAGC**

A Civilian Counsel's Viewpoint

When a convicted serviceman exercises his right to retain civilian counsel to represent him in the appeal of his conviction, it is extremely important that the role of his military counsel be clarified and an efficient working relationship established to insure that the client receives the best possible representation.¹ The nature of the relationship between counsel will naturally vary depending upon the experience and work habits of civilian counsel. Under no circumstances should military counsel assume that because the serviceman has elected to retain civilian counsel that he is relieved of all responsibility for the appeal or that his

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1. If such a relationship cannot be established because of personality conflicts or difficulties, counsel should bear in mind that DR 2-110 of the Code of Professional Responsibility of the American Bar Association provides that one basis for permissive withdrawal is where counsel's "inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal."

services are not needed. Likewise, under no circumstances should civilian counsel ignore the assistance that can be provided by his military counterpart. It would be a foolish attorney who did not seek the advice and counsel of his military counterpart on both procedural and substantive matters, particularly if the civilian counsel is inexperienced in military jurisprudence.

At every stage of the appellate process there is a role to be played by military counsel. The first step in the appellate process should be a review of the record for any trial errors. Next, the client should be interviewed to obtain his view of the trial and his reasons for believing he did not receive a fair trial. This interview is extremely important because it may disclose matters outside the record which could provide the basis for an appeal. After these steps have been taken, both counsel should discuss and decide what issue, if any, should be presented. If they determine there are issues to be presented, the next step in the process is the preparation of the brief. Both military and civilian counsel have an obligation to prepare the best possible brief they can to obtain relief for their client. Obviously, brief preparation and styles vary. Some civilian defense counsel may look to military counsel to prepare the initial draft of the brief, while others may assume full responsibility for drafting. In the former situation, military counsel is given an opportunity in drafting the brief to bring to bear all of his experience and expertise in military law. In the latter situation, where civilian counsel drafts the brief, the input of military counsel is also important. Military counsel should bring to the attention of civilian counsel any recent military decisions which are pertinent to the issues being presented, and when asked, should assist in any needed legal research. Once the brief has been prepared, military counsel should then review the brief before it is filed and offer any suggestions for its improvement. Military counsel should always bear in mind that when he signs the brief he adopts it as his own.

The final step in the process is the oral argument. In almost all cases oral argument will be made by civilian counsel. However, in some complex cases presenting numerous issues, depending upon the desires of the client, military counsel might be given the responsibility for arguing one or

more issues. This will be a rare case since as a general rule the splitting of arguments is not considered a wise appellate tactic.

Even though the oral argument is to be made by civilian counsel, military counsel should still play a role in the preparation for the argument. Military counsel should not be bashful about offering any suggestions he may have for the successful presentation of the oral argument, and civilian counsel should solicit his views. This is particularly important where civilian counsel has not argued before the Court of Military Review before or, having argued before the Court of Military Review, has not argued before the particular panel who will decide the case. Civilian counsel should ask and military counsel should inform of his past experiences or the experiences of others in his office in oral argument. It is always important for counsel making an oral argument to know as much as he can about the background of the members of the Court, their positions on the issues being presented, and their attitude and approach toward counsel at oral argument. Knowing whether the judges will be well prepared for the argument by having studied the papers, what their judicial temperament is, and whether they are inquisitive or let counsel make an uninterrupted presentation, are helpful in preparing and making oral argument.

By establishing the kind of working relationship herein described, the client will be assured of receiving the best possible representation and the likelihood of a successful appeal will be maximized.

A Military Counsel's Viewpoint

When a convicted serviceman exercises his right to retain civilian counsel to represent him in the appeal of his conviction, it is extremely important that the role of this civilian counsel be clarified and an efficient working relationship be established. The joint work of military and civilian counsel on the appeal of a court-martial case can be a learning experience for both individuals. However, both counsel should be prepared to encounter difficulties that at times will appear to be insoluble. These difficulties seem to stem primarily from two areas. First, civilian counsel often do not understand the sometimes radical differences from civilian appeals that may be involved in a military appeal.

Second, civilian counsel may not understand the sometimes special rules that may be applicable to uniquely military offenses.

