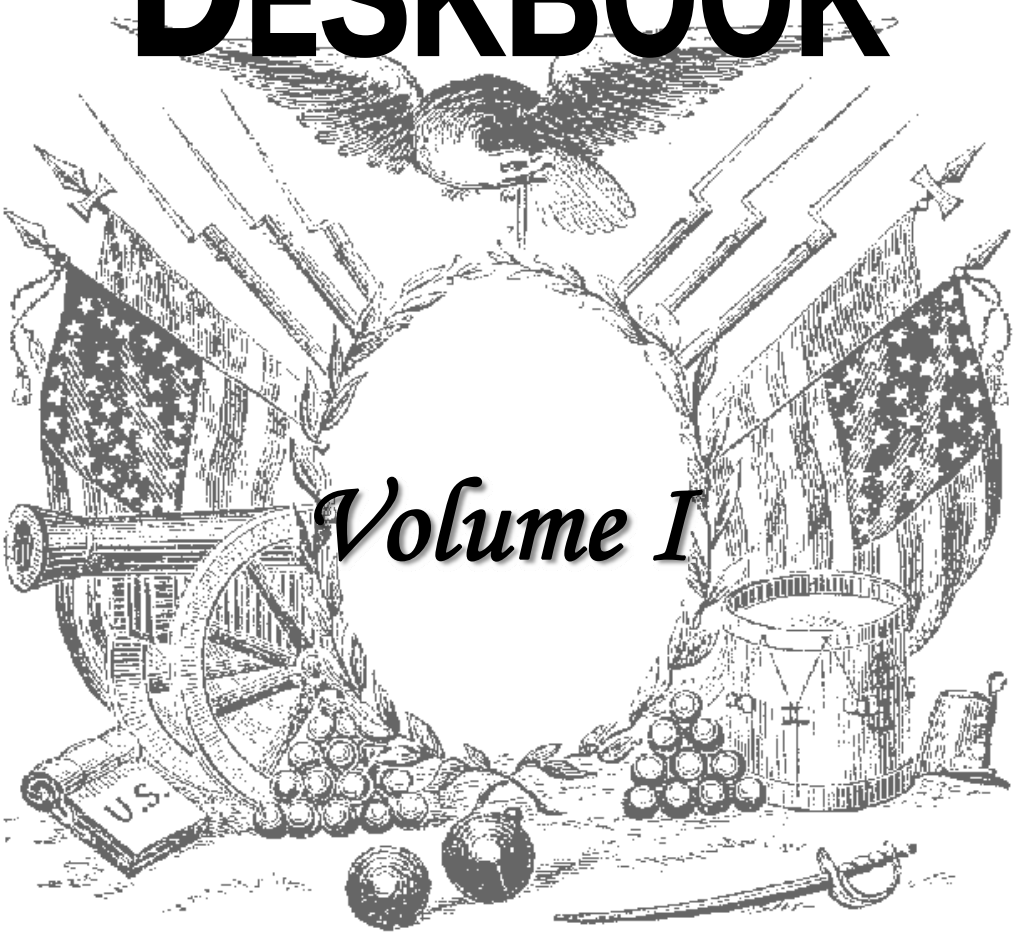
CRIMINAL LAW DESKBOOK



Volume I

The Judge Advocate General's School, US Army

Charlottesville, Virginia

Winter 2011

FOREWORD

The Criminal Law Department at The Judge Advocate General's Legal Center and School, US Army, (TJAGLCS) produces this deskbook as a resource for Judge Advocates, both in training and in the field, and for use by other military justice practitioners. This deskbook covers many aspects of military justice, including procedure (Volume I) and substantive criminal law (Volume II). Military justice practitioners and military justice managers are free to reproduce as many paper copies as needed.

The deskbook is neither an all-encompassing academic treatise nor a definitive digest of all military criminal caselaw. Practitioners should always consult relevant primary sources, including the decisions in cases referenced herein. Nevertheless, to the extent possible, it is an accurate, current, and comprehensive resource. Readers noting any discrepancies or having suggestions for this deskbook's improvement are encouraged to contact the TJAGLCS Criminal Law Department. Current departmental contact information is provided at the back of this deskbook.

//Original Signed//
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Chair, Criminal Law Department

CRIMINAL LAW DESKBOOK
VOLUME I

Table of Contents

Introduction to Criminal Law	TAB A
Professional Responsibility (contains a copy of AR 27-26)	TAB B
Unlawful Command Influence	TAB C
Court-Martial Jurisdiction	TAB D
Court-Martial Personnel	TAB E
Pretrial Restraint & Speedy Trial	TAB F
Initiation and Disposition of Charges	TAB G
Victim/Witness Assistance Program (VWAP)	TAB H
Nonjudicial Punishment – Article 15, UCMJ	TAB I
Discovery and Production	TAB J
Search and Seizure	TAB K
Self-Incrimination	TAB L
Sixth Amendment Confrontation	TAB M
The Military Rules of Evidence	TAB N
Classified Evidence	TAB O
Urinalysis	TAB P
Article 32 Pretrial Investigations & Article 34 Advice	TAB Q
Motions	TAB R
Pleas and Pretrial Agreements	TAB S
Voir Dire & Challenges	TAB T
Instructions	TAB U
Arguments	TAB V
Findings and Sentencing	TAB W
Post-Trial Procedures and Appeals	TAB X
Corrections, Clemency & Parole	TAB Y
Writs & Government Appeals	TAB Z
Sexual Assault Prevention and Response Program, Domestic Abuse Program	TAB AA

[See the CRIMINAL LAW DESKBOOK VOL. II (CRIMES & DEFENSES), JA 337, for: Theories of criminal liability, inchoate offenses, pleadings, multiplicity, conventional offenses, offenses against military order, defenses, mental responsibility/competency, and Improper Superior-Subordinate Relationships & Fraternization.]

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TAB A

INTRODUCTION TO CRIMINAL LAW

Outline of Instruction

At least since the harsh days of Gustavus Adolphus, governments have striven to strike a perceived balance of fairness in substantive and procedural law as applied to members of the military force, a balance which primarily takes into account the vital mission of the force itself. Often this balance is described in a specialized criminal code.

General William C. Westmoreland
Major General George S. Prugh
HARVARD JOURNAL OF LAW AND PUBLIC POLICY 1 (1980)

I. INTRODUCTION.

II. WHY A SEPARATE MILITARY JUSTICE SYSTEM?

A. Unique disciplinary needs.

B. Need for an efficient system that can function in a spartan environment.

C. World-wide jurisdiction.

III. LEGAL BASIS OF MILITARY JUSTICE SYSTEM.

A. Constitution of the United States.

1. Article I, section 8, clause 14: "The Congress shall have Power . . . [t]o make Rules for the Government and Regulation of the land and naval Forces."

2. Article II, Section 2: "The President shall be Commander in Chief of the Army and Navy of the United States . . . ."

B. The **Uniform Code of Military Justice** (10 U.S.C. 801-946) (referred to as either the UCMJ or the Code; individual sections are commonly referred to by their article designations, *e.g.*, Article 31).

1. In creating the UCMJ in 1950, Congress exercised its power to provide one statute to govern all the Armed Forces.

2. The UCMJ provides President with authority to decide pretrial, trial, and post-trial procedures (Article 36) and maximum punishments (Article 56).

C. The **Manual for Courts-Martial** (referred to as MCM or the Manual).

1. Executive Order (EO) of the President.

2. Most recent edition is the Manual for Courts-Martial, United States (2005). **BRING THE MANUAL TO EVERY CLASS. YOU WILL NEED IT.**

LTC Brookhart
January 2011

I. Preamble.

II. Rules for Courts-Martial (referred to as R.C.M.).

a. Rule.

b. Discussion.

III. Military Rules of Evidence [referred to as Mil. R. Evid. or (informally) M.R.E.].

IV. Punitive Articles (Arts. 77-134).

a. Text of Article from UCMJ.

b. Elements of the offense.

c. Explanation.

d. Lesser included offenses.

e. Maximum punishment.

f. Sample specification

V. Nonjudicial Punishment Procedure (aka Article 15 or NJP).

VI. Appendices.

1. Constitution.

2. UCMJ.

3. Forms, Trial Guides, Analysis, EOs.

D. Service Regulations.

Army Regulation 27-10 (16 November 2005) prescribes the policies and procedures for administration of military justice and implements the Manual within the Army. **YOU SHOULD ALWAYS HAVE THIS REG, ALONG WITH INTERIM CHANGES (IOS) AND LOCAL SUPPLEMENTS WITHIN LAUNCHING DISTANCE OF YOUR DESK.*

E. Court Decisions.

1. Military courts - Article I, U.S. Constitution.

2. Federal civilian courts - Article III, U.S. Constitution.

IV. OVERVIEW OF COURT-MARTIAL PROCESS

A. Report of misconduct.

B. Investigation

C. Initiation and recommendations by commanders.

D. Pretrial phase.

E. Trial phase.

F. Post-trial phase.

G. Appellate phase.

V. THE MILITARY COURT SYSTEM.

A. Trial Courts (see Appendices).

1. **Summary** Court-Martial (SCM).

2. **Special** Court-Martial (SPCM) (commonly referred to as a "straight special").

3. Special Court-Martial empowered to adjudge a Bad- Conduct Discharge (BCD-SPCM) (commonly termed a "**BCD Special**").

4. **General** Court-Martial (GCM). Our felony-level court.

B. Appellate Courts.

1. Courts of Criminal Appeals, *e.g.*, **Army Court of Criminal Appeals** (cited as Army Ct. Crim. App.; informally as A.C.C.A.); prior to 5 Oct 94, known as Courts of Military Review (Army court commonly referred to as ACMR).

a. Three member panels composed of senior judge advocates (COLs and senior LTC's; Chief Judge is a one-star General).

b. Consider cases in which sentence includes death, punitive discharge (Dismissal, Dishonorable Discharge (DD), Bad-Conduct Discharge (BCD)) or confinement for one year or more.

c. Each service has its own intermediate court, *e.g*., Navy-Marine Court, Air Force Court, Coast Guard Court. Their opinions are not binding on the Army, but highly relevant in that (1) other services look to each other for trends, insight, guidance; and (2) opinions from all of the service courts can ripen into decisions of higher courts that will then be binding on all of the services.

2. **United States Court of Appeals for the Armed Forces** (CAAF.); prior to 5 Oct 94 known as United States Court of Military Appeals (referred to as CMA or COMA).

a. Five civilian judges; fifteen-year terms; no more than three of one political party.

b. Current members: Chief Judge Gierke, Judges Erdmann, Crawford, Baker, and Effron.

c. Reviews all cases which include death penalty, The Judge Advocate General certifies for review, or the court grants accused's **petition for review.**

3. United States Supreme Court.

Accused or government may appeal cases <u>decided</u> by the CAAF to the Supreme Court.

VI. THE MILITARY JUSTICE SYSTEM—PERSONNEL.

A. Commander.

B. Military Police (MP), Military Police Investigator (MPI) or Criminal Investigation Division (CID) special agents. CID special agents are the Army's detectives

C. Staff Judge Advocate. The SJA is a member of the commanding general's personal staff, and serves as the primary legal advisor to a General Court-Martial Convening Authority, typically a two or three-star general. The SJA is NOT the commanding general's personal attorney; rather, the SJA represents the Army – *see* AR 27-26 (Rule of Professional Conduct for Lawyers) for further information.

D. Trial Counsel (our term for military prosecutors). Some trial counsel are assigned to the Office of the Staff Judge Advocate (OSJA). Under the Modular Force design, a major and a captain, as well as one noncommissioned officer (27D) are assigned to the Brigade Combat Team, and actually "live" with the BCT. In most locations, the Staff Judge Advocate will remain in the rating chain of these Judge Advocates, and, certainly, will be in the TECHCON (technical control) chain of command. Stay tuned – a dynamic area.

E. Trial Defense Counsel (assigned to the USA Trial Defense Service (TDS)).

F. Military Judge (assigned to Trial Judiciary) and Court Members. Legal Specialist/Paralegal/Court Reporter.

APPENDIX

COURTS-MARTIAL IN THE ARMY

	Summary	Regular Special (SPCM)	Bad-Conduct Discharge (BCD) SPCM***	General
Convening Authority	Battalion Cdr Division/Corps/ .	Brigade/ BCT Cdr	Brigade Cdr, Division/Corps/Major Installation Cdr	Major Installa-tion Cdr****
Composition	One Commissioned Officer	Military Judge alone* , or MJ and minimum of 3 court members	Military Judge alone* or MJ and minimum of 3 court members	Military Judge alone*, or MJ and minimum of 5 court members 12 members capital
Counsel	None detailed. Accused may consult with military lawyer prior to trial. May hire civilian lawyer.	Trial Counsel (lawyer)** Defense Counsel (lawyer). Accused may request individual military legal counsel or hire civilian lawyer.	Same as SPCM	Same as SPCM (trial counsel must be a lawyer)
Accused's Options	May refuse SCM.	May request enlisted personnel on court (minimum of 1/3 must be enlisted); may request trial by MJ alone.	Same as SPCM	Same as SPCM
Jurisdiction	Only enlisted personnel Noncapital offenses	All personnel Noncapital offenses	All personnel Noncapital offenses	All personnel All offenses
"Reporter"	Legal Specialist	Legal Specialist	Court Reporter	Court Reporter
Record of Trial	Abbreviated	Summarized	Verbatim	Verbatim

*There are provisions for convening a regular special court-martial without a military judge. A military judge must be detailed to a BCD SPCM unless prohibited by physical conditions or military exigencies. In practice, military judges are detailed to all special courts-martial.

**The trial counsel in a special court-martial need not be a lawyer. In practice the government is always represented by a lawyer.

*** A written pretrial advice by the SJA is a prerequisite for a BCD SPC Court-Martial to adjudge the following punishments: a Bad Conduct Discharge, confinement greater than 6 months, or forfeiture of pay for more than 6 months. See AR 27-10, Chapter 5, Para. 5-28.

****A formal investigation under Art. 32, UCMJ and a written pretrial advice by the SJA are prerequisites for referral to a GCM.

MAXIMUM PUNISHMENT CHART

Type	Confinement	Forfeitures	Reduction[1]	Punitive Discharge
Summary	1 Month[2]	2/3 pay per month for 1 month	E5 and above - one grade E4 and below - lowest Enlisted grade	None
Special	1 year[3]	2/3 pay per month for 1 year	Lowest Enlisted Grade	None
BCD Special	I year3	2/3 pay per month for 1 year	Lowest Enlisted Grade	BCD4 (enlisted)
General5	See Part IV, MCM, 1984 and Maximum Punishment Chart, Appendix 12, MCM	Total forfeitures of pay and allowances	Lowest Enlisted Grade	BCD (enlisted DD enlisted, warrant officer) Dismissal (officer)

1 Only enlisted soldiers may be reduced by courts-martial.

2 A Summary Court-Martial may impose confinement and hard labor without confinement only on soldiers in the grade of E-4 and below.

3 A Special Court-Martial may impose confinement only on enlisted soldiers.

4 In order to impose a BCD, A Special Court-Martial must:

(1) Have a military judge detailed (Unless a military judge cannot be detailed because of physical conditions or military exigencies).
(2) Have a defense counsel within the meaning of Article 27(b), U.C.M.J., detailed.
(3) Have a verbatim record of trial prepared.
(4) Have SJA Art 34 advice

5 A General Court-Martial may impose the death penalty when authorized by Part IV, MCM, 1984, and the conditions in R.C.M. 1004 are met.

TAB B

PROFESSIONAL RESPONSIBILITY

Table of Contents

I. REFERENCES. 1

A. PRIMARY. 1
B. SECONDARY. 1
C. WEB SITES 1

II. INTRODUCTION. 1

III. SCOPE AND GOVERNING STANDARDS. 1

A. REGULATORY STANDARDS IMPOSED BY THE ARMY. 1
B. CONFLICTS BETWEEN THE APPLICABLE RULES. 2
C. RESOLVING CONFLICTS. 3

IV. THE LAWYER-CLIENT RELATIONSHIP. 3

A. SCOPE OF REPRESENTATION (ARMY RULE 1.2). 3
B. THE ARMY AS THE CLIENT (ARMY RULE 1.13). 4
C. COMPETENCE (ARMY RULE 1.1). 5
D. DILIGENCE (ARMY RULE 1.3). 6
E. THE LAWYER AS ADVISOR. 8
F. COMMUNICATION (ARMY RULE 1.4). 9
G. CONFIDENTIALITY (ARMY RULE 1.6). 9
H. TERMINATING THE RELATIONSHIP. (ARMY RULE 1.16) 10
I. FEES AND SELF-REFERRAL (ARMY RULE 1.5). 11
J. CONFLICTS OF INTEREST (ARMY RULES 1.7, 1.8 & 1.9). 12
K. IMPUTED DISQUALIFICATION (ARMY RULE 1.10). 14

V. THE LAWYER AS AN ADVOCATE. 14

A. DISCLOSURE OF ADVERSE LEGAL AUTHORITY (ARMY RULE 3.3). 14
B. DISRUPTION OF THE TRIBUNAL (ARMY RULE 3.5(C)). 15
C. EXPRESSING PERSONAL OPINION AT TRIAL (ARMY RULE 3.4(E)). 15
D. TRIAL PUBLICITY (ARMY RULE 3.6). 15
E. *EX PARTE* DISCUSSIONS WITH MILITARY JUDGE AND PANEL MEMBERS (ARMY RULE 3.5). 15
F. PROSECUTORIAL DISCLOSURE (ARMY RULE 3.8(D)). 15
G. HANDLING EVIDENCE OR CONTRABAND (ARMY RULE 3.4(A)). 15
H. CLIENT PERJURY (ARMY RULE 3.3; ABA FORMAL OPINION 87-353 (1987)). 17
I. WITNESS PERJURY (ARMY RULE 3.3). 18
J. PROSECUTORIAL CONDUCT. 18
K. LAWYER AS A WITNESS (ARMY RULE 3.7). 20

VI. OBLIGATIONS TO THIRD PARTIES. 21

A. TRUTHFULNESS IN STATEMENTS TO OTHERS. 21
B. RESPECT FOR THE RIGHTS OF THIRD PARTIES (ARMY RULE 4.4). 21
C. COMMUNICATIONS WITH OPPOSING PARTIES. 22
D. THREATENING CRIMINAL PROSECUTION. 22

VII. DUTIES OF SUBORDINATES AND SUPERVISORS. 23

A. RESPONSIBILITIES OF SUPERVISORY ATTORNEYS (ARMY RULE 5.1). 23
B. RESPONSIBILITIES OF SUBORDINATE ATTORNEYS (ARMY RULE 5.2). 23

VIII. PROFESSIONAL RESPONSIBILITY COMPLAINTS. 23

A. PROFESSIONAL MISCONDUCT (ARMY RULE 8.4). 23
B. PROFESSIONAL MISCONDUCT DISTINGUISHED FROM PERSONAL MISCONDUCT. 23
C. REPORTING MISCONDUCT (ARMY RULE 8.3). 24

D. SELF-REPORTING REQUIREMENT (AR 27-1)..... 24
E. ADVISORY OPINIONS (AR 27-1, PARA. 7-7). 25

IX. CONCLUSION. 25

AR 27-26 RULES OF PROFESSIONAL CONDUCT FOR LAWYERS – 1 MAY 1992…….....21

MAJ Jay Thoman
January 2011

PROFESSIONAL RESPONSIBILITY

Outline of Instruction

I. REFERENCES.

A. Primary.

1. Army Regulation 27-26, *Legal Services - Rules of Professional Conduct For Lawyers* (1 May 92).

2. The ABA Standards for Criminal Justice.

3. The ABA Code of Judicial Conduct (2007 edition).

4. The Army Code of Judicial Conduct (2008 edition).

B. Secondary.

1. AR 27-1, *Legal Services - Judge Advocate Legal Service* (30 SEP 96).

2. AR 27-3, *Legal Services - The Army Legal Assistance Program* (21 Feb 96).

3. DA Pam 27-173, Part 6 – *Trial Procedure* (31 Dec 92).

4. AR 27-10, *Legal Services - Military Justice* (16 Nov 05).

5. American Bar Association Model Rules of Professional Conduct (Feb 2009 revisions).

6. American Bar Association Model Code of Professional Responsibility (Aug 1980).

7. Ingold, *An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers*, 124 MIL. L. REV. 1 (1989).

8. ABA/BNA Lawyers' Manual of Professional Conduct.

9. The Legislative History of the Model Rules of Professional Conduct, ABA (1999).

10. The Annotated Model Rules of Professional Conduct, ABA (6th ed.).

C. Web sites

1. State ethics rules: http://www.abanet.org/cpr/links.html#States

2. ABA links to Professional Conduct material: http://www.abanet.org/cpr/pubs/ethicopinions.html

II. INTRODUCTION.

III. SCOPE AND GOVERNING STANDARDS.

A. Regulatory Standards Imposed by the Army.

1. **The Rules of Professional Conduct For Lawyers** [hereinafter referred to as Army Rules].

a. Rules apply to:

(1) All Army judge advocates;

(2) Civilian attorneys employed by Department of the Army;

(3) Civilian attorneys appearing before courts-martial (AR 27-1, para. 7-4; AR 27-10, para. 5-8 and App. C; Glossary, Army Rules), and

(4) Army legal support personnel (i.e. 27Ds, interns, paralegals).

b. Attorneys must adhere to both the letter and the spirit of the rule.

c. Rules state a standard to be followed.

(1) Provide a basis for taking action should a lawyer fail to comply or meet the standard. Does not provide a basis for civil cause of action against either the Army or an attorney.

(2) Comments are non-binding guidance.

2. **State Rules.** "Every lawyer subject to these Rules is also subject to rules promulgated by his or her licensing authority or authorities." (Comment, Army Rule 8.5).

3. **ABA Standards for Criminal Justice** also apply to military judges, counsel, and clerical support personnel of Army courts-martial (AR 27-10, para. 5-8).

Moe Starts

B. Conflicts Between the Applicable Rules.

1. **Army Rule 8.5** provides that if there is a conflict with state rules, the lawyer should seek assistance from his or her supervisory lawyer. If not resolved, then:

a. Army Rules supersede rules of licensing jurisdiction in the performance of official duties.

b. Army Rules do not control if attorney is practicing in state or federal civilian courts.

The Basic Rule in conflicts is that the Army Rule Wins. The comments say that CONFLICTS are THEORETICAL, but may NOT be. For example, National Security Exemption to Confidentiality. So you may have to deal with a conflict between the Army rules and others. There is some help for you in the rule and we will discuss some practical methods of resolving the conflict. Remember, though, that the bottom line rule is that

The PRIMARY THING, though, is to consult your supervisor. She may be able to help resolve the situation.

SECOND, If you are in state or federal court follow those rules.

So the Basics that come out of the Rule is that for official duties, the Army rules trump, for private matters, follow your state rules.

c. **ABA Model Rule 8.5.** Disciplinary authority must make a choice of law:

(1) For conduct in connection with a court action, apply the rules of the jurisdiction where the court sits.

(2) For other conduct, apply the rules of the jurisdiction in which the lawyer principally practices.

The ABA has amended its conflicts rule and the ARMY has not adopted it. However, your STATE may have. So there are a couple of things to consider.

FIRST, The Rule says that you apply the Courts rules if your in court and the rules of the place where you "principally practice" otherwise. PROBLEM: In Legal Assistance, where do you practice – where you are stationed? Where the client is from? Your home state?

SECOND, an exception to that general rule is that other rules may apply if the "predominent effect" of your action is in that jurisdiction. So you could end up with your state applying/interpreting the Army rules because that's where the predominent effect is.

BOTTOM LINE: Know your state's position. Otherwise, you won't be able to effectively manage conflicts.

NOW, lets get to the practical - you understand the Army's position and you are familiar with your state rules. There is a conflict, what do you do?

C. Resolving Conflicts.

1. Judge advocates should follow the most restrictive standard. If a course of conduct is permitted under one standard and mandatory under another, follow the mandatory standard.

2. Employ practical alternatives.

a. Find the client new counsel.

b. Obtain exception from state bar. See, e.g., Oregon Informal Ethics Opinion 88-19, which provides that military lawyers will not be subject to discipline in Oregon as long as their conduct is not unethical under the applicable military code of ethics. NOTE: Discuss this option with your technical supervisory chain, to include the Standards of Conduct Office, if necessary.

Supervisor is the key - they can help with practical alternatives

CAUTION: Coordinate with SOCO!!!!

Moe Ends

IV. THE LAWYER-CLIENT RELATIONSHIP.

A. Scope of Representation (Army Rule 1.2).

1. A client's decisions concerning the objectives of representation are controlling on counsel. Counsel shall consult with the client as to the means by which these decisions are to be pursued. A lawyer may, however, limit the objectives of the representation with the client's consent.

2. Example: Representation by Defense Counsel.

a. Client decides --

(1) Choice of counsel.

(2) What plea to enter.

(3) Selection of trial forum.

(4) Whether to enter into pretrial agreement.

(5) Whether to testify.

b. Defense counsel decides --

(1) What motions to make.

(2) Which court members to select.

(3) Which witnesses to call.

(4) How cross-examination will be conducted.

(5) General strategic and tactical decisions.

c. Comment to Army Rule 1.2; see also Standards for Criminal Justice 4-5.2(b)).

3. A lawyer should assume responsibility for technical and legal tactical issues.

4. A lawyer shall not counsel a client to engage in conduct the lawyer knows is criminal. (Army Rule 1.2(d))

B. The Army as the Client (Army Rule 1.13).

1. A judge advocate or other Army lawyer represents the Army acting through its authorized officials (e.g. commanders).

2. The lawyer-client relationship exists between the lawyer and the Army.

3. Regulations may authorize representation of individual clients. For example, legal assistance attorneys and defense counsel are authorized to represent individual clients, not the Army. See AR 27-1, para. 2-5 and AR 27-3, para. 2-3a.

4. If not authorized to form an attorney-client relationship with the client, an Army lawyer *must* advise the individual that no such relationship exists between them. (Army Rule 1.13(b)).

5. While an attorney may be permitted by law or regulation to form an attorney-client relationship, situations may arise in which doing so may lead to a conflict. Army attorneys should exercise considerable discretion in handling the personal legal problems of Army officials, and receiving client confidences, when the Army attorney is not assigned to a client service organization such as Legal Assistance or Trial Defense Service.

6. Illegal Acts: If an official of the Army (e.g., a commander) is acting illegally or intends to act illegally, and the action might be imputed to the Army, the lawyer shall--

a. Proceed as is reasonably necessary in the best interest of the Army.

b. Consider utilizing the following measures:

(1) Asking the official to reconsider.

(2) Advising the official to get a separate legal opinion.

(3) Advising the official that his or her personal legal interests are at risk and he or she should consult counsel.

(4) Advising the official that counsel is ethically bound to serve Army interests and must discuss the matter with supervisory lawyers.

(5) Referring the matter to or seeking guidance from higher authority in the technical chain of supervision.

c. If unsuccessful, the lawyer may terminate representation with respect to the matter in question.

Moe Starts

We are now going to talk about some very basic rules that we tend to overlook. However, they are critical. For example:

MN Bar Article - Feb. 1997: 35-40% of all disciplinary complaints are the result of neglecting the case (diligence) or lack of commo.

Of course, the first question is whether you are competent to handle the case in the first place.

C. Competence (Army Rule 1.1).

1. Competence requires legal knowledge, skill, thoroughness, and preparation to the extent reasonably necessary for representation.

   a. The required proficiency is that generally afforded to clients in similar matters.

   b. Supervisor makes the initial determination as to competence for a particular assignment.

   c. *United States v. Hanson*, 24 M.J. 377 (C.M.A. 1987). Judge believed defense counsel incompetent; properly appointed another detailed counsel without severing existing attorney-client relationship.

   d. *United States v. Weathersby*, 48 M.J. 668 (Army Ct. Crim. App. 1998). Lack of defense sentencing case.

   e. *United States v. Murphy*, 50 M.J. 4 (C.A.A.F. 1998). Lack of defense sentencing case in capital case.

   f. *United States v. Denedo*, 2010 WL 996432 (UNPUBLISHED) (N.M.Ct.Crim.App.). A civilian defense counsel's bad advice on immigration consequences of guilty plea did not render plea involuntary.

   g. *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010). Padilla is a U.S. permanent resident of forty years who served in the U.S. military during Vietnam. He was charged with felony drug trafficking, among other things. He asked his attorney if a guilty plea would impact his immigration status, and his attorney told him he "did not have to worry about immigration status since he has been in the country so long." Padilla's attorney's advice was incorrect and but for his appeal that he pled guilty in reliance on his attorney's advice, he would have been deported. While the Supreme Court did not decide the ultimate issue of whether there was prejudice in this case, they did grant a new entitlement under the Sixth Amendment that Justice Scalia in his dissent terms a "Padilla warning" that now requires that where the law "is truly clear," as the court found in this case, "the duty to give correct advice is equally clear."

   h. *United States v. Larson*, 66 M.J. 212 (C.A.A.F. 2008). A defense counsel may concede guilt on lesser charges to gain credibility on the main charge despite an accused's NG plea.

i. Psychotherapist-patient privilege. *United States v. Paaluhi*, 54 M.J. 181 (C.A.A.F. 2000). Trial Defense Counsel erroneously interpreted possible psychotherapist-patient privilege in the military. The CAAF reversed lower court's judgment and set-aside appellant's conviction and sentence, because defense counsel rendered ineffective assistance in improperly evaluating military privilege law. The resulting confession secured Paaluhi's conviction. Without his confession there might have been reasonable doubt as to his guilt.

2. A lawyer can provide adequate representation in a wholly novel field through necessary study or consultation with a lawyer of established competence in the field in question.

3. If a lawyer becomes involved in representing a client whose needs exceed either the lawyer's competence or authority to act, the lawyer should refer the matter to another lawyer.

4. Lawyers may give advice and assistance even if they do not have skill ordinarily required if referral or consultation with another lawyer is impractical.

The basic standard is fairly straight forward - the knowledge skill and throroughness needed to perform the job. The standard that is measured against is the skill generally afforded in similar matters.

If you do not have this skill, you should NOT undertake the representation! Now, that does not mean that you can go around saying – I don't have skills, I don't have to work! If, through research and preparation, you can MAKE yourself competent, you can represent. Also, you do NOT have to have specialized training in a particular matter to be competent. You are EXPECTED to keep developing and make yourself competent.

Additionally. The comment helps you here, because it reminds you that you are not in this alone. Your supervisor makes the initial determination in assigning matters. So, for example, a complex estate planning matter should not be given to the newest LT in Legal Assistance. If you feel that you are not competent to handle a matter, your supervisor is the first stop to discuss it.

Finally, note that you can be assigned a case, even if you are not as competent as we would like if you are the only one available. This is VERY rare and lookes to a deployment area or remote assignment. This is not reoutine.

A related concept is that you must employ your skills diligently.

D. Diligence (Army Rule 1.3).

1. Lawyers must act with reasonable diligence and promptness.

a. *United States v. Gibson*, 51 M.J. 198 (C.A.A.F. 1999). Civilian defense counsel found ineffective where the CDC failed to pursue leads contained in the CID report that was provided by the trial counsel. The accused was charged with rape and adultery. The undeveloped information in the CID report included summarized interviews with teachers and students at the 15 year old victim's school, that she may have alleged rape to distract school officials from her behavior, that she had a record of exaggerating her sexual experience, that she related conflicting versions of the alleged rape, and that she did not enjoy a good reputation for truthfulness.

b. *Porter v. McCollum*, 130 S. Ct. 447, 454 (2009). Attorney required to perform adequate background investigation and present evidence in sentencing even if client not helpful. Defendant's status as a veteran and his struggles with posttraumatic stress disorder and subsequent substance, as well as his impaired mental capacity and abusive childhood is highly relevant mitigation evidence.

c. *United States v. Boone*, 42 M.J. 308 (Army Ct. Crim. App. 1996), *rev'd* 49 M.J. 187 (1998). In cases where the client has retained civilian defense counsel, military defense counsel must not be lulled into inactivity and complete deference to their civilian counterparts; military defense counsel are not relieved of professional or ethical obligations to the client.

d. *United States v. Sorbera*, 43 M.J. 818 (A.F. Ct. Crim. App. 1996). Civilian defense counsel whose advice to accused led to an additional charge provided incompetent pretrial representation.

e. *United States v. McDuffie*, 43 M.J. 646 (A.F. Ct. Crim. App. 1995); *see also* ABA Standard for Criminal Justice 4-4.3(b). Defense counsel has no professional obligation as part of trial preparation to discuss pertinent evidentiary rules with a witness.

f. Post-trial submissions. *United States v. Johnston*, 51 M.J. 227 (C.A.A.F. 1999). The record of trial was returned to the convening authority for a new recommendation and action. The new post trial recommendation was served on the accused's defense counsel, who was then a civilian. Substitute counsel was not appointed. The new recommendation was not served on the accused, nor did the defense counsel contact the accused. No matters were submitted by the accused or counsel. The court found the accused was not represented at a critical point in the proceedings against him in violation of Article 27 (b).

g. *United States v. Wean*, 45 M.J. 461 (C.A.A.F. 1997). After post-trial 39a hearing, MJ concluded, "the collective failings and inactions . . . resulted in representation of the appellant that was lacking in legal knowledge, skill, thoroughness, and preparation."

h. *United States v. Fordyce*, 69 M.J. 501 (Army Ct. Crim. App. 2010). DC neglected to advise on waiver and Post Trial and Appellate Rights (PTAR) form did not cover it. The court has found this to be an ongoing problem and their "patience is at a limit." There was also question whether client consulted on clemency submissions. Court highly encourages an accused co-sign R.C.M. 1105 and 1106 submissions, as well as putting it on the record the client has fully been advised of the post-trial submission process. Court did not find counsel ineffective but found error in the post-trial handling of the case because the court was not convinced the appellant was "afforded a full opportunity to present matters to the convening authority." Consequently, the court set aside the action and returned it for a new one.

i. Qualifications of Counsel. *United States v. Williams*, 51 M.J. 592 (N.M.Ct.Crim.App. 1999). Appellant contended that his civilian defense counsel was ineffective *per se* because he was on "inactive status" with respect to his admissions to practice law in three states. The Navy-Marine Court disagreed and found nothing in R.C.M. 502(d)(3)(A) requiring the practitioner to be able to practice in the home state. 51 M.J. at 597. Counsel had submitted to the trial court various related documents to include one affirming that he was a "lawyer in good standing" in the state of Iowa. *See also U.S. v. Morris*, 54 MJ 898 (N.M.Ct.Crim.App. 2001). DC's inactive status with his state bar does not make him per se ineffective or deprive the appellant of the right to counsel; *U.S. v. Steele*, 53 M.J. 274 (2000). CDC's inactive status with his state bar does not make him per se ineffective or deprive the appellant of the right to counsel.

j. Notification of requirement to register. *United States v. Miller*, 63 M.J. 452 (C.A.A.F. 2006). Appellant averred that he was never told that pleading to an offense of possessing child pornography would require him to register as a TX sex offender. His failure to register led him to be incarcerated in TX. The court failed to find IAC for failure to inform the accused. The court did specify for cases tried after November 2006 that counsel must notify accused that any qualifying offense under DODI 1325.7 (sex + violence or minority) requires sex offender registration.

2. Lawyers must consult with clients as often as necessary.

3. A lawyer should carry through to conclusion all matters undertaken for a client.

While the language of the rule talks in terms of "reasonableness" the comments flesh that out a little bit. You must be ZEALOUS on behalf of your client. Additionally, You must pursue the case despite personal inconvenience – you may have to miss some dinners at home or some evening out on the town in order to properly handle the clients case.

What matters do you competently and diligently advise about? It CAN BE about more than the law!

E. The Lawyer as Advisor.

1. A lawyer may refer to moral, economic, social, and political factors when rendering advice to clients (Army Rule 2.1).

a. Purely technical legal advice may sometimes be inadequate.

b. NOT a moral advisor as such. Discuss how other factors influence the way the law will be applied.

You must give COMPLETE advice. There are occassions where purely legal advice is NOT enough. Thus the rules allow you to comment on economic, moral & social factors. Put these in the calculus when you are explaining hoe the law applies. For example, a client with a consumer problem may have a strictly legal claim against a creditor. However, the real problem is excessive debt. You are allowed to counsel the client on these economic matters and suggest budget counseling.

Your advice must not only be complete, it must be independent.

2. Lawyers must exercise independent judgment when advising a client (Army Rule 5.4).

a. Rule explicitly allows for individual representation when detailed or assigned.

b. Unfettered loyalty & professional independence to the same extent as lawyers in private practice when assigned individual client.

MAJ Frisk has already told you that the Army is ordinarily the client. There are two exceptions where the Army authorizes individual client representation. Thos are Trial Defense and Legal Assistance. When working in those capacities, your loyalty flows to that individual client. Therefore, you must resist pressure from command or other sources and exercise your judgment.

Incidently, the technology that we have is great, and the LAAWS system is the Army standard. However, it is NOT a replacement for the individual judgment of you as the attorney.

F. Communication (Army Rule 1.4).

1. Lawyers have a duty to keep clients reasonably informed about the status of a matter and to comply with client requests for information.

2. Lawyers also must explain matters to clients to permit them to make "informed decisions."

Finally, we reach what is the crux of many lawyer-client probelms. Commo! Talk to the client. The Rule simply requires that you keep them "reasonably informed" so that they can make "informed" decisions. I would encourage you to apply the Golden Rule here. Give the client the amount of info YOU would want if you were in their shoes. Sometimes that may mean calling and saying, "Hey, I wasn't able to contact the creditor this week. But, I am going to call Monday. Check in with me Monday afternoon." The news of inactivity doesn't get better with age!

NOTE that this is NOT just for individual client services. The Army expects to be informed as well. So keep in commo with those commanders and staff officers that you advise as representatives of the Army.

Of course, while communication with your client is always encouraged, communications with others may be circumscribed by the Rule of Condidentiality.

Moe Ends

G. Confidentiality (Army Rule 1.6).

1. General rule. A lawyer shall not reveal any information relating to the representation of a client.

a. Applies to all sources of information, not just that which comes from the client.

b. Applies to information obtained prior to formation of attorney-client relationship.

c. The duty of confidentiality continues after the lawyer-client relationship has terminated.

d. The duty also applies to Army legal support personnel.

2. Exceptions to confidentiality.

a. A client may consent to disclosure of confidences (Army Rule 1.6(a)).

b. Disclosure may be impliedly authorized in order to carry out the representation (Army Rule 1.6(a)). (See, *e.g. United States v. Province*, 45 M.J. 359 (C.A.A.F. 1997).

c. Disclosure is permitted to establish a claim or defense in a controversy with a client (Army Rule 1.6(b)).

d. Intention to commit a crime.

(1) Army Rule 1.6(b) mandates disclosure of information a lawyer reasonably believes necessary to prevent a client from committing a crime which is likely to:

(a) result in imminent death or substantial bodily harm, or

(b) significantly impair the readiness or capability of a military unit, vessel, aircraft, or weapon system.

(2) There is no authority for revealing information of other potential offenses or past crimes under the Army Rules.

(a) Example: Revealing Whereabouts of a Fugitive.

(b) ABA Formal Opinion 84-349 (1984) (withdrawing formal opinions 155 and 156, which stated that defense counsel must reveal client whereabouts -- new rule is defense counsel does not disclose).

e. Compare to Mil. R. Evid. 502 - Lawyer-Client Privilege.

(1) Protects against disclosure of privileged communication between attorney and client.

(2) Does not protect against other disclosures (*e.g.*, information gained from sources other than the client).

(3) More narrow than Rule 1.6 (*e.g.*, no restriction to just future crimes).

Moe Starts

H. Terminating the Relationship. (Army Rule 1.16)

1. Notwithstanding any other provision of the rule, a lawyer shall continue the representation when ordered to do so by a tribunal or other competent authority.

I've previously mentioned that you should only undertake representation if you can do it competently and promptly, to completion and without conflict. Note, though, that withdrawal must be approved and competent authority CAN order you to continue the representation.

In the Army, the only people who can approve your withdrawal is TJAG and your supervisor. The rule defines circumstances where you MUST seek this approval and some where you MAY.

2. A lawyer SHALL seek withdrawal (or not commence representation) if -

a. the representation will violate the rules

b. the lawyer's physical or mental condition materially impairs her ability to represent the client; OR

c. the lawyer is dismissed by the client.

The mandatory rules are fairly obvious. Be sensitive, though, to your physical and mental condition. Don't be a hero – if your condition is harming the representation see your supervisor.

3. A lawyer MAY seek withdrawal if it can be accomplished without material adverse affect to the client's interests OR -

a. the client persists in a course of action which the lawyer reasonably believes to be criminal or fraudulent;

b. the client has used the lawyer's services to perpetrate a crime or a fraud;

c. the client persists in pursuing an objective which the lawyer considers repugnant or imprudent; OR

d. other good cause for withdrawal exists.

The optional reasons to withdraw are also somewhat sensible. You cannot assist in a crime. If you reasonably believe that the clients COA is criminal, you may withdraw. Note that this is an OBJECTIVE standard – what a reasonable lawyer under the circumstances would believe.

Also note the catch-all - other good cause. The comments make clear that a change of duty or PCS IS good cause. Thus, you can withdraw if your are moving from legal assistance up to crim law.

4. A lawyer must take reasonable steps to protect a client's interests upon termination of the relationship (Army Rule 1.16).

5. Steps should include giving notice to the client, allowing time for employment of other counsel, and surrendering all papers and property.

6. *United States v. Spriggs*, 52 M.J. 235 (C.A.A.F. 2000). TDS counsel represented Spriggs at a prior court-martial resulting in an acquittal. After additional charges were preferred, including perjury charges from his first court-martial, appellant made an IMC request for his first DC. DC had left active duty. The CAAF ruled that release of the TDS counsel from active duty constituted good cause for severance of the attorney-client relationship. Additionally, appellant did not establish that there was an ongoing attorney-client relationship. *But see United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2011). Court faulted the judge for not establishing reason for DC withdraw prior to DC resigning from military service after being part of the trial defense team for a year. The court found there was not a knowing release and allowing the DC to EAS (ETS in the Army) because he had completed his commitment did not constitute "good cause." Unlike NMCCA, however, CAAF was unwilling to presume prejudice and did not set aside the findings or approved sentence.

Of course, you don't just walk out the door. You've got to take steps to protect the client. Make sure the file gets into the hands of the new attorney. Make sure that any deadlines are highlighted to them. If possible, introduce clients on pending cases to the new attorney with you there so they are compfortable. The most important, though is commo – let the client know as early as possible!

An area that civilians deal with a lot when deciding representation is the fee. I was sort of surprised to learn that the Amry had a rule on fees, since we get paid by the Army.

Most of the fee rule is there for civilian practitioners representing soldiers in courts-martial. But some rules do apply to us. (§§ F)

I. Fees and Self-Referral (Army Rule 1.5).

1. A lawyer shall not accept a gratuity, salary or other compensation from a client for services performed as an officer of the U.S. Army.

The basic rule is that you cannot take ANY compesnation or gratuity for your duties. This includes brownies at the office! Make sure your receptionist and clerks know this – it is easier to turn down the gratuity than it is to give it back!

A bigger issue, though is the referrals that we make to both the reserves and civilian practitioners.

2. A lawyer shall not receive compensation for making a referral of a client to a private practitioner.

3. A legal assistance attorney shall not receive any actual or constructive compensation or benefit for referring to a private-practitioner (including himself) a matter the lawyer first became involved with in a military legal assistance capacity. Comment to Army Rule 1.5; see also AR 27-3, para. 4-7d & d(1).

   a. Does not subsequently prohibit a reserve component lawyer from representing military personnel or dependents in a private capacity so long as the representation does not concern the "same general matter" that the attorney provided legal assistance on. AR 27-3, para. 4-7d(2) & (3) "Same general matter" means

      (1) One or more types of cases within any one of the ten categories of legal assistance; OR

      (2) Which arises out of the same factual situation or course of events.

   b. Prohibits lawyer from using official position to solicit or obtain clients for private practice.

FOR ACTIVE ATTORNEYS: You cannot receive ANY benefit from a referral to either. No gifts, no "back-scratching" nothing. It has to be a straight up transaction. In fact, the new version of AR 27-3 envisions us potentially negotiating on behalf of the client for the fee. So any interest we have would implicate conflict rules as well.

FOR RESERVISTS: You cannot represent someone FOR FEE in your private capacity if you started "the same substantial matter" as a LAA. The new verison of AR 27-3 helps with this decision. If its within the same general category of LA or same set of facts or course of events - no can do. (EX. Separation Agreement - Divorce). Of course, you can take the client on a fee basis for a "new matter."

If you are listed in the reserve component directory, you may only accept cases within the scope of legal assistance program on a no fee basis. You do not have to take the case, but if you do, you must do so on a no fee basis. If the case is outside the scope fo the program (i.e. we don't do that service under AR 27-3), you can take it on a fee basis, but you must ensure that the client understands that there will be a fee at the time of the referral.