Military counsel must, if possible, endeavor to meet personally with the civilian attorney at the earliest possible date. This initial meeting should not involve an in-depth discussion of the issues that may be involved on the appeal. Personalities, procedural rules, and the powers of the Courts of Military Review and Military Appeals should be the primary topics of discussion. Military counsel must first attempt to establish a working relationship with his counterpart and seek to understand the division of labor desired by the civilian counsel. Further, he should be prepared in the initial meeting to explain at length the rules of both the Courts of Military Review and Military Appeals. Time requirements for filing briefs and the procedure for obtaining enlargements and length of enlargements are the primary concerns. Contrary to the usual appellate practice in many civilian jurisdictions, the Courts of Military Review and Military Appeals do not grant multiple enlargements for extended periods of time. A good suggestion would be to provide the civilian attorney with a copy of the Rules of Practice and Procedure. The most important topic at the initial meeting should be the discussion of the powers of the respective Courts. Civilian attorneys are often unaware of the unique fact finding and sentence reduction powers of the Court of Military Review. Counsel must outline these powers for the civilian attorney and, in particular, those procedures that are vital to the filing of affidavits and other defense appellate exhibits.

Special care should be taken in subsequent meetings with the civilian attorney if a uniquely military offense or situation is involved in the pending case. Neither counsel should assume that the other's reading of the record of trial has identified all issues for appeal. They should themselves read the record as if another attorney were not involved, primarily with an eye to identifying those unique military situations. Military counsel will in rare cases find themselves having to "explain" the record to a civilian attorney. The concepts of pretrial advice, post-trial review, Article 32 investigations, Burton, Dunlap and Goode speedy disposition rules, and other uniquely military concepts may not be readily comprehended by an attorney who has never before been connected

with the military. Never assume that the civilian attorney knows the military rules.

Often the civilian counsel will assume the sole responsibility for writing the brief and arguing the case. When this happens military counsel will often find themselves tending to take a back seat and only performing those tasks that may be asked of them by the civilian attorney. An aggressive effort must be made, however, to ensure that the civilian attorney receives the guidance that is in the sole possession of the military attorney.

All of the aforementioned guidelines should be applicable regardless of the degree of participation desired by civilian counsel in the case. Advising the civilian counsel of possible issues, particularly military ones, and military appellate procedure must be done to assure that the client receives the best possible representation.

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THE ECSTASY AND THE AGONY --
COMA GRANTS, THEN VACATES, ON BALLEW ERROR

To the elation of the atttorneys at DAD, the Court of Military Appeals granted an accused's petition on whether the Supreme Court's holding of Ballew v. Georgia, 435 U.S. 223, 98 S. Ct. 1029, 55 L.Ed.2d 234 (1978), is applicable to trials by court-martial. United States v. Lamela, pet. granted, No. 36,000 (CMA 25 Sept 1978), Judge Cook dissenting. Then, eleven days later, the Court vacated its grant, with Judge Perry dissenting. Appellate defense counsel have since moved for reconsideration of the vacation. Until this issue is finally resolved, trial defense counsel should continue to consider challenging courts-martial consisting of less than six members. See Schafer, The Military and the Six Member Court -- An Initial Look at Ballew, 10 The Advocate 67 (1978).

CASE NOTES

FEDERAL DECISIONS

DURESS -- ESCAPE FROM CUSTODY

United States v. Bailey, 23 Crim. L. Rptr. 2373 (D.C. Cir. 1978)

Agreeing with the Seventh Circuit Court of Appeals' analysis in United States v. Nix, 501 F.2d 516 (7th Cir. 1974), the Court of Appeals for the District of Columbia has held that an escape under 18 U.S.C. §751(a) occurs when a defendant: (1) leaves custody, (2) voluntarily, (3) without permission, and (4) with an intent to "avoid confinement." The intent requirement is specific, not general. Thus, when an accused escapes not to avoid confinement, but to avoid "conditions of non-confinement" (e.g., assaults and inadequate health care), the Court reasoned, he does not entertain this higher level of intent. Since specific intent and voluntariness are essential elements of the offense in question, unusual conditions of confinement, such as beatings, threats, and homosexual attacks might negate them. Accordingly, the Court found error in the trial judge's refusal to instruct the jury on the defense of duress, as formulated by the defendant's evidence of lack of adequate medical care, assaults by prison officials and other inmates, etc.