The BOTTOM LINE to this is that the Army does not want you using your time on duty to generate business for yourself – they want you focusing on the client.

Of course, the legal profession is concerned about any interests that will take your attention away from your client. We call these conflicts of interest.

Moe Ends

J. Conflicts of Interest (Army Rules 1.7, 1.8 & 1.9).

1. Directly adverse to the current client. A lawyer shall not represent a client if the representation of the client will be directly adverse to another client unless:

   a. The lawyer reasonably believes the representation will not adversely affect the other relationship, and

   b. Each client consents after consultation (Army Rule 1.7(a)).

c. If a conflict develops after representation has been undertaken, the attorney must seek to withdraw. The Army Rules adopt an objective approach. Relevant factors in determining whether multiple representation should be undertaken include:

(1) duration and intimacy of the lawyer's relationship with the clients involved,

(2) likelihood actual conflict will arise, and

(3) likely prejudice to the client if conflict does arise.

Moe Starts

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d. Potential conflicts in legal assistance:

(1) Estate planning.

(2) Debtor-creditor and seller-purchaser. *Compare Atlantic Richfield Co. v. Sybert*, 456 A.2d 20 (1983) (no conflict) *with Hill v. Okay Construction Co.*, 252 N.W. 2d 107 (1977) (conflict).

(3) Domestic relations. *Coulson v. Coulson*, 448 N.E.2d 809 (1983); *Ishmael v. Millington*, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966).

Don't think this is only a "criminal law thing." For example, doing a will for husband and wife together - problems. Even simple things like a bill of sale (warranty or as is). Separation agreements are ripe with potential – that's why Army policy discourages them in the same office. Look at AR 27-3, Para. 4-9c for guidance. Note that your supervisor makes the call NOT YOU! Note also that you need to get written consent from BOTH parties.

Bottom line is keep your guard up in this area. Think PR as you go about your daily business. Things will be moving fast and furious in the LA business, but that is no excuse for PR problems.

Even though this is not just a criminal law thing, criminal law practice is filled with opportunities for conflicts to arise.

Moe Ends

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e. Potential conflict in criminal practice -- representing multiple accused.

(1) Ordinarily a lawyer should refuse to act for more than one of several co-defendants (Comment to Army Rule 1.7). *See* Standards for Criminal Justice 4-3.5(b).

(2) Consult AR 27-10 and USATDS SOP for procedures on handling a co-accused situation. Generally:

(a) Co-accused will initially be contacted by separate defense counsel.

(b) Co-accused may submit request for the same individual military counsel.

(c) Chief, USATDS decides whether to grant the request. No request will be granted unless each co-accused has signed a statement reflecting informed consent to multiple representation and it is clearly shown that a conflict of interest is not likely to develop.

2. Representation materially limited. A lawyer is also precluded from representing a client if the representation would be materially limited by the lawyer's responsibility to another client, a third party, or by the lawyer's own interests (Army Rule 1.7(b)). Example: Defense counsel materially limited by loyalty to Army. *United States v. Bryant*, 35 M.J. 739 (A.C.M.R. 1992).

   a. A possible conflict does not preclude representation.

   b. Representation is permitted if the lawyer reasonably believes that it will not be adversely affected by the interest and the client consents after consultation.

3. Business transactions. A lawyer shall not enter into a business transaction with a client (Army Rule 1.8).

4. Former client. A lawyer who has represented a former client shall not thereafter represent another person in the same matter or use information to the disadvantage of a former client (Army Rule 1.9).

Moe Starts

K. Imputed Disqualification (Army Rule 1.10).

1. Lawyers working in the same military law office are not automatically disqualified from representing clients with conflicting interests. A functional analysis is required (Army Rule 1.10. Compare ABA Model Rule 1.10.)

2. Army policy may discourage representation of both parties in certain instances, e.g. AR 27-3, para. 4-9c. (Representation of both parties in a domestic dispute discouraged).

You may recall from law school that a whole firm is disqualified from representing adverse interests of the clients of one member. The Army does not have this automatic rule - would grind our practice to a halt. We use a "functional analysis" Talk to your supervisor. They will consider whether they can:

PRESERVE CONFIDENTIALITY: Consider access to files, sharing clerks, use of computers, are you on a network – all can impact on this decision.

MAINTAIN INDEPENDENCE OF JUDGMENT: EACH attorney must maintain iloyalty to client and zealous representation. Can they do that. Will pressures to "move" case cause them to do something different.

AVOID POSITIONS ADVERSE TO CLIENT: Track former clients. Use technology. Does NOT rule out office, but if the position will be directly adverse, may want to reconsider.

Moe Ends

V. THE LAWYER AS AN ADVOCATE.

A. Disclosure of Adverse Legal Authority (Army Rule 3.3).

1. A lawyer shall not knowingly fail to disclose to the tribunal, legal authority in the controlling jurisdiction, known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

2. A lawyer should disclose authority from a collateral jurisdiction if the judge "would reasonably consider it important to resolving the issue being litigated." (Comment to Army Rule 3.3). ABA Formal Opinion 280 (1949); ABA Informal Opinion 84-1505 (March 1984).

B. Disruption of the Tribunal (Army Rule 3.5(c)).

C. Expressing Personal Opinion at Trial (Army Rule 3.4(e)).

D. Trial Publicity (Army Rule 3.6).

1. A lawyer shall not make public statements that will have a substantial likelihood of prejudicing a proceeding. *See Gentile v. Nevada State Bar*, 111 S. Ct. 2720 (1991).

2. Other publicity considerations.

a. TJAG Memorandum on Relations with News Media - OSJA attorneys must get approval from their SJA before any information is released to the media.

b. USATDS SOP - Defense counsel must consult with their Regional Defense Counsel and the Office of the Chief, TDS, prior to release. The ultimate decision to release information rests with the defense counsel, however.

3. Information that is releasable is listed at Rule 3.6(c).

E. *Ex Parte* Discussions with Military Judge and Panel Members (Army Rule 3.5).

1. A lawyer shall not communicate *ex parte* with a judge or juror except as permitted by law. *See United States v. Copening*, 34 M.J. 28 (C.M.A. 1992); *United States v. Hamilton*, 41 M.J. 22 (C.M.A. 1994).

2. It is unprofessional conduct for a prosecutor to engage in unauthorized *ex parte* discussions with or submission of material to a judge relating to a particular case that is or may come before the judge (Standards for Criminal Justice 3-2.8(c)).

F. Prosecutorial Disclosure (Army Rule 3.8(d)).

1. A lawyer prosecuting a criminal case shall make timely disclosure to the defense of all evidence or information known to the lawyer that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigation information known to the lawyer.

2. This is commonly referred to as “Brady” material and failure to turn it over is a “Brady Violation” after the case *Brady v. Maryland*, 373 U.S. 83 (1963).

G. Handling Evidence or Contraband (Army Rule 3.4(a)).

1. If the client informs the lawyer of the existence of the evidence but does not relinquish possession.

a. Lawyer should inform the client of the lawyer's legal and ethical obligations regarding the evidence.

b. Lawyer should refrain from either taking possession or advising the client what to do regarding the evidence.

2. If the lawyer receives the evidence or contraband.

   a. A lawyer shall not --

      (1) Unlawfully obstruct another party's access to evidence

      (2) Unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or

      (3) Assist another person to do so.

   b. A lawyer who receives an item of physical evidence implicating the client in criminal conduct shall disclose the location of or shall deliver that item to proper authorities when required by law or court order (Comment, Army Rule 3.4(a)). *United States v. Rhea*, 33 M.J. 413 (C.M.A. 1991) (defense counsel have a duty to surrender evidence which implicates their clients to prosecution). But see also *United States v. Province*, 45 M.J. 359 (1997) (no duty where Government has equal access to evidence).

   c. If a lawyer receives contraband, the lawyer has no legal right to possess it and must always surrender it to lawful authorities (Comment, Army Rule 3.4).

   d. If a lawyer receives stolen property, the lawyer must surrender it to the owner or lawful authority to avoid violating the law (Comment, Army Rule 3.4).

   e. Concealment, destruction, alteration, etc. could be a violation of UCMJ art. 134, Obstruction of Justice.

3. If the lawyer discloses the location of or delivers an item of physical evidence to proper authorities, it should be done in a way designed to protect the client's interests, including -

   a. Client's identity.

   b. Client's words concerning the item.

   c. Client's privilege against self-incrimination.

   d. Other confidential information.

4. Advice on handling evidence or contraband:

   a. Do not accept the item!!

   b. Advise the client of the consequences of continued possession and voluntary turn-in. Do not advise the client of what to do regarding the evidence. Also advise the client of the lawyer's obligations regarding the evidence.

   c. If possession cannot be avoided, turn it over to the proper authorities.

      (1) Don't dispose of it or conceal it.

      (2) Don't destroy or alter the evidentiary quality.

      (3) Upon turn-in, refuse to disclose client identity and circumstances of your possession to the extent permitted by applicable case law.

Moe Starts

H. Client Perjury (Army Rule 3.3; ABA Formal Opinion 87-353 (1987)).

1. A lawyer who knows that his client intends to testify falsely should (must under ABA formal opinion):

   a. Advise the client not to do so and explain the consequences of doing so, including the lawyer's duty to disclose.

   b. Attempt to withdraw (if the lawyer's efforts to dissuade the client from testifying falsely are unsuccessful).

   c. Limit examination to truthful areas.

   d. If not possible, disclose to the tribunal the client's intention to commit perjury.

   e. A lawyer who knows that the client has already testified falsely must:

      (1) Persuade the client to rectify it.

      (2) Disclose the perjury if unsuccessful.

   f. A lawyer "knows" that a client intends to testify falsely if the accused has admitted facts to the lawyer which establish guilt and the lawyer's independent investigation establishes that the admissions are true, but the accused insists on testifying (Comment, Army Rule 3.3).

2. *United States v. Baker*, 65 MJ 691 (C.A.A.F. 2007). Provides additional nonbinding guidance on how defense counsel and military trial judges should handle issues of client perjury at trial. Counsel should:

   a. Conduct an investigation into all evidence prior to taking any action with regard to the alleged perjury.

   b. Ethical obligations only exist if you have a “firm factual basis” to conclude that client has committed perjury.

   c. Review potential consequences with client.

   d. Request an on the record ex-parte discussion with the Military Judge to notify the military judge that the client will testify in narrative form without benefit of counsel *without* expressing why.

   e. Refrain from using the perjured testimony in any way (i.e. in argument, cross or direct of other witnesses.)

There is not much leeway in this rule. If you KNOW that the client intends to testify falsely or has testified falsely, you must take the actions set out in the rule. The obvious question is When do you Know? The comments help here, at least with respect to a criminal accused:

First, client admits facts that would make him guilty.

SECOND, the lawyer corroborates the facts with independent investigation.

If you do that, you KNOW for purposes of the rule. What do you do. If your client has not testified:

1) Advise them not to testify and the consequence of committing perjury (to include your obligations).

2) Attempt ot Withdraw

3) Limit the examination if you can.

4) If client persist, you must disclose to the judge (out of presence of members, of course)

Past perjury is a little different. There you must try to

1) Persuade the client to rectify the situation.

2) Disclose to tribunal.

This requirement exists until the "conclusion of the proceeding." The comments don't give any more guidance than this, but "Action" by the convening authority is a reasonable and definite point to consider the proceeding ended.

NOTE: that throughout this process, you reveal the minimum amount required to rectify the problem - don't just spill your guts!

Of course, clients may not be the only ones to tell an untruth – witnesses may lie as well and the rules address this situation.

Moe Ends

I. Witness Perjury (Army Rule 3.3).

1. Avoiding the use of perjured testimony.

a. When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes (Army Rule 3.3).

b. "A lawyer may refuse to offer evidence that the lawyer reasonably believes is false." (Army Rule 3.3(c)).

2. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures (Army Rule 3.3(a)(4)). This obligation ends at the conclusion of the proceeding. (Comment—*Duration of Obligation*).

J. Prosecutorial Conduct.

1. The duty of the prosecutor is to seek justice, not merely to convict. ABA Standard 3-1.2c; Air Force Standard 3-1.1c.

a. A lawyer prosecuting a criminal case shall recommend to the convening authority that any charge or specification not warranted by the evidence be withdrawn. Military Rule 3.8(a).

b. A prosecutor should not intentionally avoid pursuit of evidence because he believes it will damage the prosecution's case or aid the accused. ABA Standard 3-3.11c; Air Force Standard 3-3.11.

c. Trial counsel should report to the convening authority any substantial irregularity in the convening orders, charges, or allied papers . . . bring to the attention of the convening authority any case in which trial counsel finds trial inadvisable for lack of evidence or other reasons (R.C.M. 502(d)(6) (Discussion)).

2. Cross-examination of a truthful witness. ABA Standard 3-5.7; Air Force Standard 3-5.7.

a. Fair and objective cross-examination is permitted.

b. Unnecessary intimidation and humiliation of witness on cross-examination is prohibited.

c. If the prosecutor *believes* that the witness is truthful.

(1) Cross-examination is not precluded.

(2) But manner and tenor ought to be restricted. (Air Force standard says the method and scope of cross-examination may be affected.)

d. If the prosecutor *knows* that the witness is truthful, cross-examination may not be used to discredit or undermine the truth.

3. It is unprofessional conduct for a prosecutor knowingly to make false statements or representations in the course of plea discussions. ABA Standard 3-4.1c; Air Force Standard 3-4.1c.

4. A prosecutor may argue to the jury all reasonable inferences from the evidence in the record, but it is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw. Rule 3.4(e); ABA Standard 3-5.8(a); Air Force Standard 3-5.8(a).

5. It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant. Rule 3.4(e); ABA Standard 3-5.8(b); Air Force Standard 3-5.8(b).

6. Prosecutors should not:

a. Make arguments calculated to inflame the passions or prejudices of the jury. ABA Standard 3-5.8c; Air Force Standard 3-5.8c.

United States v. Diffoot, 54 M.J. 149 (2000). Comments made by the trial counsel during closing argument regarding accused's ethnicity and urging a conviction based on guilt by association amounted to plain error and materially prejudiced appellant's substantial rights.

b. Make arguments that would divert the jury from its duty to decide the case on the evidence. ABA Standard 3-5.8(d); Air Force Standard 3-5.8(d) (also prohibits arguments which inject issues broader than guilt or innocence of accused under controlling law, or makes predictions of the consequences of the court members' findings).

United States v. Baer, 53 M.J. 235 (C.A.A.F. 2000). The CAAF held that golden rule arguments asking the members to put themselves in the victim's place are improper and impermissible in the military justice system. However, they did recognize the validity of an argument asking the members to imagine the victim's fear, pain, terror and anguish. When improper argument is made, it must be looked at in context to determine whether it substantially impacted on the right of the accused to a fair and impartial trial. The CAAF held no such impact here and affirmed the case.

c. Ask the defendant during cross-examination to comment on the truthfulness of other witnesses.

United States v. Harrison, 585 F.3d 1155 (9th Cir. 2009), where the SAUSA asked the defendant to comment on the truthfulness of the MP's he allegedly assaulted.

d. Threaten Criminal Prosecution

Under ABA Code DR 7-105, lawyers could not present, participate in presenting, or threaten to present criminal charges "solely to gain an advantage in a civil matter." *See Iowa State Bar v. Michelson*, 345 N.W.2d 112 (Iowa 1984); TJAG Opinions, *The Army Lawyer*, March 1993 and May 1977. *See also United States v. Edmond*, 63 M.J. 343 (C.A.A.F. 2006) where a trial counsel threatened a civilian witness (former Soldier) with prosecution by the SAUSA if he testified and then had the SAUSA reiterate the threat of prosecution.

There is no parallel provision in the Army Rules (or ABA Model Rules). Threatening or filing criminal charges may, however, violate more narrow provisions of Rules 3.1, 3.3, 3.4, 3.5, 3.8, 4.4, 8.4(b), or 8.4(e).

7. Prosecutors may refer to or argue facts outside the record only if the facts are matters of common public knowledge based on ordinary human experience. ABA Standard 3-5.9; Air Force Standard 3-5.9.

8. Vindictive Prosecution

To support a claim of vindictive prosecution, one must show that (1) "others similarly situated" were not charged; (2) "he has been singled out for prosecution"; and (3) "his 'selection . . . for prosecution' was 'invidious or in bad faith, *i.e.*, based on such impermissible considerations such as race, religion, or the desire to prevent his exercise of constitutional rights.'" Failure to show any of the three prongs of the test must result in the failure of a claim of vindictive prosecution. Because the burden to establish a claim of vindictive prosecution falls on the moving party, challenging a case on grounds of vindictive prosecution can be difficult. See *Unites States v. Martinez*, 2009 WL 1508451 (A.F. Ct. Crim. App. 2009). Air Force Captain alleged that he had "identified problems with operating procedures, equipment and standard of care," which he claimed irritated the SJA, convening authority, the Article 32 IO, the judge, TC, DC, "and a myriad of others."

Moe Starts

K. Lawyer as a Witness (Army Rule 3.7).

1. A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

   a. The testimony relates to an uncontested issue;

   b. The testimony relates to the nature and quality of legal services rendered in the case; or

   c. Disqualification of the lawyer would work a substantial hardship on the client.

2. Unless the lawyer for the accused is prepared to forego impeachment of a witness by the lawyer's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present such impeaching testimony, the lawyer should avoid interviewing a prospective witness except in the presence of a third person. Standards for Criminal Justice 4-4.3(d).

Generally, a lawyer is prhibited from being a witness in a case where they are representing on of the parties. If they are not involved with the case, of course they can be a witness. If

they become a witness, they should not undertake the representation. There are some exceptions:

1) The testimony relates to an uncontested issue

2) The testimony relates to the nature and quality of your legal services.

3) Disqualification would work a substantial hardship on the client.

BOTTOM LINE: avoid the situation. In deciding what to do, the comments give tribunals some factors to consider:

1) Nature of the Case

2) Importance/Tenor of lawyer's testimony

3) Conflict with other witnesses

4) Effect on client

5) Could either party have reasonably foreseen the lawyer as a witness (CLERK AT INTERVIEWS!!!!!!!!!!!)

We've been talking about your obligations to the client and the tribunal. You also have obligations to third parties.

Moe Ends

VI. OBLIGATIONS TO THIRD PARTIES.

A. Truthfulness in Statements to Others.

1. A lawyer shall not make a false statement of law or fact to third parties (Army Rule 4.1(a)).

   a. Knowledge of falsity generally required.

   b. Misrepresentations can occur if a lawyer affirms a false statement of another person.

2. A lawyer may not fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act, unless disclosure is prohibited by Rule 1.6 (Army Rule 4.1(b)).

3. A lawyer also has an obligation to disclose prior misstatements.

B. Respect for the Rights of Third Parties (Army Rule 4.4).

1. A lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third party or use methods of obtaining evidence that violate the rights of third parties (Army Rule 4.4).

2. Other obligations to third parties:

   a. A lawyer has a duty of candor when dealing with third parties. *People v Berge*, 620 P.2d 23 (Colo. 1980).

   b. A lawyer is forbidden from engaging in illegal, dishonest, and fraudulent conduct. *Office of Disciplinary Counsel v Kissel*, 442 A.2d 217 (Pa. 1982).

c. Lawyers must not make derogatory remarks about opposing counsel or opposing parties. Professional Responsibility, *The Army Lawyer* (Sept. 1978) ("lowly, dishonest, welsher"). *See also State v Turner*, 538 P.2d 966 (Kan. 1975).

C. Communications with Opposing Parties.

1. A lawyer shall not discuss a case with another party who is represented by an attorney (Army Rule 4.2). *See also* ABA Code DR 7-104.

a. A lawyer may not accomplish communication indirectly through an agent or encourage clients to contact opposing parties.

Trial counsel, following on the heels of military defense counsel, barged into a meeting between civilian defense counsel and accused. Trial counsel proceeded to tell the accused that his civilian lawyer had not interviewed witnesses and was ineffective. This was inappropriate contact with the accused. *United States v. Meek*, 44 M.J. 1 (C.A.A.F. 1996).

b. Communication with a party concerning matters outside the representation is permissible.

c. A lawyer may communicate with the commander of an opposing party even if the party is represented by counsel.

2. A lawyer is not precluded from communicating with an unrepresented party (Army Rule 4.3).

a. Lawyers may not state or imply that they are disinterested.

b. Lawyers should refrain from giving advice to unrepresented persons (Comment to Army Rule 4.3). *See also* ABA Code DR 7-104(A)(2).

Moe Starts

D. Threatening Criminal Prosecution.

1. Under ABA Code DR 7-105, lawyers could not present, participate in presenting, or threaten to present criminal charges "solely to gain an advantage in a civil matter." *See Iowa State Bar v. Michelson*, 345 N.W.2d 112 (Iowa 1984); TJAG Opinions, *The Army Lawyer*, March 1993 and May 1977. *See also United States v. Edmond*, 63 M.J. 343 (C.A.A.F. 2006) where a trial counsel threatened a civilian witness (former Soldier) with prosecution by the SAUSA if he testified and then had the SAUSA reiterate the threat of prosecution.

2. There is no parallel provision in the Army Rules (or ABA Model Rules). Threatening or filing criminal charges may, however, violate more narrow provisions of Rules 3.1, 3.3, 3.4, 3.5, 3.8, 4.4, 8.4(b), or 8.4(e).

3. Practical application.

a. Attorneys should exercise caution when writing to collect support payments or debts on behalf of clients. *See Iowa State Bar v. Michelson*, 345 N.W.2d 112 (Iowa 1984); OTJAG Ethics Opinions, *The Army Lawyer*, March 1993, September 1978, and May 1977.

b. Complaints to the opposing party's commander are permissible.

c. Lawyers should avoid making threats of initiating criminal charges. A lawyer may not circumvent this rule by encouraging clients to make threats. *In re Charles*, 618 P.2d 1281 (1980).

d. Neutral statements of fact concerning criminal penalties are permissible. *See* TJAG Professional Responsibility Opinion 89-01. (Found on JAGCNET under Administrative and Civil Law, then click on "Ethics: Attorney Professional Responsibility," click "By Category." One of the categories is "Ethics Opinions: TJAG's PRC." https://www.jagcnet2.army.mil/85256762006321e7)

Moe Ends

VII. DUTIES OF SUBORDINATES AND SUPERVISORS.

A. Responsibilities of Supervisory Attorneys (Army Rule 5.1).

1. Supervisors must make reasonable efforts to ensure subordinates comply with Rules (Army Rule 5.1). Includes nonlawyers under supervision (Army Rule 5.3).