QUESTIONS PRESENTED: Is the defense of duress applicable to Article 86 offenses? Is the distinction between specific and general intent essential to an application of the defense in an AWOL case?

INVESTIGATORY STOPS

Canal Zone v. Bender, 23 Crim. L. Rptr. 2359 (5th Cir. 1978)

During an investigatory stop, two policemen ordered the accused to leave their parked car. Upon doing so, one of the arresting policemen placed himself between the car and the defendants, while the other put his head inside the car to investigate. Smelling marijuana, he reached under the seat and found the suspected substance.

The Fifth Circuit Court of Appeals, rejecting the government's contention that the officers were authorized to make a limited search for weapons under Terry v. Ohio, 392 U.S. 1 (1968), found the search of the automobile illegal. The Court stressed that the scope of a Terry search must be limited to its purpose of protecting the policeman who finds himself in a dangerous situation. Here, there was no danger, however, because the occupants, who left the vehicle pursuant to the officers' order, were physically separated from the car by the position of one of the officers. Any weapon which might have been hidden therein was beyond the reach of both suspects and, therefore, could not present a danger to the officers while they conducted their investigation.

JUDICIAL NOTICE

United States v. Jones, 23 Cr. L. 2456 (6th Cir. 1978)

The Sixth Circuit has ruled that Federal Rule of Evidence 201(g) does not allow judicial notice of a fact for the first time on appeal. Its ruling holds against any contention to the contrary based on Rule 201(f). In a criminal case, the judge shall instruct the jury that it may, but is not required, to accept a fact judicially noticed. It is the jury's duty to pass on facts judicially noticed and this may not be relegated to an appellate court.

QUESTION PRESENTED: In light of the unique fact-finding powers conferred on it by Congress (Article 66(c), UCMJ), may a Court of Military Review judicially notice matters which were not so noticed by the trial court?

COURT OF MILITARY APPEALS DECISIONS

EQUAL PROTECTION -- ARMY'S CHARGING OF HEROIN AND MARIJUANA UNDER ART. 134 IS O.K.

United States v. Dillard, 5 M.J. 355 (CMA 1978) (ADC: CPT Ramsey)

The Court of Military Appeals has held that the Army is properly charging marijuana and heroin offenses under Article

134, which carries a five and ten year maximum punishment, respectively. The Court rejected the arguments of appellate defense counsel in two respects. First, it refused to give decisional import to footnote 2 in United States v. Jackson, 3 M.J. 101,102, n.2 (CMA 1977), thus rejecting the argument that the January 1977 change to AR 600-50, which directs prosecution of marijuana and heroin offenses under Article 134, does not remedy the problems of "selective" prosecution condemned in its earlier decision of United States v. Courtney, 1 M.J. 438 (CMA 1976). Second, the Court rejected the argument that the appellant was being denied equal protection of the laws. The Court held that no equal protection violation arises simply because accused in the Navy are being prosecuted for marijuana and heroin offenses under Article 92, pursuant to regulations enacted for that particular service.

COURT OF MILITARY REVIEW DECISIONS

GOODE REVIEWS -- DUNLAP ISSUE

United States v. Tucker, SPCM 12845 (ACMR 30 August 1978) (unpub.) No. 36,518, certification filed 19 Sept 1978 (ADC: CPT Schafer)

The United States Army Court of Military Review dismissed all charges and specifications since 91 days passed between sentence and action. Dunlap v. Convening Authority, 23 USCMA 135, 48 CMR 751 (1974).

On the eighty-fourth day after trial, a copy of the post-trial review was served on the defense counsel. United States v. Goode, 1 M.J. 3 (CMA 1975). Defense counsel agreed to submit his rebuttal within five days and that any requested extension of time would be submitted in writing. Six days later, he submitted his rebuttal. The record did not reflect any request for or grant of an extension of time. On the ninety-first day, action was taken. The Army Court held that there was no reason advanced by the government why action could not have been taken before the ninety-first day and reversed, per Dunlap.

NOTE: In the case of United States v. Goode, supra, at 6, the Court of Military Appeals explained that failure to

reply within five days of service of the post-trial review would normally be deemed a waiver of any errors in the review. The Army Court apparently takes the position that once the five day period has passed, the government has a duty to apply the waiver doctrine, absent indication of a granted extension of time.

BOOKER AND ARTICLE 31

United States v. Ballard, SPCM 13187 (ACMR 4 Aug. 1978) (unpub.)
(ADC: MAJ Vallecillo)

During the presentencing portion of trial, five records of nonjudicial punishment were introduced into evidence without objection. Notwithstanding the defense failure to object, trial counsel asked the military judge to conduct an inquiry to establish that the accused had consulted with counsel and in fact validly waived his right to trial before accepting the nonjudicial proceedings. Although the Army Court of Military Review found that the records of nonjudicial punishment, on their face, established a valid waiver, they adhered to their earlier ruling in United States v. Gordon, 5 M.J. 653 (ACMR 1978) that the questioning of an accused for the purpose of obtaining evidence to increase punishment, without a warning concerning his right to remain silent, was impermissible.

STATE COURT DECISIONS

VOIR DIRE

Commonwealth v. Christian, 23 Crim. L. Rptr. 2431 (Pa. Sup. Ct. 1978)

A black accused was convicted of raping and murdering a white woman. During voir dire, the trial judge limited questioning regarding racial prejudice to the question: "Have you had any dealings or experiences with Negro persons that might make it difficult for you to sit in impartial judgment on this case?" The following questions were disallowed: "This case involves a rape-murder, the defendant in the case is black, do you feel that blacks have sexual drives that

differ from whites?" "There may be some evidence that . . . the defendant . . . evidenced affection for a white girl. Do you believe there is anything wrong with a black man showing affection to a white woman?" "Do you feel that anyone so evidencing affection would be more likely to commit a crime than anyone else?"

In reversing the conviction, the Pennsylvania Supreme Court held that the only question which the trial judge allowed was too general in that it dealt strictly with personal experiences and did not sufficiently elicit stereotyped feelings. Although the struck questions were too suggestive of ultimate facts or contained irrelevant material, they should not have been struck in toto. Instead, the trial judge himself should have rephrased the questions, excising the improper material contained therein. The purpose of voir dire, the Court reaffirmed, is to secure a competent and fair jury. Where circumstances suggest that racial prejudice will become a legitimate concern, the potential biases must be exposed. See also Ham v. South Carolina, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973), the lead United States Supreme Court case holding curtailment of voir dire on racial prejudice/bias constitutes reversible error.

PLAIN VIEW -- PROBABLE CAUSE REQUISITE

State v. Beaver, 23 Crim. L. Rptr. 2325 (N.C. Ct. App. 1978)

The North Carolina Court of Appeals has held that an object in plain view may only be seized "when the officer seizing it has probable cause to believe that it constitutes contraband or evidence of a crime." Its ruling stemmed from a situation in which a deputy sheriff, who had no expertise in drug identification, stopped a car that had a broken tail-light. While talking with the driver, the sheriff noticed that a passenger was holding a shot glass between his legs. Observing that the shot glass contained a white powdery substance which he thought was a narcotic residue, the sheriff seized it. The Court determined that the seizure was unconstitutional, concluding that the observation of the glass in and of itself did not rise to a reasonable belief that the white powder substance in it was contraband or evidence of a crime.

Accord: State v. Hoggans, 23 Crim. L. Rptr. 2551 (Ore. Ct. App. 1978)

While maintaining a surveillance of a known drug seller's residence, a deputy sheriff observed the defendant place a television set and a large amount of clothing with price tags attached into the trunk of his car. Knowing that narcotics users often traded stolen property for drugs, the officer stopped the defendant, opened the trunk, and seized the clothing which he later learned had recently been stolen from a nearby retail store.

The Oregon Court of Appeals rejected the government's position that the search of the trunk was justified under the plain view doctrine. The Court explained that, before an official may seize an object in plain view, he "must have probable cause to believe it is seizable, i.e., that it is contraband or evidence of a crime. The plain view doctrine does not authorize seizure of the observed property to simply determine if it is evidence or contraband." Since the deputy had no basis to support a "well warranted suspicion" that the items had been stolen when he first observed them, the Court found the search unreasonable. Moreover, the Court decided that subsequent warrant-authorized searches and arrests, and a statement taken from the defendant, which were based on information derived from the illegal trunk search, were tainted and also illegal.