2. A supervisor assumes imputed responsibility for acts of subordinates if:

a. The lawyer orders or ratifies a subordinate's violation, or

b. The lawyer knows of and fails to take remedial action to avoid or mitigate the consequences of a violation.

B. Responsibilities of Subordinate Attorneys (Army Rule 5.2).

1. A subordinate is bound by the Rules of Professional Conduct even if he or she acts at the direction of another.

2. Subordinate attorneys may rely on ethical judgment of a supervisor if the issue is subject to question. If the ethical question can be answered only one way, the subordinate must comply with the Rules.

Moe Starts

VIII. PROFESSIONAL RESPONSIBILITY COMPLAINTS.

A. Professional Misconduct (Army Rule 8.4).

1. It is professional misconduct for a lawyer to violate or attempt to violate these rules, to do so through the acts of others, or to knowingly assist another in violating the rules.

2. A lawyer is professionally answerable for criminal acts that indicate lack of a characteristic relevant to the practice of law. Examples include offenses involving violence, dishonesty, breach of trust, or interference with justice.

3. A lawyer also commits professional misconduct by engaging in conduct (even if not criminal) involving dishonesty, fraud, deceit, or misrepresentation, or that is prejudicial to the administration of justice.

B. Professional misconduct distinguished from personal misconduct.

1. Cases normally in the scope of AR 27-1.

a. Dishonesty – false claims, shoplifting, obtaining false official orders, firearms violations, stalking, or illegal surveillance.

b. Sexual misconduct – Bigamy, sexual relationships involving a conflict of interest, sexual crimes.

c. Insulting Behavior – Mismanaging by uttering insulting ethnic or sexual comments, displaying offensive visual material or by inappropriate touching of subordinates, clients, witnesses, or staff workers.

d. Dealing with Subordinates – Mismanaging by having personal business transactions with subordinates or imposing on subordinates for personal favors.

2. Cases normally not in scope of AR 27-1.

a. Discretionary Administrative Action – OERs, NCOERs, award recommendations, pass, or leave actions.

b. Personal misconduct or questionable sexual activity (including adultery) unless it involves mismanagement or is a criminal act that reflects on fitness to practice law (i.e. having sex with a married client).

c. DWIs or minor traffic offenses.

d. Insulting Behavior – rudeness and name-calling unless directed toward judges or investigating officers or as listed in C.1.c., above.

e. Conduct is being investigated as criminal misconduct, punishable under the UCMJ.

C. Reporting Misconduct (Army Rule 8.3).

1. A lawyer with knowledge of a violation of a Rule of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer, must report the violation.

2. Minor or inadvertent violations need not be reported.

3. Disclosure of information protected under Rule 1.6 is not required.

4. There is no requirement to confront a violator.

5. Army system implemented in AR 27-1.

a. Allegations are reviewed by several supervisory JAs up to and including DJAG before a formal preliminary screening inquiry (PSI) is ordered.

b. Increased due process protections for the accused attorney.

c. Designed to protect the interests of both the Army and the attorney.

d. OTJAG determines whether to report violation to state bar.

D. Self-Reporting Requirement (AR 27-1).

1. AR 27-1, para 7-10a. A JA is required to self-report to OTJAG (Professional Responsibility Branch) when he or she is first notified that he or she is being investigated by his or her licensing authority under circumstances that could result in being disciplined as an attorney or a judge.

2. If a JA claimed they had never been notified as his or her defense for not self-reporting, TJAG could still, at his discretion, decide that he has lost faith and trust in the JA and could then discipline the JA IAW his authority under Art 27(b) and RCM 109(a) of the UCMJ and under 10 USC 3037.

E. Advisory Opinions (AR 27-1, para. 7-7).

1. Requests should be forwarded through technical channels to the Executive, OTJAG.

2. Opinions will be rendered only for important issues of general applicability to the JAG Corps.

F. Determining Ineffective Assistance of Counsel (IAC).

1. The Supreme Court has recognized that simply providing counsel is insufficient to meet the burden imposed by the Sixth Amdt. Of the U.S. Constitution. "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. An accused is entitled to be assisted by an attorney… who plays the role necessary to ensure that the trial is fair." Strickland v. Washington, 466 U.S. 668, 685 (1984). The test for determining whether counsel's conduct has fallen below the acceptable line is measured in a two-part test. First the court looks at whether counsel's performance was deficient, compared to what is expected of reasonably competent counsel, without the benefit of hindsight, and using the standards in place at the time, and then examining whether appellant was harmed by the deficiency, assuming there was one. If either prong of the test fails, then the court will not find IAC.

2. On 19 January 2011, the Supreme Court released two cases, Harrington v. Richter and Premo v. Moore, using this analysis in examining whether defense counsel was deficient for not calling a blood spatter expert or failing to attempt to suppress an admission before entering into a guilty plea.

IX. CONCLUSION.

Army Regulation 27–26

Legal Services

Rules of Professional Conduct for Lawyers

Headquarters
Department of the Army
Washington, DC
1 May 1992

Unclassified

SUMMARY of CHANGE

AR 27–26
Rules of Professional Conduct for Lawyers

This regulation--

- Designates certain officials as ’senior counsel’ (para 4a).
- Defines proper conduct for the purposes of professional discipline (para 6).
- Parallels the structure of the American Bar Association’s Rules of Professional Conduct for Lawyers (app B).

Headquarters
Department of the Army
Washington, DC
1 May 1992

*Army Regulation 27–26

Effective 1 June 1992

Legal Services

Rules of Professional Conduct for Lawyers

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Official:

MILTON H. HAMILTON
Administrative Assistant to the
Secretary of the Army

History. This UPDATE printing publishes a new Army regulation.

Summary. This regulation provides comprehensive rules governing the ethical conduct of Army lawyers, military and civilian, and of non–government lawyers appearing before Army tribunals in accordance with the Manual for Courts–Martial. It establishes the Department of the Army Professional Conduct Council to provide authoritative interpretations of these rules.

Applicability.

a. This regulation applies to all judge advocates of the Active Army, the Army National Guard, and the U.S. Army Reserve, all other military personnel who are attorneys and are called upon to deliver legal services as a part of their duties, to all civilian attorneys employed by the Department of the Army to provide legal services, and to non–government attorneys who practice in proceedings governed by the Manual for Courts–Martial. It also applies to all other Army personnel, military and civilian, who perform duty in an Army legal office in support of Army lawyers.

b. Penalties for violations of imperative rules by Army lawyers include all administrative sanctions prescribed by law and regulation. Violations by non–government attorney's may result in imposition of sanctions pursuant to RCM 109, Manual for Courts–Martial. A violation by a military lawyer would not, in and of itself, be a violation of Article 92(1), Uniform Code of Military Justice, but the conduct itself may violate a punitive article of the Code, including Article 48. Nothing in this regulation precludes referral of violations to appropriate licensing authorities.

Proponent and exception authority. Not applicable

Army management control process. This regulation is not subject to the requirements of AR 11–2.

Supplementation. Supplementation of this regulation is prohibited without the prior approval of the General Counsel of the Army. Proposed supplements will be submitted to HQDA (DAJA–SC), WASH DC 20310–2200.

Interim changes. Interim changes to this regulation are not official unless they are authenticated by the Administrative Assistant to the Secretary of the Army. Users will destroy interim changes on their expiration dates unless sooner superseded or rescinded.

Suggested Improvements. The proponent agency of this regulation is the Office of The Judge Advocate General. Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms) directly to HQDA (DAJA–SC), WASH DC 20310–2200, with a copy to HQDA (SAGC), WASH DC 20310–0104.

Distribution. Distribution of this publication is made in accordance with DA Form 12–09–E, block number 4066, intended for command level C for Active Army, the Army National Guard, and the U.S. Army Reserve.

Contents (Listed by paragraph and page number)

Purpose • 1, *page 1*
References • 2, *page 1*
Explanation of abbreviations and terms • 3, *page 1*
Responsibilities • 4, *page 1*
Exception • 5, *page 1*
Preamble: A Lawyer's Responsibilities • 6, *page 1*
Purpose of the Rules • 7, *page 1*

Appendixes

A. References, *page 3*

B. Rules of Professional Conduct for Lawyers, *page 3*

Glossary

Index

*This regulation supersedes DA Pamphlet 27–26, 31 December 1987.

Unclassified

RESERVED

1. Purpose

This regulation provides comprehensive rules governing the ethical conduct of Army lawyers, military and civilian, and, pursuant to RCM 109, Manual for Courts–Martial, of non–government lawyers appearing before Army tribunals.

2. References

Related publications are listed in appendix A.

3. Explanation of abbreviations and terms

Explanation of abbreviations and special terms (definitions within the scope of the Rules of Professional Conduct) used in this regulation are explained in the glossary.

4. Responsibilities

a. The General Counsel of the Army, The Judge Advocate General of the Army, the Chief Counsel, U.S. Army Corps of Engineers, and the Command Counsel, U.S. Army Materiel Command, will serve as senior counsel. They will be responsible for—

(1) The issuance of enforcement procedures required by appendix B, Rule 10.1(a)(1).

(2) Serving on the Department of the Army Professional Conduct Council, or appointing an appropriate designee.

(3) Ensuring general compliance with the Rules of Professional Conduct for Lawyers by personnel under their qualifying authority and/or jurisdiction.

b. Other civilian military supervisory lawyers shall make reasonable efforts to ensure that lawyers subject to their supervision are aware of and conform to these Rules of Professional Conduct for Lawyers. More specific aspects of supervisory responsibility are found in appendix B, Rule 5.1.

5. Exception

Only the Secretary of the Army or the General Counsel, as his designee, may grant an exception to the provisions of this regulation. The granting of an exception is in the sole discretion of the Secretary or his designee, and the granting of an exception in one case is not precedent for a later request. A request for an exception will be submitted through the requesting attorney's legal supervisory chain, except that a request by a non–government attorney subject to RCM 109, Manual for Courts–Martial, will be submitted through the Chief, U.S. Army Trial Defense Service.

6. Preamble: A Lawyer's Responsibilities

a. A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

b. As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with informed understanding of the client's rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the law and the ethical rules of the adversary system. As negotiator, a lawyer seeks results advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

c. In all professional functions a lawyer should be competent, prompt, diligent, and honest. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client, except so far as disclosure is required or permitted by these Rules of Professional Conduct or other law.

d. A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's personal affairs. A lawyer should use the law's procedures only for their lawfully intended purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

e. As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education.

f. Many of a lawyer's professional responsibilities are prescribed in these Rules of Professional Conduct, as well as in substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, to exemplify the legal profession's ideals of public service, and to respect the truth–finding role of the courts.

g. A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and justice will be served. So also, a lawyer can be sure that preserving client confidence ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

h. In the nature of legal practice, however, conflicting responsibilities are encountered. Mostly all difficult ethical problems arise from conflict among a lawyer's responsibilities to clients, to the law and the legal system and to the lawyer's own interest in remaining an upright person. These Rules of Professional Conduct prescribe guidance for resolving such conflicts. Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying these Rules.

7. Purpose of the Rules

a. These Rules of Professional Conduct are intended to govern the ethical conduct of lawyers as defined in these Rules. These Rules are intended to be used in conjunction with law which controls the practice of lawyers. Such law includes but is not limited to the Uniform Code of Military Justice and Army regulations (ARs), including AR 27–1 and AR 27–10. The definitive interpretation, implementation, and enforcement of these Rules are the exclusive province of the authorities listed in appendix B, Rule 9.1.

b. While the American Bar Association (ABA) Model Rules of Professional Conduct were the basis of these rules, changes to some of the ABA Rules and associated Comment were required to ensure that these Rules met the needs of Army practice. In addition, some ABA Rules were omitted. Rules on public interest, for example, were omitted because judge advocates and lawyers employed by the Army already serve the public interest and need no further inducement for such service. Reasons for the changes include but are not limited to:

(1) An ABA Rule's inapplicability to Army practice.

(2) The need for guidance tailored to Army practice.

(3) Differences in approach to the resolution of specific ethical issues for Army lawyers.

c. These Rules of Professional Conduct are rules of reason.They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of these Rules are imperatives, cast in the terms "shall" or"shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term"may," are permissive and define areas under these Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. These Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role.Many of the Comments use the term "should." Comments do not add obligations to these

Rules but provide guidance for practicing in compliance with these Rules.

d. These Rules presuppose a larger legal context shaping the lawyer's role. That context includes statutes and court rules relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with these Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. These Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. These Rules simply provide a framework for the ethical practice of law.

e. Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules may determine whether a client–lawyer relationship exists.

f. Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. These Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, these Rules presuppose that whether or not discipline should be imposed for a violation, and severity of a sanction, depend on all the circumstances, such as the willingness and seriousness of the violation, extenuating factors, and whether there have been previous violations.

g. Violation of a Rule should not give rise to a private cause of action nor should it create a presumption that a legal duty has been breached. These Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through the disciplinary authority of the senior counsel concerned or of the attorney's chain of command or supervision. They are not designed to be a basis for civil liability. Furthermore, the purpose of these Rules can be subverted when invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in these Rules should be deemed to augment any substantive legal duty of lawyers or the extra disciplinary consequences of violating such duty.

h. Moreover, these Rules are not intended to govern or affect judicial application of either the attorney–client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney–client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney–client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under these Rules is required or permitted to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be compelled only in accordance with recognized exceptions to the attorney–client and work product privileges.

i. The lawyer's exercise of discretion not to disclose information under appendix B, Rule 1.6(b) should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

j. This and the preceding paragraph provide general orientation. The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The comments are intended as guides to interpretation, but the text of each Rule is authoritative.

Appendix A
References

Section I
Required Publications

Manual for Courts–Martial, United States,
(Cited in paras 1, 5, and app B, Rules 1.1. 1.5, 1–7, 1.8, 5.4, and 7.2.)

Uniform Code of Military Justice.
(Cited in para 7a and app B, Rules 1.1, 1.5, 1.7, 1.8, and 7.2.)

Section II
Related Publications

American Bar Association Rules of Professional Conduct

Federal Bar Association Rules of Professional Conduct

AR 27–1
Judge Advocate Legal Service

AR 27–3
Legal Assistance

AR 27–10
Military Justice

Section III
Prescribed Forms
This section contains no entries.

Section IV
Referenced Forms
This section contains no entries.

Appendix B
Rules of Professional Conduct for Lawyers

Contents

CLIENT-LAWYER RELATIONSHIP

1.1 Competence
1.2 Scope of Representation
1.3 Diligence
1.4 Communication
1.5 Fees
1.6 Confidentiality of Information
1.7 Conflict of Interest: General Rule
1.8 Conflict of Interest: Prohibited Transactions
1.9 Conflict of Interest: Former Client
1.10 Imputed Disqualification: General Rule
1.11 Successive Government and Private Employment
1.12 Former Judge or Arbitrator
1.13 Army as Client
1.14 Client Under a Disability
1.15 Safekeeping Property
1.16 Declining or Terminating Representation

COUNSELOR

2.2 Mediation
2.3 Evaluation for Use by Third Persons

ADVOCATE

3.1 Meritorious Claims and Contentions
3.2 Expediting Litigation
3.3 Candor Toward the Tribunal
3.4 Fairness to Opposing Party and Counsel
3.5 Impartiality and Decorum of the Tribunal
3.6 Tribunal Publicity
3.7 Lawyer as Witness
3.8 Special Responsibilities of a Trial Counsel
3.9 Advocate in Nonadjudicative Proceedings

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

4.1 Truthfulness in Statements to Others
4.2 Communication with Person Represented by Counsel
4.3 Dealing with Unrepresented Person
4.4 Respect for Rights of Third Persons

LEGAL OFFICES

5.1 Responsibilities of Senior Counsel and Supervisor Lawyers
5.2 Responsibilities of a Subordinate Lawyer
5.3 Responsibilities Regarding Nonlawyer Assistants
5.4 Professional Independence of a Lawyer
5.5 Unauthorized Practice of Law
5.6 [Not used]

PUBLIC SERVICE

6.1 [Not used]
6.2 [Not used]
6.3 [Not used]
6.4 [Not used]

INFORMATION ABOUT LEGAL SERVICES

7.1 Communications Concerning a Lawyer's Services
7.2 Advertising
7.3 Direct Contact with Prospective Clients
7.4 Communications of Fields of Practice
7.5 Firm Names and Letterheads

MAINTAINING THE INTEGRITY OF THE PROFESSION

8.1 Bar Admission and Disciplinary Matters
8.2 Judicial and Legal Officials
8.3 Reporting Professional Misconduct
8.4 Misconduct
8.5 Jurisdiction

INTERPRETATION

9.1 INTERPRETATION
9.2 [Not used]

ENFORCEMENT

10.1 Enforcement Procedures
10.2 [Not used]

CLIENT-LAWYER RELATIONSHIP

RULE 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

COMMENT:

Legal Knowledge and Skill

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or consult with, a lawyer of established competence in the field in question. In most instances, the required proficiency is that generally afforded to clients by other lawyers in similar matters. Expertise in a particular field of law may be required in some circumstances.

Initial determinations as to competence of an Army lawyer for a particular assignment will be made by supervisory lawyers prior to case or issue assignments; however, once assigned, Army lawyers may consult with supervisory lawyers concerning competence in a particular case or issue. See Rules 5.1 and 5.2.

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence, and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study or consultation with a lawyer of established competence in the field in question.

A lawyer may become involved in representing a client whose needs exceed either the lawyer's competence or authority to act in the client's behalf. In such a situation, the lawyer should refer the matter to another lawyer who has the requisite competence or authority to meet the client's needs. For civilian lawyers practicing before tribunals conducted pursuant to the Manual for Courts-Martial or the Uniform Code of Military Justice, competent representation may also be provided through the association of a lawyer of established competence in the field in question.

A lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation with another lawyer would be impractical. However, assistance should be limited to that reasonably necessary in the circumstances, for ill considered action can jeopardize the client's interest.

Thoroughness and Preparation

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Maintaining Competence

To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. Civilian lawyers practicing before tribunals conducted pursuant to the Manual for Courts-Martial or the Uniform Code of Military Justice for whom a system of peer review has been established should consider making use of the peer review system in appropriate circumstances.

CROSS REFERENCES:

Rule 1.2 Scope of Representation
Rule 1.3 Diligence
Rule 1.13 Army as Client
Rule 1.16 Declining or Terminating Representation
Rule 2.1 Advisor
Rule 3.1 Meritorious Claims and Contentions
Rule 3.4 Fairness to Opposing Party and Counsel
Rule 5.1 Responsibilities of the Senior Counsel and Supervisory Lawyers
Rule 5.2 Responsibilities of a Subordinate Lawyer

RULE 1.2 Scope of Representation.

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

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

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

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

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

(f) An Army lawyer's authority and control over decisions concerning the representation may, by law, be expanded beyond the limits imposed by paragraphs (a) and (c).

COMMENT:

Scope of Representation

Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law, and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, such as what witnesses to call, whether and how to conduct cross-examination, what court members to challenge, and what motions to make. Except where precluded by Rule 4.4, the lawyer should defer to the client regarding such questions as any expense to be incurred and concern for third persons who might be adversely affected.

In a case in which the client appears to be suffering mental

disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Service Limited in Objectives or Means

The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the law governing the conditions under which the lawyer's services are made available to the client. Formation of attorney-client relationships and representation of clients by Army lawyers is permissible only when authorized by competent authority. Thus, notwithstanding Rule 1.2(a) and (c), Army lawyers are subject to directions from officials at higher levels within the Department. When acting pursuant to properly delegated authority, these officials may authorize or require some variance in the scope of representation otherwise agreed upon between the Army lawyer and a lower level official. For example, the Secretary of the Army may: prescribe who is entitled to legal assistance; limit the scope of consultation when an individual is deciding whether to accept nonjudicial punishment; or limit the scope of representation at a hearing to review pretrial confinement. When the objectives or scope of services provided by a lawyer are limited by law, the lawyer should ensure at the earliest opportunity that the client is aware of such limitations.

If a lawyer is uncertain of the scope of services permitted by the law governing the conditions under which the lawyer's services are made available to a client, the lawyer should consult with the lawyer's supervisory lawyer concerning the matter. See Rule 5.2.

An agreement concerning the scope of representation must accord with these Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to conclude a matter that the lawyer might wish to continue.

Criminal, Fraudulent and Prohibited Transactions

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where required or permitted by Rule 1.6 or Rule 3.3. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Seeking to withdraw from the representation, therefore, may be appropriate.

Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may include a course of action contrary to the terms of the statute or regulation or of the interpretation placed upon it by governmental authorities.

CROSS REFERENCES

Rule 1.1 Competence
Rule 1.6 Confidentiality of Information
Rule 1.13 Army as Client
Rule 1.14 Client Under a Disability
Rule 2.1 Advisor
Rule 2.3 Evaluation for use by Third Person
Rule 3.3 Candor Toward the Tribunal
Rule 4.4 Respect for Rights of Third Persons
Rule 5.1 Responsibilities of the Senior Counsel and Supervisory Lawyers
Rule 5.2 Responsibilities of a Subordinate Lawyer

RULE 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client and in every case will consult with a client as soon as practicable and as often as necessary after undertaking representation.

COMMENT:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. Although a lawyer may be bound by court precedent to pursue certain matters on behalf of a client, see e.g. United States v. Grostefron, 12 M.J. 431 (C.M.A. 1982), a lawyer has professional discretion in determining the means by which a matter should be pursued. See Rules 1.2, 1.4b. A lawyer's workload should be managed by both lawyer and supervisor so that each matter can be handled adequately. See Rule 5.1.

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interest often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

Unless the relationship is terminated as provided in Rule 1.16, and to the extent permitted by law, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's representation is limited to a specific matter, the relationship terminates when the matter has been resolved. Doubt about whether a client-lawyer relationship exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.

A lawyer who has handled a judicial or administrative proceeding that produced a result adverse to the client should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

CROSS REFERENCES:

Rule 1.1 Competence
Rule 1.4 Communication
Rule 1.2 Scope of Representation
Rule 1.16 Declining or Terminating Representation
Rule 3.1 Meritorious Claims and Contentions
Rule 3.2 Expediting Litigation
Rule 3.4 Candor Toward the Tribunal
Rule 4.1 Truthfulness of Statements to Others
Rule 5.1 Responsibilities of the Senior Counsel and Supervisory Lawyers

RULE 1.4 Communication

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

(b) A lawyer shall explain a matter to the extent reasonably

necessary to permit the client to make informed decisions about the representation.

COMMENT:

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating a pretrial agreement on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from the Government and take other reasonable steps that permit the client to make a decision regarding the feasibility of further negotiation with the Government. A lawyer representing the Government who receives from the accused an offer for a pretrial agreement must communicate that offer, and should provide advice as to that offer, to the convening authority.

Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

When the client is the Army, it is often impossible or inappropriate to inform everyone of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the Army. See Rule 1.13.

Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigencies may limit the opportunity for consultation and also require a lawyer to act for a client without prior consultation.

In some circumstances, a lawyer may be required to withhold information from a client. For example, classified information may not be disclosed without proper authority. In other circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience, or where disclosure would be favorable to the defense of a criminal accused. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

CROSS REFERENCES:

Rule 1.1 Competence
Rule 1.2 Scope of Representation
Rule 1.3 Diligence
Rule 1.6 Confidentiality of Information
Rule 1.7 Conflict of Interest: General Rule
Rule 1.13 Army as Client
Rule 2.1 Advisor
Rule 2.2 Intermediary
Rule 3.2 Expediting Litigation
Rule 3.8 Special Responsibilities of Trial Counsel
Rule 4.1 Truthfulness of Statements to Others

RULE 1.5 Fees.

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing in representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) a lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) the client is advised of and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

(f) A lawyer who has initially represented a client concerning a matter as part of the attorney's official Army duties shall not accept any salary or other payments as compensation for services rendered to that client in a private capacity concerning the same general matter for which the client was seen in an official capacity.

(g) A lawyer shall not accept any payments or benefits, actual or constructive, directly or indirectly for making a referral of a client.

(h) An Army lawyer, in connection with the Army lawyer's official duties, may not request or accept any compensation from any source other than that provided by the United States for the performance of duties.

COMMENT:

Army Lawyers

Army lawyers are prohibited by statute from accepting any salary or contribution to or supplementation of salary, as compensation for services as an officer or employee of the Army from any source other than the Government of the United States. Rule 1.5(a)-(e), therefore, applies only to private civilian lawyers practicing before tribunals conducted pursuant to the Manual for Courts-Martial or the Uniform Code of Military Justice. The inclusion of Rule 1.5(a)-(e) as applicable to such private civilian lawyers is not so much to allow The Judge Advocate General to regulate fee arrangements

between such lawyers and their clients as it is to provide guidance to judge advocates practicing with such lawyers and to supervisory judge advocates who may be asked to inquire into an alleged fee irregularities. Absent Rule 1.5(a)-(e), such judge advocates have no readily available standard with which to consider allegedly questionable conduct of a private civilian lawyer. Rule 1.5(a)-(e) is the same as the American Bar Association Model Rule of Professional Conduct 1.5 (a)-(e) and thus reflects generally accepted professional standards.

Basis or Rate of Fee

When the lawyer has regularly represented a client, they ordinarily will have reached an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge, a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of fee is set forth.

Terms of Payment

A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. Where there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

Division of Fee

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyer to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive. Joint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved.

Disputes over Fees

If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Military Representation and Referral

Army lawyers may neither request nor accept any gratuity, salary or other compensation from any source as payment for performance of official Army duties. For example, a legal assistance officer is prohibited from accepting a gift or a loan from a client tendered as a result of assistance rendered.

Army lawyers may not request or accept any gratuity, salary, or other compensation from a client obtained incident to the performance of duties as an officer or employee of the Army. For example, a legal assistance officer (including a reservist being utilized as a legal assistance officer such as during drills or as a Special Legal Assistance Officer) may not receive any actual or constructive compensation or benefit for or in connection with referring to private practice (including one in which the referring lawyer engages during off-duty hours) a matter the lawyer first become involved with in a military legal assistance capacity. This rule precludes the legal assistance officer from referring a client originally seen in a legal assistance capacity to himself or herself or to the firm in which the lawyer works in a private capacity concerning the same general matter for which the client was seen in legal assistance unless no fee or other compensation is charged. It does not preclude the lawyer from representing military personnel or dependents in a private capacity concerning new matters, even though the relationship might have been first established in a military legal assistance capacity. The rule prohibits a lawyer from using an official position to solicit or obtain clients for a private practice.

CROSS REFERENCES:

Rule 1.2 Scope of Representation
Rule 1.7 Conflict of Interest: GeneralRule
Rule 1.8 Conflict of Interest: Prohibited Transactions
Rule 1.16 Declining or Terminating Representation

RULE 1.6 Confidentiality of Information.

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

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

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

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

COMMENT:

The lawyer is part of a judicial system charged with upholding

the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that most clients follow the advice given, and the law is upheld.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by these Rules of Professional Conduct or other lawful order, regulation or statute.

The preservation of client confidentiality also may be affected by the nature of the facilities available. Army lawyers should have enclosed private offices which afford the degree of privacy necessary to preserve confidentiality. Under any circumstances, an Army lawyer must strive to avoid allowing unauthorized persons to overhear confidential conversations. Control or access by others to automated data processing systems or equipment utilized by the lawyer also must be considered. Control or access by personnel who are not subject to the Rules, or supervised by those subject to these Rules, may lead to a violation of the confidentiality required by this Rule.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized Disclosure

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers may disclose to supervisory lawyers and to paralegals, subject to the direction and control of the lawyer or the lawyer's supervisory lawyer, information relating to a client, unless the client has instructed that particular information be confined to specified lawyers, or unless otherwise prohibited by these Rules of Professional Conduct or other lawful order, regulation, or statute.

Disclosure Adverse to Client

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited. Several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer owes a duty of candor to the court and has a duty under Rule 3.3(a)(3) not to use false evidence. These duties are essentially special instances of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to "counsel or assist"criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm, or significant impairment of national security or of the readiness or capability of a military unit, vessel, aircraft, or weapon system. As stated in paragraph (b), the lawyer has a professional obligation to reveal information to the extent that lawyer reasonably believes necessary to prevent such consequences.

Examples of conduct likely to result in the significant impairment of the readiness or capability of a military unit, vessel, aircraft, or weapon system include: divulging the classified location of a special operations unit such that the lives of members of the unit are placed in immediate danger; sabotaging a vessel or aircraft to the extent that the vessel or aircraft and crew will be lost; compromising the security of a weapons site such that the weapons are likely to be stolen or detonated. Paragraph (b) is not intended to and does not mandate the disclosure of conduct which may have a slight impact on the readiness or capability of a unit, vessel, aircraft or weapon system. Examples of such conduct are: absence without authority from a peacetime training exercise; intentional damage to an individually assigned weapon; and intentional minor damage to military property.

In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

Withdrawal

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must seek to withdraw, as stated in Rule 1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the client's confidence, except as otherwise provided in Rule 1.6. Nothing in this Rule, Rule 1.8(b) or Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is the Army, the lawyer may be in doubt whether contemplated conduct will actually be carried out. Where necessary to guide conduct in connection with the Rule, the lawyer may make inquiry within the Army as indicated in Rule 1.13(c).

Dispute Concerning a Lawyer's Conduct

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (c) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably

believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A non-government lawyer entitled to a fee is permitted by paragraph (b)(2) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosure Otherwise Required or Authorized

The attorney-client privilege is defined by Military Rule of Evidence 502. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

These Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Former Client

The identification of the client, for purposes of the Army Lawyer, is important to the application of this rule. Generally the agency is the Army lawyer's client. Communications by an Army lawyer both inside and outside of the agency may or may not violate this rule. An Army Lawyer's duty under this rule is affected by statutes, regulations and other lawful directives.

Paragraph (d) permits disclosures that the agency authorizes its lawyers to make in connection with the performance of their duties to the agency. These disclosures may be required by statute, Executive Order, regulation or directive, depending upon the authority of the agency to issue such order. An attorney may reveal information when authorized by law and must reveal information when required to do so by law.

There are circumstances in which an Army Lawyer may be assigned to provide an individual with counsel or representation in which it is clear that an obligation of confidentiality adheres to that individual and not the agency. Examples include judge advocates who provide defense counsel or legal assistance services to individuals. It would also include Army Lawyers who have been approved by their Senior Counsel or the Senior Counsel's designee to provide legal service to an individual with regard to a specific legal matter.

The duty of confidentiality continues after the client-lawyer relationship has terminated.

CROSS REFERENCES:

Rule 1.1 Competence
Rule 1.2 Scope of Representation
Rule 1.8 Conflict of Interest: Prohibited Transactions
Rule 1.13 Army as Client
Rule 1.16 Declining and Terminating Representation
Rule 2.1 Advisor
Rule 2.2 Intermediary
Rule 2.3 Evaluation for Use by Third Persons
Rule 3.3 Candor toward the Tribunal
Rule 4.1 Truthfulness of Statements to Others
Rule 5.4 Professional Independence of a Lawyer

RULE 1.7 Conflict of Interest: General Rule.

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

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

(2) each client consents after consultation.

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

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

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

COMMENT:

Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should seek to withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer is permitted to withdraw because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and Consent

A client including an organization (see Rule 1.13c)(b), may consent to representation notwithstanding a conflict. However, as indicated in Rule 1.7(a)(1) with respect to representation directly adverse to a client, and Rule 1.7(b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement to provide representation on the basis of the

client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Lawyer's Interests

The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, a military lawyer's desire to take leave or transfer duty stations should not motivate the lawyer to recommend a pretrial agreement in a case. If the propriety of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts of Litigation

Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple accused in a criminal case is so grave that ordinarily a lawyer should not represent more than one co-accused. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2 involving intermediation between clients.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, Government lawyers in some circumstances may represent Government employees in proceedings in which a Government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily proper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Interest of a Person Paying for a Lawyer's Service

A civilian lawyer practicing before a tribunal conducted pursuant to the Manual for Courts-Martial or the Uniform Code of Military Justice may be paid from a source other than the client, if the client is informed of that fact, consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, an accused soldier's family may pay a civilian lawyer to represent the soldier at a court-martial.

Other Conflict Situations

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of the proximity and degree.

For example, a legal assistance attorney may not represent both parties in a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them. Such cases of common interest might include advising a buyer and seller of an auto and preparing a bill of sale for them.

Conflict questions may also arise in estate planning. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise.

Conflict Charged by an Opposing Party

While the lawyer must be careful to avoid conflict of interest situations, resolving questions of conflict of interest is primarily the responsibility of the supervisory lawyer or the military judge. See also Rule 5.1. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple coaccused. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.

CROSS REFERENCES:

Rule 1.1 Competence
Rule 1.2 Scope
Rule 1.4 Communication
Rule 1.8 Conflict of Interest: Prohibited Transactions
Rule 1.9 Conflict of Interest: Former Client
Rule 1.12 Former Judge or Arbitrator
Rule 1.13 Army as Client
Rule 1.16 Declining or Terminating Representation
Rule 2.2 Intermediary
Rule 2.3 Evaluation for Use by Third Person
Rule 5.1 Responsibilities of the Senior Counsel and Supervisory Lawyers
Rule 5.4 Professional Independence of a Lawyer

RULE 1.8 Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless;

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) While representing a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation except that a civilian lawyer practicing before a tribunal conducted pursuant to the Manual for Courts-Martial or the Uniform Code of Military

Justice representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless;

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship;and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client.

COMMENT:

Army Lawyers

Army lawyers will strictly adhere to Department of the Army standards of conduct regulations in all dealings with clients. Such regulations generally prohibit entering into business transactions with clients, deriving financial benefit from representations of clients, and accepting gifts from clients or other entities for the performance of official duties. This rule does not authorize conduct otherwise prohibited by such regulations. An Army lawyer will not make any referrals of legal or other business to any private civilian lawyer or enterprise with whom the Army lawyer has any present or expected direct or indirect personal interest. Special care will be taken to avoid giving preferential treatment to reserve judge advocates or other government lawyers in their private capacities.

Transactions Between Client and Lawyer

As a general principle, all business transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable. All transactions must comply with promulgated standards of conduct and other lawful orders and regulations. See also Rule 1.5.

Rule 1.8(e) does not prohibit de minimis financial assistance to a client such as a trial defense counsel's purchase of an authorized ribbon for wear on the accused's uniform during court-martial proceedings.

Literary Rights

An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation.

Person Paying for a Lawyer's Services

Rule 1.8(f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest.

Family Relationships Between Lawyers

Rule 1.8(i) applies to related lawyers who are in different offices, e.g., one lawyer is a trial counsel in a staff judge advocate office and one lawyer is a trial defense counsel serving the same staff judge advocate office. Related lawyers in the same office are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in Rule 1.8(i) is personal and is not imputed to other lawyers in the offices with whom the lawyer performs duty.

Acquisition of Interest in Litigation

Rule 1.8(j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigation set forth in paragraph (e).

The Rule is not intended to apply to customary qualifications and limitations in legal opinions and memoranda.

CROSS REFERENCES:

Rule 1.1 Competence
Rule 1.2 Scope of Representation
Rule 1.5 Fees
Rule 1.7 Conflict of Interest: General Rule
Rule 1.9 Conflict of Interest: Former Client
Rule 1.16 Declining or Terminating Representation

RULE 1.9 Conflict of Interest: Former Client

(a) A lawyer who has formerly represented a client in a matter shall not thereafter;

(1) represent another person in the same or a substantially related matter in which the person's interests are materially adverse to the interests of the client unless the former client consents after consultation; or

(2) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

(b) An Army lawyer shall not knowingly represent a second client in the same or a substantially related matter in which a firm with which the lawyer formerly associated had previously represented a client;

(1) whose interests are materially adverse to that second client; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) An Army lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter;

(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

COMMENT:

After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule. The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has defended an accused at trial could not properly act as appellate Government counsel in the appellate review of the accused's case.

The scope of a "matter"for purposes of Rule 1.9(a) may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Thus, the reassignment of military lawyers between defense, prosecution, review, claim and legal assistance functions within the same military jurisdiction is not precluded by this Rule.

The underlying question is whether the lawyer was so involved in a particular matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

Information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

Disqualification from subsequent representation is for the protection of clients and can be waived by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's role in behalf of the new client.

Rule 1.9(b) and (c) make clear that the foregoing applies to Army lawyers with respect to the clients whom they previously served while in private practice.

With regard to an opposing party's raising a question of conflict of interest, see Comment to Rule 1.7.

CROSS REFERENCES:

Rule 1.1 Competence
Rule 1.2 Scope of Representation
Rule 1.6 Confidentiality
Rule 1.7 Conflict of Interest: General Rule
Rule 1.16 Declining or Terminating Representation
Rule 2.2 Intermediary

RULE 1.10 Imputed Disqualification: General Rule

(a) Army lawyers working in the same Army law office are not automatically disqualified from representing a client because any of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

(b) When an Army lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless;

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification under this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

COMMENT:

The circumstances of military service may require representation of opposing sides by Army lawyers working in the same law office. Such representation is permissible so long as conflicts of interest are avoided and independent judgment, zealous representation, and protection of confidences are not compromised. Thus, the principle of imputed disqualification is not automatically controlling for Army lawyers. The knowledge, actions, and conflicts of interest of one lawyer are not to be imputed to another simply because they operate from the same office. For example, the fact that a number of defense attorneys operate from one office and share clerical assistance, would not prohibit them from representing co-accused at trial by court-martial.

Army policy may address imputed disqualification in certain contexts. For example, Army policy discourages representation by one legal assistance office of both spouses involved in a domestic dispute.

Whether a lawyer is disqualified requires a functional analysis of the facts in a specific situation. The analysis should include consideration of whether the following will be compromised; preserving attorney-client confidentiality; maintaining independence of judgment; and avoiding positions adverse to a client.

Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in a particular circumstance, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a military law office and may regularly participate in discussions of their affairs; it may be inferred that such a lawyer in fact is privy to all information about all the office's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not to information of other clients. Additionally, a lawyer changing duty stations or changing assignments within an office has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9.

Maintaining independent judgment allows a lawyer to consider, recommend and carry out any appropriate course of action for a client without regard to the lawyer's personal interests or the interests of another. When such independence is lacking or unlikely, representation cannot be zealous.

Another aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers in the same office through imputed disqualification. Hence this aspect of the problem is governed by Rule 1.9(a).

Rules 1.10(b) and (c) address the imputed disqualification of the Army lawyer's former law firm. These rules indicate that the conflict-of-interest principles in Rule 1.9 do not apply to the law firm except as indicated in these rules.

CROSS REFERENCES:

Rule 1.6 Confidentiality
Rule 1.7 Conflict of Interest: General Rule
Rule 1.8 Conflict of Interest: Prohibited Transactions
Rule 1.9 Conflict of Interest: Former Client
Rule 2.2 Intermediary

RULE 1.11 Successive Government and Private Employment

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless;

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate Government agency to enable it to ascertain compliance with the provisions of this Rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential Government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not;

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

(d) As used in this Rule, the term "matter" includes;

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate Government agency.

(e) As used in this Rule, the term "confidential Governmental information"means information which has been obtained under Governmental authority and which, at the time this Rule is applied, the Government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

COMMENT:

This Rule prevents a lawyer from exploiting public office for the advantage of a private client.

A lawyer representing a Government agency, whether employed or specially retained by the Government, is subject to these Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and Government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the Government agency may give consent under this Rule.

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential Government information about the client or by reason of access to confidential Government information about the client's adversary obtainable only through the lawyer's Government service. However, the rules governing lawyers presently or formerly employed by a Government agency should not be so restrictive as to inhibit transfer of employment to and from the Government. The Government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

Paragraphs (a)(1) and (b) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

Paragraph (a)(2) does not require that a lawyer give notice to the Government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the Government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

Paragraph (b) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

CROSS REFERENCES:

Rule 1.5 Fees
Rule 1.7 Conflict of Interest: General Rule
Rule 1.8 Conflict of Interest: Prohibited Transactions

RULE 1.12 Former Judge or Arbitrator

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, or law clerk to such a person, unless all parties to the proceeding consent after disclosure.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, or arbitrator. A lawyer serving as law clerk to a judge, other adjudicative officer, or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer, or arbitrator.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which the lawyer is associated may knowingly undertake or continue representation in the matter unless;

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

COMMENT:

This Rule generally parallels Rule 1.11. The term "personally and

substantially"signifies that a judge who was a member of a multi-member court, and thereafter left judicial office, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court or judiciary office does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the comment to Rule 1.11. The term "adjudicative officer"includes such officials as hearing officers, legal advisors to administrative boards, Article 32 investigating officers, summary court-martial officers, and also lawyers who serve as part time judges.

CROSS REFERENCES:.

Rule 1.7 Conflict of Interest: General Rule
Rule 1.8 Conflict of Interest: Prohibited Transactions
Rule 1.11 Successive Government and Private Employment

RULE 1.13 Army as Client

(a) Except when representing an individual client pursuant to (g) below, an Army lawyer represents the Department of the Army acting through its authorized officials. These officials include the heads of organizational elements within the Army, such as the commanders of armies, corps and divisions, and the heads of other Army agencies or activities. When an Army lawyer is assigned to such an organizational element and designated to provide legal services to the head of the organization, the lawyer-client relationship exists between the lawyer and the Army as represented by the head of the organization as to matters within the scope of the official business of the organization. The head of the organization may not invoke the lawyer-client privilege or the rule of confidentiality for the head of the organization's own benefit but may invoke either for the benefit of the Army. In so invoking either the lawyer-client privilege or lawyer-client confidentiality on behalf of the Army, the head of the organization is subject to being overruled by higher authority in the Army. The term Army as used in this and related Rules will be understood to mean the Department of the Army or the organizational element involved.

(b) An Army lawyer shall not form a client-lawyer relationship or represent a client other than the Army unless specifically assigned or authorized by competent authority. Unless so authorized, the Army lawyer will advise the individual that there is no lawyer-client relationship between them.

(c) If a lawyer for the Army knows that an officer, employee, or other member associated with the Army is engaged in action, intends to act or refuses to act in a matter related to the representation that is either a violation of a legal obligation to the Army or a violation of law which reasonably might be imputed to the Army the lawyer shall proceed as is reasonably necessary in the best interest of the Army. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the Army and the apparent motivation of the person involved, the policies of the Army concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the Army and the risk of revealing information relating to the representation to persons outside the Army. Such measures may include among others;

(1) advising the head of the organization that his or her personal legal interests are at risk and that he or she should consult counsel as there may exist a conflict of interest for the lawyer and the lawyer's responsibility is to the organization;

(2) asking reconsideration of the matter;

(3) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the Army;

(4) advising the person that the lawyer is ethically obligated to preserve the interests of the Army and, as a result, must consider discussing the matter with supervisory lawyers within the Army lawyer's office or at a higher level within the Army.

(5) referring the matter to or seeking guidance from higher authority in the technical chain of supervision, including, if warranted by the seriousness of the matter, referral to the Army lawyer assigned to the staff of the acting official's next superior in the chain of command.

(d) If, despite the lawyer's efforts in accordance with paragraph (c), the highest authority that can act concerning the matter insists upon action, or refusal to act, that is clearly a violation of law, the lawyer may terminate representation with respect to the matter in question. In no event shall the lawyer participate or assist in the illegal activity.

(e) In dealing with the Army's officers, employees, or members, a lawyer shall explain the identity of The Army as the client when it is apparent that the Army's interests are adverse to those of the officers, employees, or members.

(f) A lawyer representing the Army may also represent any of its officers, employees, or members acting on behalf of the Army subject to the provisions of Rule 1.7 and other applicable authority. If the Army's consent to dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the Army other than the individual who is to be represented.

(g) A lawyer who has been duly assigned to represent an individual who is subject to disciplinary action or administrative proceedings, or to provide civil legal assistance to an individual, has, for those purposes, a lawyer-client relationship with that individual.

COMMENT:

The Army as the Client

The Army and its commands, units, and activities are legal entities, but cannot act except through their authorized officers, employees, and members. The Army's interests may conflict with or become adverse to those of one or more of the officers, employees, or members. Under such circumstances the question arises as to who the client is. Identifying the client is of great significance to the lawyer because of the ramifications it has on the carrying out of legal and ethical obligations.

For purposes of these Rules, an Army lawyer normally represents the Army acting through its officers, employees or members in their official capacities. It is to that client when acting as a representative of the organization that a lawyer's immediate professional obligation and responsibility exists absent assignment or designation by the Army to represent a specific individual client.

When one of the officers, employees, or members of the Army communicates with the Army's lawyer on a matter relating to the lawyer's representation of the organization on the organization's official business, the communication is generally protected from disclosure to anyone outside the Army by Rule 1.6. This does not mean, however, that the officer, employee, or member is a client of the lawyer. It is the Army, and not the officer, employee, or member which benefits from Rule 1.6 confidentiality. The Army's entitlement to confidentiality from third parties may not be asserted by an officer, employee, or member as a basis to conceal personal misconduct from the Army. The lawyer may not disclose information relating to the representation except for disclosures explicitly or impliedly authorized by the Army in order to carry out the representation or as otherwise permitted in Rule 1.6.