NOTE: Trial defense counsel should be alert to object to any "plain view" seizure of an object not clearly identifiable as contraband or evidence of a crime. In the following military cases, the "plain view" seizure theories, proposed by the government, were rejected: United States v. Thomas, 16 USCMA 306, 36 CMR 462 (1966) (medicine bottle containing white powder observed in hands of sleeping CQ); United States v. Juarez, 45 CMR 488 (ACMR 1972) (empty plastic vial which the commander thought was of a type that "normally contains heroin"); United States v. Martinez, 41 CMR 467 (ACMR 1969) (MP's observation of brown paper bag in an automobile, contents of which were not visible).

"SIDE-BAR"

or

Points to Ponder

1. Objecting to Baseless Charges at Trial. We have received records of trial in which the Article 32 investigating officers' reports appear to be deficient by failing to supply enough information to the convening authority from which he could conclude that probable cause exists to refer the investigated charges to trial. Recently, a trial defense counsel sought advice from TDS, concerning a case in which the convening authority referred charges even though the investigating officer had recommended that they be dismissed. In all of these situations, the prosecution was able to fill in the gap and obtain sufficient evidence to convict between the time of referral and the time of trial.

During pretrial discovery, if defense counsel learns that the prosecution intends to use at trial a witness who did not testify at the Article 32 investigation or physical evidence that was not admitted therein, he should consider the possibility that, without that witness or evidence, the evidence gained at the investigation was insufficient to base a proper referral. Then, at trial, perhaps he can successfully challenge the referral of the charges itself.

The convening authority is precluded from referring a charge to general court-martial unless the charge is warranted by evidence contained in the Article 32 report of investigation.¹ The quantum of evidence required is not specified in the UCMJ or Manual for Courts-Martial, United States, 1969 (Revised edition), but the Court of Military Appeals has described it as "the degree of proof which would convince a reasonable, prudent person there is probable cause to believe a crime was committed and the accused committed it." United States v. Engle, 1 M.J. 387, 389, n.4 (CMA 1976). This standard,

1. Uniform Code of Military Justice, Article 34, 10 U.S.C. §834 [hereinafter cited as UCMJ].

admittedly a "low" one to meet, appears to be the same one necessary to apprehend or confine a service member.²

In raising the issue in a pretrial motion, defense counsel should request the military judge to apply the above standard to the charges which he alleges are not supported by the pretrial investigation. A military judge is not discharging his judicial responsibilities if he defers to the convening authority a decision on the existence of probable cause to refer the charges to trial, and thereby compels the accused to stand trial on baseless charges.³ Defense counsel should set forth the areas in which the investigation is deficient. The trial judge must make his ruling on the evidence contained in the report. There is no need for the defense to show that the accused will be prejudiced by going to trial on these unsupported charges, for the accused is entitled to enforcement of his pretrial rights without regard to whether such enforcement will benefit him at trial.⁴ If the military judge makes an interlocutory finding that there was no probable cause to bring the offenses in question to trial, the charges must be further investigated or dismissed.⁵

There are several benefits to moving for the dismissal of baseless charges at trial. A successful motion reduces the number of charges for the panel to consider. Even if the prosecution failed to prove the charges, there is concern that members might give harsher sentences because of the number of offenses initially charged. If the government has collected enough evidence by the time of trial, although there was not enough at the Article 32 investigation, this motion will at least allow for a better discovery at the new pretrial investigation. Finally, if the military judge erroneously denies the motion, the issue will be preserved for appeal.