When the officers, employees, or members of the Army make decisions for the Army, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer may have reason to know that the Army may be substantially injured by the action of an officer, employee, or member that is in violation of law or directive. In such a circumstance, it may be necessary for the lawyer to ask the officer, employee, or member to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the Army, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by higher authority in the Army. Army

lawyers should refer such matters through supervisory channels.

Paragraph (b) specifies that a client-lawyer relationship is not formed between an Army Lawyer and an individual unless specifically authorized by competent authority such as statute, Executive Order, directive, regulation, or on a case by case basis by the Senior Counsel or their designee. Further the rule affirmatively requires an Army Lawyer to advise an individual with whom they are dealing that, absent express authorization from competent authority, no lawyer-client relationship exists. However, this obligation arises only when it appears that the individual acts or intends to act in violation of a legal obligation, contrary to the interests of the Army, or when it reasonably appears that the person is expecting representation in an individual capacity.

Relation to Other Rules

The authority and responsibility provided in paragraph (c) are concurrent with the authority and responsibility provided in other Rules. In particular, the Rule does not limit or expand the lawyer's responsibility under Rule 1.6, 1.8, 1.16, 3.3, or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

Clarifying the Lawyer's Role

At those times when the Army's interests are clearly adverse to those of one or more of its officers, employees, or members, the lawyer should advise the officer, employee, or member that the lawyer cannot continue to advise the officer, employee, or member and that such person may wish to obtain independent representation. Care must be taken to assure that the person understands that, when there is such adversity of interest, the lawyer for the Army may no longer provide legal advice to that person on those matters in which the person's interests are adverse, and that discussions between the lawyer for the Army and the person may not be confidential or privileged.

Subparagraph (c)(4) also requires the Army Lawyer to advise the individual of the Army Lawyer's duty to protect the interests of the Army, and the possibility of discussions of the matter within the Army Lawyer's immediate office or within the technical chain of supervision extending up to the Department of the Army.

Dual Representation

Paragraph (f) recognizes that a lawyer for the Army may also represent an officer, employee, or member of the Army.

Paragraph (g) recognizes that the lawyer who is designated to represent another individual in Government service against whom proceedings are brought of a disciplinary, administrative or personal character, establishes a lawyer-client relationship with its privilege and professional responsibility to protect and defend the interest of the individual represented. This is also true for lawyers providing civil legal assistance. But see Rule 1.2. Representation of members of the Army, Government employees, and other individuals in accordance with paragraph (g) and the assumption of the traditional lawyer-client relationship with such individuals is not inconsistent with the lawyer's duties to the Army so long as no conflict exists.

A lawyer assigned outside the Department of the Army, such as to a joint or unified command or another executive agency, owes loyalty to that organization. It is to that client that a lawyer's immediate professional obligation and responsibility exists, absent assignment or designation by the organization to represent a specific individual client.

CROSS REFERENCES:

Rule 1.2 Scope of Representation
Rule 1.6 Confidentiality of Information
Rule 1.7 Conflict of Interest: General Rule
Rule 1.8 Conflict of Interest: Prohibited Transactions
Rule 1.16 Declining or Terminating Representation
Rule 2.1 Advisor
Rule 3.3 Candor Toward the Tribunal
Rule 3.8 Special Responsibilities of a Trial Counsel
Rule 4.1 Truthfulness in Statements to Others
Rule 5.1 Responsibilities of the Senior Counsel and Supervisory Lawyers
Rule 5.2 Responsibilities of a Subordinate Lawyer
Rule 5.4 Professional Independence of a Lawyer

RULE 1.14 Client Under a Disability

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

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

COMMENT:

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about the matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer should take action so that procedures are initiated for the appointment of a guardian by the person's relatives, civil authorities or the Veteran's Administration. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, the lawyer should consider recommending such an appointment where it would serve the client's best interests.

Disclosure of the Client's Conditions

Rules of procedure in civil litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment or to disclosure of information which would be to a client's detriment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician but military law does not recognize a doctor-patient privilege.

CROSS REFERENCES:

Rule 1.2 Scope of Representation
Rule 1.3 Diligence
Rule 1.6 Confidentiality of Information

RULE 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or the third person. Except as stated in this Rule or as otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their respective interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

COMMENT:

Army lawyers normally will not hold property of clients or third persons. Should an Army lawyer find it necessary to hold such property, care will be taken to ensure that the Army does not become responsible for any claims for the property. This rule does not authorize Army lawyers to hold property of clients or third persons when otherwise prohibited from doing so.

A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in safe deposit boxes, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

When it is necessary to use a client's property as evidence, a lawyer should seek to obtain court permission to withdraw the property as an exhibit and to substitute a description or photograph after trial. If a lawyer is offered contraband property, the lawyer should refer to Rule 3.4 and Comment for guidance.

Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

CROSS REFERENCES:

Rule 3.4 Fairness to Opposing Party and Counsel

RULE 1.16 Declining or Terminating Representation

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

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

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

(3) the lawyer is dismissed by the client.

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

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

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

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

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

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

(6) other good cause for withdrawal exists.

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

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law.

COMMENT:

A lawyer should not represent a client in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal

A lawyer ordinarily must seek to withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates these Rules of Professional Conduct or other law. The lawyer is not obliged to seek to withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

Continued Representation Notwithstanding Good Cause

Notwithstanding the existence of good cause for terminating representation, a lawyer appointed to represent a client shall continue such representation until relieved by competent authority. Who is competent authority will differ with the circumstances. For example, in a trial by court-martial, the appointing authority would be competent authority prior to trial; but the military judge would be competent authority once trial begins. After trial, representation may be terminated pursuant to Army regulation. A lawyer representing the

Army may be authorized to withdraw from the representation by The Judge Advocate General or the lawyer's supervisory lawyer.

Difficulty may be encountered where competent authority requires an explanation for the termination and such explanation would necessitate the revelation of confidential facts. Where necessary and practicable, a lawyer should seek the advice of a supervisory lawyer. The decision by one authority to continue representation does not prevent the lawyer from seeking withdrawal from other competent authority such as a military judge.

Discharge by the Client

A client has a right to discharge a lawyer with or without cause. Where future disputes about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

Whether a client can release appointed counsel may depend on applicable law. A client seeking to release appointed counsel should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself or herself.

If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event, the discharge may be seriously adverse to the client's interests. See Rule 1.14.

Optional Withdrawal

A lawyer may seek to withdraw from representation in some circumstances. The lawyer has the option of seeking to withdraw if it can be accomplished without material adverse effect on the client's interests. Seeking to withdraw is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Seeking to withdraw is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may seek to withdraw where the client insists on a repugnant or imprudent objective.

As the scope of a lawyer's representation may be limited by the law under which the lawyer's services are made available to the client, see Comment to Rule 1.2, good cause to seek withdrawal exists when a lawyer changes duty stations or changes duties within an office. For example, a legal assistance lawyer has good cause to seek withdrawal when the lawyer is reassigned within the office to duties as trial counsel. In such a circumstance, the legal assistance lawyer has been granted permission to withdraw from representation of legal assistance clients by virtue of the reassignment to trial counsel duties. If a question arises as to whether a lawyer has permission to withdraw from a particular representation, the lawyer should consult with the supervisory lawyer who has the authority to grant permission to withdraw from the representation.

Assisting the Client upon Withdrawal

A lawyer who has withdrawn from representation must take all reasonable steps to mitigate the consequences to the client. Such steps may include referral of the client to another lawyer who is able to represent the client further. A lawyer making such a referral should ensure that these Rules and any Army policy governing referral of clients is followed. If a lawyer must refer a client to another lawyer due to a conflict of interest, the referring lawyer should be careful not to disclose confidential information relating to representation of another client.

Whether or not a lawyer representing the Army may under certain unusual circumstances have a legal obligation to the Army after withdrawing or being released by the Army's highest authority is beyond the scope of these Rules.

CROSS REFERENCES:

Rule 1.2 Scope of Representation
Rule 1.6 Confidentiality of Information
Rule 1.7 Conflict of Interest: General Rule
Rule 1.13 Army as Client
Rule 1.14 Client Under A Disability
Rule 3.1 Meritorious Claims and Contentions
Rule 3.3 Candor Toward the Tribunal
Rule 3.8 Special Responsibilities of a Trial Counsel

COUNSELOR

RULE 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation, but not in conflict with the law.

COMMENT:

Scope of Advice

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's best advice often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

CROSS REFERENCES:

Rule 1.4 Communication
Rule 1.6 Confidentiality of Information
Rule 1.13 Army as Client
Rule 3.1 Meritorious Claims and Contentions
Rule 5.4 Professional Independence of a Lawyer

RULE 2.2 Mediation

(a) A lawyer may act as a mediator between individuals if;

(1) the lawyer consults with each individual concerning the implications of the mediation, including the advantages and risks involved, and the effect on the lawyer-client confidentiality, and obtains each individual's consent to the mediation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the individuals' best interests, that each individual will be able to make adequately informed decisions in the matter, and that there is little risk of material prejudice to the interests of any of the individuals if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the mediation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the individuals.

(b) While acting as a mediator, the lawyer shall consult with each individual concerning the decisions to be made and the considerations relevant in making them, so that individual can make adequately informed decisions.

(c) A lawyer shall withdraw as a mediator if any of the individuals so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not represent any of the individuals in the matter that was the subject of the mediation unless each individual consents.

COMMENT:

A lawyer acts as a mediator under this Rule when the lawyer mediates among two or more individuals with potentially conflicting interests. For example, both soldiers and dependents are entitled to legal assistance. Should a legal assistance officer see both the dependent-seller and a soldier-buyer of a used car, the individuals would have potentially conflicting interests and the legal assistance officer would be acting as a mediator in such a situation. Because confusion can arise as to the lawyer's role where each individual is not separately represented, it is important that the lawyer make clear the relationship.

A lawyer acts as a mediator in seeking to establish or adjust a relationship between individuals on an amicable and mutually advantageous basis; for example, arranging a property distribution in settlement of an estate or mediating a dispute between individuals. The lawyer seeks to resolve potentially conflicting interests by developing the individuals' mutual interests. The alternative can be that each individual may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the individuals may prefer that the lawyer act as mediator.

In considering whether to act as a mediator between individuals, a lawyer should be mindful that if the mediation fails the result can be additional cost, embarrassment and recrimination. In some situations the risk of failure is so great that mediation is plainly impossible. For example, a lawyer cannot undertake mediation among individuals when contentious litigation is imminent or who contemplate contentious negotiations. More generally, if the relationship between the individuals has already assumed definite antagonism, the possibility that the individuals' interests can be adjusted by mediation ordinarily is not very good.

The appropriateness of mediation can depend on its form. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent either individual on a continuing basis and whether the situation involves creating a relationship between the individuals or terminating one.

Confidentiality and Privilege

A particularly important factor in determining the appropriateness of mediation is the effect on client-lawyer confidentiality of information relating to the mediation. See Rules 1.4 and 1.6. As the lawyer represents neither individual in the mediation, there is neither lawyer-client privilege nor lawyer-client confidentiality.

Since the lawyer is required to be impartial between commonly represented clients, mediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the individuals for a long period and in a variety of matters might have difficulty being impartial between the individual and one to whom the lawyer has only recently been introduced.

Consultation

In acting as a mediator between individuals, the lawyer is required to consult with the individuals on the implications of doing so, and proceed only upon consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances.

Where the lawyer is a mediator, the individuals ordinarily must assume greater responsibility for decisions than when each individual is represented by a lawyer.

Withdrawal

Each individual has the right to the loyalty and diligence of the mediating lawyer, and may discharge the lawyer as stated in the Rule.

CROSS REFERENCES:

Rule 1.4 Communication
Rule 1.6 Confidentiality of Information
Rule 1.7 Conflicts of Interest: General Rule
Rule 1.9 Conflicts of Interest: Former Client
Rule 1.13 Army as Client
Rule 1.16 Declining or Terminating Representation

RULE 2.3 Evaluation for Use by Third Persons

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client, and

(2) the client consents after consultation.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

COMMENT:

Definition

An evaluation may be performed at the client's direction but for the primary purpose of establishing information for the benefit of third parties; for example, a judge advocate is asked to prepare a brief setting forth his service's position on a situation for use by another Governmental agency or the Congress.

Lawyers may be called upon to give a formal opinion on the legality of action contemplated by the Army. In making such an evaluation, the lawyer acts at the behest of the Army as the client but for the purpose of establishing the limits of the Army's authorized activity. Such an opinion may be confidential legal advice depending on whether the Army intended it to be confidential.

If a lawyer believes that making an evaluation is incompatible with other aspects of the lawyer's relationship with the client, the lawyer should consult with the lawyer's supervisory lawyer for advice and guidance.

A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a lawyer-client relationship. For example, a lawyer detailed to conduct a foreign

claims investigation of a traffic accident between a foreign national and a soldier in accordance with applicable Army regulations does not have a lawyer-client relationship with the soldier. So also, an investigation into a person's affairs by a lawyer is not an evaluation as that term is used in this rule. The question is whether the lawyer represents the person whose affairs are being examined. When the lawyer does represent the person, the general rules concerning loyalty to client and preservation of confidences apply. For this reason, it is essential to identify the client. The identity of the client should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duty to Third Person

When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this rule. However, since such an evaluation involves a departure from the normal lawyer-client relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken on behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

CROSS REFERENCES:

Rule 1.2 Scope of Representation
Rule 1.6 Confidentiality of Information
Rule 1.7 Conflict of Interest: General Rule
Rule 1.9 Conflict of Interest: Former Client
Rule 1.13 Army as Client
Rule 1.16 Declining or Terminating Representation
Rule 4.1 Truthfulness in Statements to Others
Rule 4.2 Communication with Person Represented by Counsel
Rule 4.3 Dealing with Unrepresented Person
Rule 4.4 Respect for the Rights of Third Persons

ADVOCATE

RULE 3.1 Meritorious Claims and Contentions

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

COMMENT:

The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. Merely because an issue has never been raised before, or because it may have been raised under different circumstances and been resolved under those circumstances, the raising of the issue again is not necessarily frivolous. The action is frivolous, however, if the client desires to have the action taken solely for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

A lawyer does not violate this Rule by raising issues in good faith compliance with court precedent, see e.g., United States v. Grostefron, 12 M. J. 431 (C.M.A. 1982).

CROSS REFERENCES:

Rule 1.3 Diligence
Rule 1.4 Communication
Rule 1.6 Confidentiality of Information
Rule 3.2 Expediting Litigation
Rule 3.3 Candor Toward the Tribunal
Rule 3.4 Fairness to Opposing Party and Counsel
Rule 3.8 Special Responsibilities of a Trial Counsel

RULE 3.2 Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation and other proceedings consistent with the interests of the client and the lawyer's responsibilities to the tribunal to avoid unwarranted delay.

COMMENT:

Dilatory practices bring the administration of criminal, civil and other administrative proceedings into disrepute. The interests of the client are rarely well-served by such tactics. Delay exacts a toll upon a client in uncertainty, frustration, and apprehension. Expediting litigation, in contrast, often can directly benefit the client's interest in obtaining bargaining concessions and in obtaining an early resolution of the matter. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

CROSS REFERENCES:

Rule 1.4 Communication
Rule 3.1 Meritorious Claims and Contentions
Rule 3.3 Candor Toward the Tribunal

RULE 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

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

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

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

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

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

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

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

(d) In an ex parte proceeding, a lawyer shall inform the tribunal

of all material facts known to the lawyer which are necessary to enable the tribunal to make an informed decision, whether or not the facts are adverse.

COMMENT:

The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a Lawyer

An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Misleading Legal Argument

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case. A lawyer should not knowingly fail to disclose to the tribunal legal authority from a noncontrolling jurisdiction, known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, if the legal issue being litigated has not been decided by a controlling jurisdiction and the judge would reasonably consider it important to resolving the issue being litigated.

False Evidence

When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the tribunal. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered. If it has been offered, the advocate's proper course ordinarily is to consult with the client confidentially. The lawyer should urge the client to immediately correct the matter on the record. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

The rule generally recognized is that, if the client refuses to correct the matter and if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the tribunal or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the tribunal, thereby subverting the truthfinding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the tribunal.

Perjury by a Criminal Accused

A criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious is the most difficult situation. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the tribunal.

If the accused has admitted to the lawyer facts which establish guilt and the lawyer's independent investigation establishes that the admissions are true but the accused insists on exercising the right to testify, the lawyer must advise the client against taking the witness stand to testify falsely. If before trial the accused insists on testifying falsely, the lawyer shall seek to withdraw from representation. See Rule 1.16. If that is not permitted or if the situation arises during the trial or other proceedings and the accused insists upon testifying falsely, it is unprofessional conduct for the lawyer to lend aid to the perjury or use the perjured testimony. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused does not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(d).

Remedial Measures

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the tribunal. It is for the tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the tribunal. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

Duration of Obligation

A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

Refusing to Offer Proof Believed to be False

Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate.

Ex Parte Proceedings

Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The

judge, magistrate, or other official has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

CROSS REFERENCES:

Rule 1.2 Scope of Representation
Rule 1.6 Confidentiality of Information
Rule 3.1 Meritorious Claims and Contentions
Rule 3.4 Fairness to Opposing Party and Counsel
Rule 3.8 Special Responsibilities of a Trial Counsel
Rule 4.1 Truthfulness in Statements to Others
Rule 8.4 Misconduct
Rule 8.5 Jurisdiction

RULE 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation to an opposing party and counsel under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

COMMENT:

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the Government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed. Applicable law in many jurisdictions, including the UCMJ, makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

A lawyer who receives (i.e., in the lawyer's possession) an item of physical evidence implicating the client in criminal conduct shall disclose the location of or shall deliver that item to proper authorities when required by law or court order. Thus, if a lawyer receives contraband, the lawyer has no legal right to possess it and must always surrender it to lawful authorities. If a lawyer receives stolen property, the lawyer must surrender it to the owner or lawful authority to avoid violating the law. The appropriate disposition of such physical evidence is a proper subject to discuss confidentially with a supervisory attorney. When a client informs the lawyer about the existence of material having potential evidentiary value adverse to the client or when the client presents but does not relinquish possession of such material to the lawyer, the lawyer should inform the client of the lawyer's legal and ethical obligations regarding evidence. Frequently, the best course for the lawyer is to refrain from either taking possession of such material or advising the client as to what course of action should be taken regarding it. See Rules 1.6 and 1.7. If a lawyer discloses the location of or delivers an item of physical evidence to proper authorities, such action should be done in the way best designed to protect the client's interest. The lawyer should consider methods of return or disclosure which best protect (a) the client's identity; (b) the client's words concerning the item; (c) other confidential information; and (d) the client's privilege against self-incrimination.

Neither a lawyer acting as a victim/witness liaison nor another person appointed by a lawyer to be a victim/witness liaison unlawfully obstructs another party's access to evidence or to material having potential evidentiary value by performing victim/witness liaison duties in accordance with Army regulation. For example, a victim/witness liaison, upon the request of a victim or witness, may require trial counsel and defense counsel to coordinate with the victim/witness liaison for interviews of a victim of or witness to the crime which forms the basis of a court-martial.

With regard to paragraph (b), it is not improper to pay a witness' expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

With regard to paragraph (c), a "rule of a tribunal"includes Rule 6(e) of the Federal Rules of Criminal Procedure governing discussion of grand jury testimony.

Paragraph (f) permits a lawyer to advise relatives, employees, or other agents of a client to refrain from giving information to another party, for such persons may identify their interests with those of the client. See also Rule 4.2.

CROSS REFERENCES:

Rule 1.2 Scope of Representation
Rule 1.6 Confidentiality of Information
Rule 1.7 Conflict of Interest: General Rule
Rule 3.3 Candor Toward the Tribunal
Rule 4.1 Truthfulness in Statements to Others
Rule 4.2 Communication with Person Represented by Counsel
Rule 4.4 Respecting Rights of Third Persons
Rule 5.2 Responsibilities of a Subordinate Lawyer
Rule 5.4 Professional Independence of a Lawyer

RULE 3.5 Impartiality and Decorum of the Tribunal.

A lawyer shall not:

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

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

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

COMMENT:

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's

right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

CROSS REFERENCES:

Rule 1.2 Scope of Representation
Rule 3.3 Candor Toward the Court
Rule 3.4 Fairness to Opposing Party and Counsel

RULE 3.6 Tribunal Publicity

(a) A lawyer shall not make an extra judicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding or an official review process thereof.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter or any other proceeding that could result in incarceration, discharge from the Army or other adverse personnel action and that statement relates to:

(1) the character, credibility, reputation, or criminal record of a party, suspect in a criminal investigation, or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by an accused or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of an accused or suspect in a criminal case or proceeding that could result in incarceration, discharge from the Army, or other adverse personnel action;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial;

(6) the fact that an accused has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the accused is presumed innocent until and unless proven guilty; or

(7) the credibility, reputation, motives, or character of civilian or military officials of the Department of Defense. This does not preclude the lawyer from commenting on such matters in a representational capacity.

(c) Notwithstanding paragraphs (a) and (b)(1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of the person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case:

(i) the identity, duty station, occupation, and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time, and place of apprehension; and

(iv) the identity of investigating and apprehending officers or agencies and the length of the investigation.

(d) The protection and release of information in matters pertaining to the Army is governed by such statutes as the Freedom of Information Act and Privacy Act, in addition to those governing protection of national defense information. In addition, regulations of the Department of Defense, the Department of the Army, The Judge Advocate General, Corps of Engineers, and U.S. Army Materiel Command may further restrict the information that can be released or the source from which it is to be released.

COMMENT:

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury or members is involved. If there were no such limits, the result would be the practical nullification of the protective effects of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression. The formula in this Rule is based upon the ABA Model Code of Professional Responsibility and the ABA Standards Relating to Fair Trial and Free Press, as amended in 1978.

Special rules of confidentiality may validly govern proceedings involving classified material, juveniles, domestic relations and mental disability proceedings, and perhaps other types of proceedings. Rule 3.4(c) requires compliance with such Rules.

Rule 3.6(b)(7) makes clear that the prohibition on extra judicial statements does not preclude comment about the credibility, reputation, motives or character of DOD personnel by a lawyer properly acting in a representational capacity, e.g. before an administrative hearing where such matters are relevant. Rule 3.6d. acknowledges that an Army lawyer's release of information is governed not only by Rule 3.6 but also by law. Prior to releasing any information, an Army lawyer should consult the appropriate statute, directive, regulation or policy guideline.

CROSS REFERENCES:

Rule 1.6 Confidentiality of Information
Rule 3.4 Fairness to Opposing Party and Counsel
Rule 3.5 Impartiality and Decorum of the Tribunal
Rule 3.8 Special Responsibilities of a Trial Counsel

RULE 3.7 Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and quality of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's office is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

COMMENT:

Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Rule 3.7(a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Rule 3.7(a)(2) recognizes that where the testimony concerns the extent and quality of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

Apart from these two exceptions, Rule 3.7(a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness.

Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7.

CROSS REFERENCES:

Rule 1.6 Confidentiality of Information
Rule 1.7 Conflict of Interest: General Rule
Rule 1.9 Conflict of Interest: Former Client
Rule 3.4 Fairness to Opposing Party and Counsel

RULE 3.8 Special Responsibilities of a Trial Counsel

A trial counsel shall:

(a) recommend to the convening authority that any charge or specification not warranted by the evidence be withdrawn;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights;

(d) make timely disclosure to the defense of all evidence or information known to the lawyer that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the lawyer, except when the lawyer is relieved of this responsibility by a protective order or regulation; and

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the lawyer in a criminal case from making an extra judicial statement that the trial counsel would be prohibited from making under Rule 3.6.

COMMENT:

A trial counsel is not simply an advocate but is responsible to see that the accused is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. See also Rule 3.3(d), governing ex parte proceedings. Applicable law may require other measures by the trial counsel and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

Rule 3.8(c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and to remain silent.

The exception in Rule 3.8(d) recognizes that a trial counsel may seek an appropriate protective order from the tribunal if disclosures of information to the defense could result in substantial harm to an individual or organization or to the public interest. This exception also recognizes that applicable regulations may proscribe the disclosure of certain information without proper authorization.

A trial counsel may comply with Rule 3.8(e) in a number of ways. These include personally informing others of the lawyer's obligations under Rule 3.6, conducting training of law enforcement personnel, and appropriately supervising the activities of personnel assisting the trial counsel.

CROSS REFERENCES:

Rule 1.11 Successive Government and Private Employment
Rule 3.1 Meritorious Claims and Contentions
Rule 3.3 Candor Toward the Tribunal
Rule 3.4 Fairness To Opposing Party and Counsel
Rule 3.5 Impartiality and Decorum of the Tribunal
Rule 3.6 Trial Publicity
Rule 3.9 Advocate in Nonadjudicative Proceedings
Rule 4.4 Respect for the Rights of Third Persons
Rule 5.4 Professional Independence of a Lawyer

RULE 3.9 Advocate in Nonadjudicative Proceedings

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a)-(c), 3.4(a)-(c), and 3.5.

COMMENT:

In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rulemaking or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body should deal with the tribunal honestly and in conformity with applicable rules of procedure.

Lawyers have no exclusive right to appear before nonadjudicative bodies. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

CROSS REFERENCES:

Rule 1.1 Competence
Rule 1.6 Confidentiality of Information
Rule 3.3 Candor Toward the Tribunal
Rule 3.4 Fairness to the Opposing Party or Counsel
Rule 3.5 Impartiality and Decorum of the Tribunal
Rule 4.1 Truthfulness in Statements to Others
Rule 5.4 Professional Independence of the Lawyer

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS.

RULE 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person: or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

COMMENT:

Misrepresentation

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

Statements of Fact

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject are in this category.

Fraud by Client

Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6.

CROSS REFERENCES:

Rule 1.6 Confidentiality of Information
Rule 3.3 Candor Toward the Tribunal
Rule 3.4 Fairness to Opposing Party and Counsel

RULE 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

COMMENT:

This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a Government agency and private party does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to controversy with a Government agency to speak with Government officials about the matter.

This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

This rule does not prohibit a lawyer representing one party in a matter from communicating concerning the matter with the commander of another party to the matter. For example, a legal assistance lawyer representing a dependent spouse may write to the commander of the soldier-sponsor concerning a disputed matter of financial support to the dependent spouse.

CROSS REFERENCES:

Rule 3.8 Special Responsibilities of a Trial Counsel
Rule 4.1 Truthfulness in Statements to Others
Rule 4.4 Respect for Rights of Third Persons

RULE 4.3 Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

COMMENT:

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

CROSS REFERENCES:

Rule 1.2 Scope of Representation
Rule 3.4 Fairness to Opposing Party and Counsel
Rule 4.1 Truthfulness in Statement to Others
Rule 4.4 Respect for Rights of Third Persons

RULE 4.4 Respect for Rights of Third Persons

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

COMMENT:

Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. The duty of a lawyer to represent the client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons. Similarly, an Army lawyer may communicate a correct statement of fact that includes the possibility of criminal action if a civil obligation is not fulfilled. However, in such a communication, the lawyer may not use intemperate and inappropriate language to embarrass, delay, or burden the recipient of the communication.

CROSS REFERENCES:

Rule 3.2 Expediting Litigation
Rule 3.8 Special Responsibilities of a Trial Counsel
Rule 4.1 Truthfulness in Statements to Others
Rule 4.2 Communication with Person Represented by Counsel
Rule 4.3 Dealing with Unrepresented Person

LEGAL OFFICES

RULE 5.1 Responsibilities of the Senior Counsel and Supervisory Lawyers

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

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

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

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

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

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

COMMENT:

Rule 5.1(a) recognizes the responsibilities of the Senior Counsel and supervisory lawyers to effect and ultimately enforce these Rules.

Rule 5.1(b) requires all lawyers who directly supervise other lawyers to take reasonable measures to ensure that such subordinates conform their conduct to these Rules. The measures required to fulfill the responsibility prescribed in Rule 5.1(b) can depend on the office's structure and the nature of its practice. In a small office, informal supervision and occasional admonition ordinarily might be sufficient. In a large office, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary. In some offices, for example, junior lawyers can make confidential referral of ethical problems directly to a senior lawyer. See Rules 1.13 and 5.2. Offices may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of an office can influence the conduct of all its members and a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to these Rules.

Supervisory lawyers must be careful to avoid conflicts of interest in providing advice to subordinate lawyers. For example, the chief of administrative law in an office may be the supervisory lawyer for both administrative law lawyers and legal assistance lawyers. Both subordinate lawyers may seek advice concerning an appeal to an adverse action handled by the administrative law lawyer and now being challenged by the client of the legal assistance lawyer. In such a situation, the supervisory lawyer should not advise both subordinate lawyers. Depending on the circumstances, the supervisory lawyer may advise one subordinate lawyer and refer the other subordinate lawyer to another supervisory lawyer in the office, or the supervisory lawyer may refer both subordinate lawyers to separate supervisory lawyers in the office.

Rule 5.1(c)(1) expresses a general principle of supervisory responsibility for acts of another. See also Rule 8.4(a). Ratification as used in Rule 5.1(c)(1) means approval of or consent to another lawyer's conduct. For example, a chief of legal assistance ratifies the unauthorized disclosure of a client confidence by a subordinate legal assistance lawyer when the subordinate informs the chief of legal assistance of his intention to disclose the confidence and the chief consents to the subordinate's doing so.

Rule 5.1(c)(2) defines the duty of a lawyer having direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Appropriate remedial action would depend on the immediacy of the supervisor's involvement and the seriousness of the misconduct. Apart from the responsibility that may be incurred for ordering or ratifying another lawyer's conduct under Rule 5.1(c)(1), the supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervisory lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

Professional misconduct by a lawyer under supervision could reveal a violation of Rule 5.1(b) on the part of the supervisory lawyer even though it does not entail a violation of Rule 5.1(c) because there was no direction, ratification or knowledge of the violation.

Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of subordinate lawyers. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

CROSS REFERENCES:

Rule 1.13 Army as Client
Rule 5.2 Responsibilities of a Subordinate Lawyer
Rule 5.3 Responsibilities Regarding Nonlawyer Assistants
Rule 5.4 Professional Independence of a lawyer
Rule 8.3 Reporting Professional Misconduct
Rule 8.4 Misconduct

RULE 5.2 Responsibilities of a Subordinate Lawyer

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

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

COMMENT:

Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of these Rules. For example, if a subordinate filed a frivolous motion at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

CROSS REFERENCES:

Rule 5.1 Responsibilities of the Senior Counsel and Supervisory Lawyers
Rule 5.4 Professional Independence of the Lawyer
Rule 8.4 Misconduct

RULE 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer under the authority, supervision, or direction of a lawyer:

(a) the senior supervisory lawyer in an office shall make reasonable efforts to ensure that the office has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's

conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of these Rules of Professional Conduct if engaged in by a lawyer if:

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

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

COMMENT:

Lawyers generally employ assistants in their practice, including paralegals, secretaries, clerks, investigators, law student interns, and others. Such assistants act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their performance, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

CROSS REFERENCES:

Rule 1.6 Confidentiality of Information
Rule 3.8 Special Responsibilities of a Trial Counsel
Rule 4.1 Truthfulness in Statements to Others
Rule 4.4 Respect for Rights of Third Persons
Rule 5.5 Unauthorized Practice of Law

RULE 5.4 Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a nonlawyer who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interests therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

(e) Notwithstanding a lawyer's status as a commissioned officer or Department of the Army civilian, a lawyer detailed or assigned to represent an individual soldier or employee of the Army is expected to exercise unfettered loyalty and professional independence during the representation consistent with these Rules and to the same extent as required by a lawyer in private practice.

(f) The exercise of professional judgment in accordance with *(e)* above will not, standing alone, be a basis for an adverse evaluation or other prejudicial action.

COMMENT:

General

Provisions (a) through (d) of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in Rule 5.4(c), such arrangements should not interfere with the lawyer's professional judgment.

Judge Advocates

Provisions (e) and (f) of this Rule recognize that judge advocates and Department of the army civilian attorneys are required by law to obey the lawful orders of superior officers. Nevertheless, the practice of law requires the exercise of judgment solely for the benefit of the client and free of compromising influences and loyalties. Thus, when a judge advocate or other Army Lawyer is assigned to represent an individual client, neither the lawyer's personal interests, the interests of other clients, nor the interests of third persons should affect loyalty to the individual client.

Not all direction given to a subordinate lawyer is an attempt to improperly influence the lawyer's professional judgment. Each situation must be evaluated by the facts and circumstances, giving due consideration to the subordinate's training, experience and skill. A lawyer subjected to outside pressures should make full disclosure of them to the client. If the lawyer or the client believes that the effectiveness of the representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of the client.

Additionally, the military lawyer has a responsibility to report any instances of unlawful command influence. See R.C.M. 104, MCM, 1984.

CROSS REFERENCES:
Preamble

Rule 1.1 Competence
Rule 1.2 Scope of Representation
Rule 1.3 Diligence
Rule 1.7 Conflicts of Interest: General Rule
Rule 1.13 Army as Client
Rule 5.1 Responsibilities of the Senior Counsel and Supervisory Lawyers
Rule 5.2 Responsibilities of a Subordinate Lawyer

RULE 5.5 Unauthorized Practice of Law

A lawyer shall not:

(a) except as authorized by an appropriate military department, practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

COMMENT:

Limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. A lawyer's performance of legal duties pursuant to a military department's authorization, however, is considered a federal function and not subject to regulation by the states. Thus, a lawyer may perform legal assistance duties even though the lawyer is not licensed to practice in the jurisdiction within which the lawyer's duty station is located. Paragraph (b) does not prohibit a lawyer from employing the services of nonlawyers and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does not prohibit

lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, social workers, accountants and persons employed in Government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed prose or nonlawyers authorized by law to practice in military proceedings.

CROSS REFERENCES:

Rule 1.2 Scope of Representation
Rule 5.3 Responsibilities Regarding Nonlawyer Assistants
Rule 8.5 Jurisdiction

PUBLIC SERVICE
RULE 6.1 [Not used]
RULE 6.2 [Not used]
RULE 6.3 [Not used]
RULE 6.4 [Not used]

INFORMATION ABOUT LEGAL SERVICES.
NOTE: The following Rules on lawyer advertising are included in these Rules of Professional Conduct not so much to regulate this aspect of private civilian lawyer practice as to provide professionally recognized standards which may be used by Army lawyers working with private civilian lawyers in considering alleged improper advertising on the part of private civilian lawyers. These rules do not authorize advertising activities on the part of Army lawyers which are otherwise prohibited by law. Publicizing the availability of government-provided legal services to authorized clients is not "advertising"for the purposes of these Rules.

RULE 7.1 Communications Concerning a Lawyer's Services
A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate these Rules of Professional Conduct or other law; or(c) compares the lawyer's services with other lawyer's services, unless the comparison can be factually substantiated.

COMMENT:
This Rule governs all communications about a lawyer's services. Whatever means are used to make known a lawyer's services, statements about them should be truthful. The prohibition in Rule 7.1(b) of statements that may create "unjustified expectations"would ordinarily preclude statements about results obtained on behalf of a client, such as the lawyer's record in obtaining favorable decisions. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.

CROSS REFERENCES:

Rule 1.2 Scope of Representation
Rule 4.1 Truthfulness in Statement to Others

RULE 7.2 Advertising
(a) Except as prohibited by law and subject to the requirements of Rule 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor sign, radio or television, or through written communication not involving solicitation as defined in Rule 7.3.

(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

(d) Any communication made pursuant to this Rule shall include the name of at least one lawyer responsible for its content.

COMMENT:
Note: This Rule and Comment do not authorize Army lawyers to advertise except as authorized and in the manner prescribed by Army regulation. The Rule and Comment are intended to govern the conduct of civilian lawyers practicing before tribunal's conducted pursuant to the Manual for Courts-Martial or the Uniform Code of Military Justice.

To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

This Rule permits, except as prohibited by law, public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified"advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising
Rule 7.2(b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

Paying Others to Recommend a Lawyer
A lawyer is allowed to pay for advertising permitted by this Rule, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer

referral programs and pay the usual fees charged by such programs. Rule 7.2(c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.

CROSS REFERENCES:

Rule 7.1 Communications Concerning a Lawyer's Services
Rule 7.3 Direct Contact with Prospective Clients
Rule 7.4 Communication of Fields of Practice
Rule 7.5 Firm Names and Letterheads

RULE 7.3 Direct Contact with Prospective Clients

A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

COMMENT:

There is a potential for abuse inherent in direct solicitation by a lawyer of prospective clients known to need legal services. It subjects the lay person to the private importuning of a trained advocate, in a direct interpersonal encounter. A prospective client often feels overwhelmed by the situation giving rise to the need for legal services, and may have an impaired capacity for reason, judgment and protective self-interest. Furthermore, the lawyer seeking the retainer is faced with a conflict stemming from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect.

The situation is therefore fraught with the possibility of undue influence, intimidation, and overreaching. This potential for abuse inherent in direct solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising permitted under Rule 7.2 offers an alternative means of communicating necessary information to those who may be in need of legal services.

Advertising makes it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct personal persuasion that may overwhelm the client's judgment.

The use of general advertising to transmit information from lawyer to prospective client, rather than direct private contact, will help to assure that the information flows cleanly as well as freely. Advertising is out in public view, thus subject to scrutiny by those who know the lawyer. This information review is itself likely to help guard against statements and claims that might constitute false or misleading communications, in violation of Rule 7.1. Direct, private communications from a lawyer to a prospective client are not subject to such third person scrutiny and consequently are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

These dangers attend direct solicitation whether in person or by mail. Direct mail solicitation cannot be effectively regulated by means less drastic than outright prohibition.

General mailings not speaking to a specific matter do not pose the same danger of abuse as targeted mailings, and therefore are not prohibited by this Rule. The representations made in such mailings are necessarily general rather than tailored, less importuning than informative. They are addressed to recipients unlikely to be specially vulnerable at the time, hence who are likely to be more skeptical about unsubstantiated claims. General mailings not addressed to recipients involved in a specific legal matter or incident, therefore, more closely resemble permissible advertising rather than prohibited solicitation.

Similarly, this Rule would not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for its members, insureds, beneficiaries or other third parties for the purpose of the plan or arrangement which the lawyer or the lawyer's firm is willing to offer. This form of communication is not directed to a specific prospective client known to need legal services related to a particular matter. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services or others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

CROSS REFERENCES:

Rule 7.1 Communication Concerning a Lawyer's Services
Rule 7.2 Advertising
Rule 7.4 Communication of Fields of Practice
Rule 7.5 Firm Names and Letterheads

RULE 7.4 Communication of Fields of Practice

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

(a) a lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney"or a substantially similar designation;

(b) a lawyer engaged in admiralty practice may use the designation "Admiralty,""Proctor in Admiralty"or a substantially similar designation; and

(c) a lawyer designated a specialist by an appropriate jurisdiction may use a designation authorized by that jurisdiction.

COMMENT:

This Rule permits a lawyer to indicate areas of practice in communication about the lawyer's services, for example, in a telephone directory or other advertising. If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted so to indicate. However, stating that the lawyer is a "specialist"or that the lawyer's practice "is limited to"or "concentrated in"particular fields is not permitted. These terms have acquired a secondary meaning employing formal recognition as a specialist. Hence, use of these terms may be misleading unless the lawyer is certified or recognized in accordance with procedures in the jurisdiction where the lawyer is licensed to practice.

Recognition of specialization in patent matters is a matter of long established policy of the Patent and Trademark Office. Designation of admiralty practice has a long historical tradition associated with maritime commerce and federal courts.

CROSS REFERENCES:

Rule 7.1 Communications Concerning a Lawyer's Services
Rule 7.2 Advertising
Rule 7.3 Direct Contact with Prospective Clients
Rule 7.5 Firm Names and Letterheads

RULE 7.5 Firm Names and Letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of the lawyer holding a public office shall not be used in the name of a law firm, or in communication on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

COMMENT:

A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic."Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm.

With regard to Rule 7.5(d), lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, "Smith and Jones," for that title suggests partnership in the practice of law.

CROSS REFERENCES:

Rule 7.1 Communications Concerning a Lawyer's Services
Rule 7.2 Advertising
Rule 7.3 Direct Contact with Prospective Clients
Rule 7.4 Communication of Fields of Practice

MAINTAINING THE INTEGRITY OF THE PROFESSION

RULE 8.1 Bar Admission and Disciplinary Matters

An applicant for admission to a bar, or a lawyer in connection with a bar admission application, application for employment with the Federal government, application for appointment or active duty in The Judge Advocate General's Corps, certification by The Judge Advocate General, or a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.

COMMENT:

The duty imposed by this Rule extends to lawyers seeking admission to a bar, application for appointment or active duty in The Judge Advocate General's Corps or certification by The Judge Advocate General. Hence, if a person makes a material false statement in connection with an application for admission or certification, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. This Rule also requires affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

This Rule is subject to the provisions of the fifth amendment of the United States Constitution and Article 31, UCMJ. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship.

CROSS REFERENCES:

Rule 8.3 Reporting Professional Misconduct
Rule 8.4 Misconduct
Rule 8.5 Jurisdiction

RULE 8.2 Judicial and Legal Officials

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

COMMENT:

Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons performing legal duties. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine confidence in the administration of justice.

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

RULE 8.3 Reporting Professional Misconduct

(a) A lawyer having knowledge that another lawyer has committed a violation of these Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall report such a violation pursuant to Rule 10.1 or implementing regulations promulgated by the Office of the General Counsel, The Judge Advocate General, the Corps of Engineers, or the Army Materiel Command.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6.

(d) This Rule does not affect any reporting requirements a lawyer may have under other rules of professional conduct to which the lawyer is subject.

COMMENT:

Self regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of these Rules of Professional Conduct or other such rules. Lawyers have a similar obligation with respect to judicial misconduct. An apparent isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A

measure of judgment is therefore required in complying with provisions of this Rule. The term "substantial"refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. Any report should be made in accordance with regulations promulgated by the General Counsel, The Judge Advocate General, the Command Counsel, Army Materiel Command, or the Chief Counsel, Corps of Engineers, as appropriate.

CROSS REFERENCES:

Rule 5.1 Responsibilities of the Senior Counsel (Judge Advocate General) and Supervisory Lawyers
Rule 8.4 Misconduct
Rule 8.5 Jurisdiction

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

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

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

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

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

(e) state or imply an ability to influence improperly a government agency or official; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

COMMENT:

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, which have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. One example of such conduct is the unlawful, unauthorized or nonconsensual obtaining of confidential files, including confidential working paper files, of lawyers who are known or reasonably should be known to be representing a client. Such conduct includes the solicitation or prompting of another person, not bound by these Rules, to engage in such activities. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to ethical obligations.

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

Judge advocates hold a commission as an officer in the United States Army and assume legal responsibilities going beyond those of other citizens. A judge advocate's abuse of such commission can suggest an inability to fulfill the professional role of judge advocate and lawyer.

CROSS REFERENCES:

Rule 8.3 Reporting Misconduct
Rule 8.5 Jurisdiction

RULE 8.5 Jurisdiction

(a) Lawyers (as defined in these Rules of Professional Conduct) shall be governed by these Rules of Professional Conduct.

(b) Pursuant to the authority of The Judge Advocate General under 10 U.S.C. S 3037, these Rules apply to Judge Advocates in the Active Army, the Army National Guard, and the U. S. Army Reserve.

(c) Pursuant to the authority of The Judge Advocate General under Rule for Courts-Martial 109, these Rules apply to lawyers who practice in proceedings governed by the UCMJ and the MCM.

(d) Pursuant to the authority of the General Counsel of the Army, The Judge Advocate General, the Command Counsel of the U. S. Army Materiel Command, and the Chief Counsel of the U. S. Army Corps of Engineers, in their capacities as qualifying authorities for the civilian Army lawyers in their respective organizations, these Rules apply to the civilian Army lawyers in their respective organizations when acting in an official capacity as employees of the Department of the Army. Official capacity includes providing legal assistance or other representation or counseling as part of a lawyer's official duties even though the client may not be the Army.

(e) These Rules should be interpreted and applied in light of the similar rules and commentary thereon contained in the American Bar Association Model Rules of Professional Conduct, and the Federal Bar Association Rules of Professional Conduct for Federal Lawyers.

(f) Every Army lawyer subject to these Rules is also subject to rules promulgated by his or her licensing authority or authorities. In case of a conflict between these Rules and the rules of the lawyer's licensing authority, the lawyer should attempt to resolve the conflict with assistance of the lawyer exercising technical supervision over him or her. If the conflict is not resolved -

(1) these Rules will govern the conduct of the lawyer in the performance of the lawyer's official responsibilities;

(2) the rules of the appropriate licensing authority will govern the conduct of the lawyer in the private practice of law unrelated to the lawyer's official responsibilities.