2. United States v. Rozier, 1 M.J. 469 (CMA 1976).

3. See United States v. Chestnut, 2 M.J. 84 (CMA 1976).

4. Chestnut, supra; United States v. Donaldson, 23 USCMA 293, 49 CMR 542 (1975).

5. United States v. Mickle, 9 USCMA 324, 26 CMR 104 (1958).

2. Disparate Sentences by Co-Actors (Con't). Side Bar #3, 10 The Advocate 220 (1978), pointed out the importance of trial defense counsel's noting to the convening authority in his Goode⁶ response the disparate sentence of co-actors. The Army Court of Military Review in United States v. Paige, CM 436398, ___ M.J. ___, (ACMR 29 Sept 1978), added further fuel to this suggestion. The appellant was convicted of rape and sentenced by court members to a bad conduct discharge, confinement at hard labor for five years, total forfeitures, and reduction to Private E-1. The Army Court noted that the co-perpetrators, whose participation far exceeded the appellant's, had been sentenced separately by the appellant's presiding military judge to only bad conduct discharges, nine months confinement, total forfeitures and reduction to Private E-1. The Court stated, "[w]e cannot turn a blind eye to disparities of such gross dimensions and are constrained to consider whether appellant's individual sentence remains appropriate against that backdrop." The Court, concluding that it was not appropriate, reassessed the sentence to a bad conduct discharge, nine months confinement, total forfeitures and reduction to the grade of Private E-1.

3. Stipulating to Chain of Custody. The Defense Appellate Division continues to receive cases where trial defense counsel have stipulated to the chain of custody in drug cases. The Court of Military Appeals in United States v. Nault, 4 M.J. 318,320, n.7 (CMA 1978), suggests that the chain of custody receipt form (DA Form 4137) is inadmissible as it is prepared "principally with a view to prosecution." The Court has granted review in several cases attacking the admissibility of the receipt, e.g., United States v. Franklin, pet. granted 5 M.J. 141 (CMA 1978); United States v. Ferrard, pet. granted 5 M.J. 176 (CMA 1978). In light of Nault, and the pending cases, trial defense counsel should restrict their use of such stipulations to those cases in which they are convinced that the government is prepared to and can prove the chain of custody with all necessary witnesses and the defense can receive some tangible advantage for doing so.

7. See also discussions in 10 The Advocate 49 and 110 (1978).

6. United States v. Goode, 1 M.J. 3 (CMA 1975).

4. Determining the "Officiality" of Informant's Interrogation. The Air Force Court of Military Review has ruled in United States v. Johnstone, 5 M.J. 744 (AFCMR 1978), that where (1) an informant asked a suspect questions which were calculated to and did evoke incriminating responses, and (2) the questions were posed per specific instructions from an OSI agent, the informant's conduct was "official" for purposes of requiring that the suspect be informed of his Article 31, UCMJ, rights. The accused's incriminating responses to the informant's questions, in the absence of proper warnings, were held improperly admitted at trial. The Court went on to state that the improper admission of the accused's statement required reversal of the "infected" finding of guilty without regard to the other evidence of guilt, citing United States v. Kaiser, 19 USCMA 104, 41 CMR 106-7 (1969); United States v. Hall, 1 M.J. 162 (CMA 1975).

The decision provides trial defense counsel with an avenue of attack, when the accused's admissions to an informer are introduced at trial. Counsel should examine the informant as to the existence of specific instructions given by the authorities to him, and whether or not these instructions included specific questions to pose to the accused. If so, the accused and the informant should be questioned as to whether or not the accused's statements to the informant were in response to these questions. Even if the government does not intend to utilize a confession, counsel should explore the possibility that, in any case in which an informant was used, some of the government's evidence might be tainted by illegally-acquired admissions of the accused.

"ON THE RECORD"

or

Quotable Quotes from Actual
Records of Trial Received in DAD

* * * * *

Q: What was it - he was going to kill you if you told?

A: I guess because he hit me and also to scare me, to frighten me, to make me scared of him. It worked. I was frightened to death of him. If y'all was to walk out now, I'd go ape-**** trying to get out.

* * * * *

Q: Mrs. _____, how long have you been married to the accused?

A: What's today? Wednesday? About two weeks and some days.

* * * * *

PRES (reading sentence): Private _____, it is my duty as president of this court to inform you that the court, in closed session and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring, sentences you: To be reduced to the grade of Private E-1; to be confined at hard labor for ten years . . .

ACC: S---.

PRES: . . . to forfeit all pay and allowances; to be dishonorably discharged from the service.

ACC: G-- d---.

MJ: Gentlemen, I will just say that I regret the perhaps understandable reaction of the accused.

* * * * *

MJ (to TC): Let's see - this is now June. CPT _____, you have the option of opening or closing [argument].