COMMENT:

Almost all lawyers (as defined by these Rules) practice outside the territorial limits of the jurisdiction in which they are licensed. While lawyers remain subject to the governing authority of the jurisdiction in which they are licensed to practice, they are also subject to these Rules.

When Army lawyers are engaged in the conduct of Army legal functions, whether servicing the Army as a client or serving an individual client as authorized by the Army, these Rules are regarded as superseding any conflicting rules applicable in jurisdictions in which the lawyer may be licensed. As for civilian lawyers practicing in tribunals conducted pursuant to the Manual for Courts-Martial or the Uniform Code of Military Justice, violation of these Rules may result in suspension from practice before such tribunals. However, lawyers practicing in state or federal civilian court proceedings will abide by the rules adopted by that state or federal civilian court during the proceedings.

Every lawyer subject to these Rules is also subject to rules promulgated by his or her licensing authority or authorities. This raises the possibility of a conflict in the governing rules, albeit a conflict likely more theoretical than practical. If a conflict does arise, the lawyer is advised to attempt to resolve the conflict with the assistance of the lawyer exercising technical supervision over him or her. In most cases, the conflict can be resolved by a change of assignment or withdrawal from the matter that gives rise to it. If such assistance is not effective in resolving the conflict, then the subparagraphs (1) and (2) of Rule 8.5 (f) provide clear guidance.

CROSS REFERENCES:

Rule 5.1 Responsibilities of the Senior Counsel and Supervisory Lawyers
Rule 8.3 Reporting Professional Misconduct

INTERPRETATION
RULE 9.1 Interpretation

(a) Authoritative Army interpretations of these Rules shall be provided by a Department of the Army (DA) Professional Conduct Council. The purpose of the Council is to provide uniform interpretation of these Rules for the Army.

(b) The DA Council shall consist of the General Counsel of the Army who shall act as chairman, The Judge Advocate General of the Army, the Command Counsel of the U. S. Army Materiel Command, and the Chief Counsel of the U. S. Army Corps of Engineers. These duties may be delegated by any of the above named members to a deputy who is either a general officer or member of the senior executive service.

(c) The DA Council shall meet as often as necessary. It shall, at its discretion, issue written opinions interpreting these Rules. Such opinions shall be considered the authoritative Army interpretation of these Rules. In arriving at its opinion in any case in which a senior counsel has special expertise in the issue(s) presented, the DA Council normally will adopt for the Army the opinion of that senior counsel, e.g., The Judge Advocate General with respect to military justice matters. The Council may, at its discretion, issue advisory opinions.

(d) Each senior counsel will establish a professional conduct committee within his or her jurisdiction to assist him or her with respect to questions before the DA Professional Conduct Council.

(e) Army lawyers are encouraged to seek interpretations of these rules from their legal supervisory chain. Any lawyer subject to these Rules may request an opinion from the Council. To do so, the lawyer must submit a complete description of the factual situation that is the subject of contention under the Rules, subject to Rule 1.6 and Rule 8.5(f), a discussion of the relevant law, and the lawyer's opinion as to the correct interpretation. For Army lawyers, the request must be submitted through their legal supervisory chain and the professional responsibility committee established by the lawyer's senior counsel.

(f) All requests for opinions will be processed first through the committee of the senior counsel under whose qualifying authority or jurisdiction the issue arose, or when appropriate, the committee to which assigned by the DA Council.

(g) The actions of the DA Council are not disciplinary in nature nor are its opinions to be considered as disciplinary. The Council's opinions may, however, be used by others invested with disciplinary authority as authoritative Army interpretations of these Rules.

(h) The written opinions of the DA Council shall be open to the public.

RULE 9.2 [Not Used]

ENFORCEMENT
RULE 10.1 Enforcement

(a) The Judge Advocate General, the Command Counsel, Army Materiel Command, and the Chief Counsel, Corps of Engineers, will:

(1) establish procedures for reporting, processing, investigating, and taking appropriate action on allegations of violations of these rules by lawyers under their qualifying authority or jurisdiction;

(2) notify the General Counsel in writing immediately upon learning of an allegation of a violation of these rules by any general officer or Senior Executive Service member under their qualifying authority.

(b) Any allegation of a violation of these rules by an attorney while assigned to the Office of the General Counsel, or by The Judge Advocate General, the Command Counsel of Army Materiel Command, or the Chief Counsel of the Corps of Engineers, will be reported to the General Counsel.

(1) The General Counsel will conduct an inquiry into such allegations as he/she deems necessary. This may include appointing an individual to conduct an investigation, enlisting the aid of the Inspector General, and reviewing reports of investigations conducted by others. In the event the General Counsel does conduct an inquiry, he/she will, as a minimum, solicit a written response to the allegations from the attorney who is the subject of the allegations.

(2) Upon completion of his/her inquiry, the General Counsel will take appropriate action with respect to attorneys from his/her office, or will advise the Secretary of the Army or the Chief of Staff, Army, of the action which should be taken, if any, with respect to the qualifying authority who is the subject of the allegations.

(c) Any person having knowledge of an apparent violation of these rules by the General Counsel of the Army should advise the Secretary of the Army of the alleged violation.

COMMENT:

This Rule assigns to the Senior Counsel general responsibility for establishing systems for investigation and discipline of violations of these Rules. Because of the significant differences in the legal work forces under the jurisdiction of the four senior counsel, it is desirable to have complementary investigatory and disciplinary systems for each work force.

Subparagraph (2) requires reporting to the General Counsel only those allegations involving a General Officer or member of the Senior Executive Service (SES). This Rule also provides that in the case of the Senior Counsel, other than the General Counsel, the General Counsel of the Army will conduct the investigation. This eliminates the potential problem of the Senior Counsel being subject to investigatory and disciplinary rules of their own creation and subject to their control.

The term "qualifying authority "has significance only with respect to civilian attorneys. Judge advocates are directed in their duties by The Judge Advocate General (see 10 USC 3037(c)(2)), and are not restricted to specific positions within an Army organization as are civilian attorneys. Therefore, "jurisdiction"in subparagraph (a)(1) refers only to judge advocates. They are under the jurisdiction of The Judge Advocate General even when assigned or detailed to MACOM legal offices, including those within the Army Materiel Command and the Corps of Engineers.

RULE 10.2 [Not Used]

Glossary

Section I
Abbreviations

ABA
American Bar Association

AR
Army regulation

Section II
Terms

Army lawyer
An Army lawyer is any attorney, whether civilian or military, while employed by the Department of the Army to provide legal services and acting in an official capacity. This includes attorneys providing legal assistance or defense counsel as part of their official duties. In addition, it includes any Army Reserve judge advocate or judge advocate in the Army National Guard when on active duty, active duty for training, inactive duty for training, or any other type of tour of Federal duty as a judge advocate. It also includes any attorney under contract to the Department of the Army to provide legal advice or services within the scope of that contract.

Belief (or believes)
The person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

Consult (or consultation)
A communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

Fraud (or fraudulent)
Conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

Judge advocate
An officer of The Judge Advocate General Corps of the Army.

Judge Advocate General
Refers to The Judge Advocate General of the Army.

Knowingly (know or knows)
The actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

Law
The term "law" as used in these Rules includes statutes, judicial precedents, regulations, directives, instructions, and orders.

Lawyer
A person who is a member of the bar of a Federal court, or the highest Court of a State or Territory, or occupies a comparable position before the courts of foreign jurisdiction and who practices law under the disciplinary jurisdiction of the Army. This includes all Army lawyers and civilian lawyers practicing before tribunals conducted pursuant to the Uniform Code of Military Justice and the Manual for Courts–Martial.

Other adjudicative officer
Includes a person detailed to serve as a member (including a sole member) of a board or court of inquiry convened to determine facts and make recommendations.

Professional disciplinary proceeding
Refers to all types of administrative proceedings(including investigations and inquiries), convened in accordance with applicable law to inquire into allegations of violations of these Rules of Professional Conduct, and those proceedings convened pursuant to the disciplinary body.

Reasonable (or reasonably)
When used in relation to conduct by a lawyer means the conduct of a reasonably prudent and competent lawyer.

Reasonable belief (or reasonably believes)
When used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

Reasonably should know
When used in reference to a lawyer means that a lawyer of reasonable prudence and competence would ascertain the matter in question.

Senior counsel
This term applies to the General Counsel of the Army, The Judge Advocate General of the Army, the Command Counsel of the U.S. Army Materiel Command, and the Chief Counsel of the U.S. Army Corps of Engineers.

Substantial
When used in reference to degree or extent means a material matter of clear and weighty importance.

Supervisory lawyer
Means a lawyer within an office or organization with authority over or responsibility for the direction, coordination, evaluation, or assignment of responsibilities and work of subordinate lawyers and nonlawyer assistants (paralegals).

Tribunal
Includes all fact–finding, review or adjudicatory bodies or proceedings convened or initiated pursuant to applicable law.

Section III
Special Abbreviations and Terms
There are no entries in this section.

Index

This section contains no entries.

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TAB C

UNLAWFUL COMMAND INFLUENCE

Table of Contents

I. INTRODUCTION.....1

II. METHODOLOGY OF PROOF - SHORT FORM. 1

III. UCMJ ART. 37(A):.....2

IV. INDEPENDENT DISCRETION VESTED IN EACH COMMANDER. 2

V. INDEPENDENT DISCRETION OF MILITARY JUDGE. 4

VI. WITNESS INTIMIDATION. 5

VII. INFLEXIBLE ATTITUDE MAY DISQUALIFY CONVENING AUTHORITY.....9

VIII. COURT MEMBER SELECTION. 11

IX. NO OUTSIDE PRESSURE.....13

X. PRETRIAL PUNISHMENT MAY RAISE UNLAWFUL COMMAND INFLUENCE. 17

XI. STAFF MAY COMMIT UCI 18

XII. EXPANDING THE SCOPE OF UCI.....19

XIII. REMEDIAL ACTIONS. 19

XIV. METHODOLOGY OF PROOF - LONG FORM.....22

XV. WAIVER.....24

XVI. CONCLUSION. 25

XVII. FURTHER READING 25

LTC Daniel G. Brookhart

January 2011

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UNLAWFUL COMMAND INFLUENCE

Outline of Instruction

Unlawful command influence (UCI) *is the improper use, or perception of use of superior authority to interfere with the court-martial process. See Gilligan and Lederer, COURT-MARTIAL PROCEDURE, Volume 2 §18-28.00 (2d Ed. 1999). Unlawful command influence is most often exerted on members of any of the following populations: (1) subordinate commanders, (2) potential panel members, and (3) potential witnesses. It can be exerted by commanders as well as those acting with the "mantle of command authority," and can be intentional or inadvertent. Judge Advocates at all levels need to know the test for command influence at the trial level so that, in drafting findings of fact and conclusions of law, they can seek facts that are relevant to the application of that test. They should also be conversant with the numerous "fixes" available to craft pre and post trial responses to substantiated claims of command influence.*

I. INTRODUCTION.

References:

1. MANUAL FOR COURTS-MARTIAL, United States (2008) [hereinafter MCM].
2. Uniform Code of Military Justice [hereinafter UCMJ], Art. 37.
3. Dep't of Army, Reg. 27-10, Legal Services, Military Justice (November 2005) [hereinafter AR 27-10].

II. METHODOLOGY OF PROOF - SHORT FORM.

United States v. Biagase, 50 M.J. 143 (1999); *United States v. Stombaugh*, 40 M.J. 208 (C.M.A. 1994). Details the standards for assessment of unlawful command influence by the military judge during motions at trial.

1. Threshold at trial is low, more than mere allegation or speculation - some evidence."
2. Facts, which, if true, constitute unlawful command influence, and alleged unlawful command influence has logical connection to court-martial in terms of potential to cause unfairness in the proceedings.
3. Burden does not shift to government unless defense meets the initial burden of producing sufficient evidence to raise unlawful command influence. The government must show either there was no unlawful command influence or that the unlawful command influence will not affect the proceedings, by:
   a. Disproving predicate facts on which allegation of unlawful command influence is based.
   b. Persuading the military judge that the facts do not constitute unlawful command influence.
   c. Producing evidence that unlawful command influence will not affect the proceedings.

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4. **BURDEN OF PROOF -** beyond a reasonable doubt that there was no unlawful command influence or that the unlawful command influence will not affect the findings or sentence.

III. UCMJ ART. 37(A):

No authority convening a general, special or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to [the UCMJ] may attempt to coerce or, by unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case . . .

A. "This Court has consistently held that any circumstance which gives even the appearance of improperly influencing the court-martial proceedings against the accused must be condemned. *United States v. Hawthorne*, 22 C.M.R. 83, 87 (C.M.A. 1956).

B. Defects in the preferral and forwarding of the charges are waived unless raised at trial, unless the defense is deterred from raising those issues at trial due to unlawful command influence. *United States v. Hamilton*, 41 M.J. 32 (C.M.A. 1994). *See also United States v. Brown*, 45 M.J. 389 (1996). *See also United States v. Drayton*, 39 M.J. 871 (A.C.M.R. 1994), *aff'd*, 45 M.J. 180 (1996), relying upon *United States v. Bramel*, 29 M.J. 958 (A.C.M.R.), *aff'd*, 32 M.J. 3 (C.M.A 1990) (summary disposition).

IV. INDEPENDENT DISCRETION VESTED IN EACH COMMANDER.

A. Independent discretion **by law** which may not be impinged upon.

B. Recurring mistakes:

1. Anticipatory advice (Policy Letters).

a. Wing commander's "We Care About You" policy letter setting out reduction in grade and $500 fine "as a starting point" for first-time drunk drivers was clearly UCI, notwithstanding letter's preface that "[p]unishment for DWI will be individualized." *United States v. Martinez*, 42 M.J. 327, 331-334 (1995) (found harmless because of disclosure, assessment of damage and proper curative instruction).

b. Division Commander's five-page policy letter on physical fitness and physical training addressed other fitness considerations such as weight, smoking, drinking and drugs:

"There is no place in our Army for illegal drugs **or for those who use them**. This message should be transmitted clearly to our soldiers, and we must work hard to ensure that we identify drug users through random urinalysis and health and welfare inspections."

CG disqualified from taking action on case despite not referring drug specification to court-martial. *United States v. Griffin*, 41 M.J. 607, 608-

D

09 (Army Ct. Crim. App. 1994) (emphasis added). *See also, United States v. Rivers*, 49 M.J. 434 (1998) (corrective action by government and military judge preserved court from taint of unlawful command influence).

c. *United States v. Pope*, 63 M.J. 68 (2006). Appellant was an Air Force recruiter involved in unprofessional conduct with prospective applicants. The Military Judge admitted (over defense objection) a letter offered at sentencing which argued Air Force core values and endorsed "harsh adverse action" for those who committed appellant's offenses. **HELD:** Admitting the letter (especially without a limiting instruction) raised the appearance of improper command influence because it conveyed the commander's view that harsh action should be taken against an accused. A policy directive may be promulgated to improve discipline but not as leverage to compel a certain result in the trial itself. "Thus we have condemned references to command policies that in effect bring the commander into the deliberation room." Such a practice raises the specter of command influence, and in this case the CAAF was not convinced beyond a reasonable doubt that the members were not influenced by the letter. The sentence was set aside with a rehearing authorized.

d. *United States v. Reed*, 65 M.J. 487 (2008). Appellant was a Master Sergeant stationed in Korea. He claimed BAH at the married rate when he was actually single, and was subsequently charged with receiving payments substantially higher than he was entitled to. In support of an unlawful command influence motion, appellant introduced an email from the convening authority to his subordinates addressing a variety of command management issues and containing a thirty-one page slideshow. One slide contained the following statement: "Senior NCO and Officer misconduct – I am absolutely uncompromising about discipline in the leader ranks." Some noted examples included: "BAH Fraud, Fraternization, DUI, Curfew violations, Soldier abuse, Sexual misconduct." The defense also presented evidence that a deputy commander of a subordinate unit addressed a "newcomer's briefing" with a warning that "BAH fraud is an automatic court-martial here." **HELD:** The government met its burden of demonstrating beyond a reasonable doubt that the proceedings were not affected by actual unlawful command influence or the appearance of unlawful command influence. The command took prompt remedial action, the issue was thoroughly explored at trial (including voir dire of members) and the military judge made detailed findings of fact and conclusions of law regarding the lack of any UCI or appearance of UCI in the proceedings.

2. Advice after the offense.

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a. *United States v. Gerlich*, 45 M.J. 309 (1996). After Art. 15 adjudicated, IG wrote to CG, who wrote to COL, who wrote to MAJ who administered Art. 15. Charges preferred, accused got BCD. CG's letter parroted concerns of IG – and expressed dissatisfaction with resolution – while also asking for inquiry into "systemic concerns" regarding the climate at the AFB. CAAF held that subordinates, notwithstanding their protests, were pressured to change their minds. "*We have previously recognized the difficulty of a subordinate ascertaining for himself or herself the actual influence a superior has on that subordinate*." *Id*. at 313.

b. Improper for battalion commander to return request for Article 15 to company commander with comment, "Returned for consideration for action under Special Court-Martial with Bad Conduct Discharge." *United States v. Rivera*, 45 C.M.R. 582, 583 (A.C.M.R. 1972).

c. *But see United States v. Wallace*, 39 M.J. 284 (C.M.A. 1994). No error where battalion commander learned of additional misconduct by the accused and told subordinate commander, "You may want to reconsider the [company grade] Article 15 and consider setting it aside based on additional charges." Company commander set aside the Article 15, preferred charges and recommended a BCD-SPCM. On appeal and relying on fully developed record at trial, agreed with trial court judge that subordinate "exercised his own independent discretion when he preferred charges." *Id*. at 286-287. *And see United States v. Stirewalt*, 60 M.J. 297 (2004). CAAF affirmed Military Judge's denial of relief despite fact that superior officer "very clearly and forcefully made his opinion known" to subordinate that case was too serious for nonjudicial punishment and that article 32(b) investigation was warranted.

d. Reconciling *Gerlich* and *Wallace/Stirewalt*?

(1) Truly new evidence in *Wallace* that prompted (or at least justified) the re-look.

(2) Quantitatively less command pressure in *Wallace*, more legitimately permissive language.

(3) Strong evidence of prior independence by subordinate in *Wallace*.

(4) In *Stirewalt*, CAAF noted the extensive fact-finding (including the context of the statements) and thorough legal analysis by the Military Judge and seemed to grant more deference than usually accorded in these cases.

V. INDEPENDENT DISCRETION OF MILITARY JUDGE.

A. Prohibition: "No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case . . . ." UCMJ, art. 37(a).

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B. Efficiency Ratings: "[N]either the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge." UCMJ art. 26(c).

C. Subtle pressures.

1. Improper for DSJA to request that the senior judge telephone the magistrate to explain the seriousness of a certain pretrial confinement issue. *United States v. Rice*, 16 M.J. 770 (A.C.M.R. 1983).

2. *United States v. Mabe*, 33 M.J. 200 (C.M.A. 1991). Senior judge's letter, written to increase sentence severity, subjected judges to unlawful command influence.

1. *United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976). Commander and SJA inquiries that question or seek justification for a judge's decision are prohibited.

VI. WITNESS INTIMIDATION.

A. Direct attempts to influence witnesses.

1. *United States v. Gore*, 60 M.J. 178 (2004). The CAAF issues a unanimous, wide-ranging decision affirming the power of the military judge to dismiss charges and specifications with prejudice in the face of unlawful command influence, despite the fact that Appellant negotiated a pretrial agreement prior to the facts which gave rise to the UCI. In so doing, the court clarified the appellate standards of review of the military judge's actions when faced with allegations of UCI, and reaffirmed the role of the military judge as the "last sentinel" to protect a court-martial from unlawful command influence. The case is also a model of the MJ's use of compelling and descriptive findings of fact, particularly in describing the specific demeanor of witnesses that led him to conclude that certain witnesses were and were not truthful.

a. Facts: Appellant was charged with desertion (two specifications) and unauthorized absence. He negotiated a pretrial agreement whereby he agreed to plead guilty. Prior to trial, the defense attempted to obtain character witnesses but was prevented from doing so due to unlawful command influence on the part of the convening authority, a naval commander (0-5).

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b. *Procedural History*. Following a hearing into the substance of the defense motion, the military judge found that the defense carried its burden "by a rather exceeding [sic] level," of producing "some evidence" that unlawful command influence occurred, and that it had the potential to cause unfairness in the proceedings. Finding that the government did not carry its burden of refuting the evidence, or of proving that it would not affect the proceedings beyond a reasonable doubt, and based on the egregious nature of the UCI, the military judge dismissed the charges and specifications with prejudice. The government appealed the military judge's decision to the NMCCA under the provisions of Article 62, UCMJ. The NMCCA remanded the case with instructions for the military judge to prepare additional findings of fact and conclusions of law concerning the decision to dismiss with prejudice. The military judge complied with the order. On further review, the NMCCA agreed that there was UCI, but "concluded that the military judge abused his discretion in fashioning a remedy," and ordered the military judge to "select an appropriate remedy short of dismissal." The Appellant appealed the NMCCA decision to CAAF.

c. *Nature of the UCI*. Appellant's defense counsel contacted a Chief Petty Officer who initially agreed to testify on his behalf in the presentencing proceeding and to distribute questionnaires to other personnel in the unit. The convening authority ordered the Chief not to testify, and told the Chief to "toe the line." As a result, the Chief told the defense that if he did testify, it would be "consistent with the command's wishes." The Chief did attend the trial, but claimed that he thought he was there as a command representative, and not as a witness. He was extremely uncomfortable testifying, and "made repeated denials that contradicted the testimony of the defense counsel" and the defense counsel's supervisor, another defense counsel. These denials included denying initially telling the defense that he would testify; in fact the Chief "denied any knowledge of being a witness."

d. The government called the convening authority as a witness. The CA agreed he told the Chief he was not going to go to appellant's trial. Further, the CA testified that he thought once a pretrial agreement was arranged, it was a "done deal." The CA denied any UCI. The military judge found the two defense counsel credible, and the Chief and the CA not credible, and dismissed the charges with prejudice.

e. Held:

(1) In a 5-0 opinion, the court reversed the NMCCA and reinstated the military judge's ruling dismissing the charges with prejudice.

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(2) The court reviewed the military judge's findings of fact for clear error, and the selection of an appropriate remedy for an abuse of discretion. "Simply stated, our prior cases have addressed only what a military judge can do, not what the military judge must do, to cure (dissipate the taint of the unlawful command influence) or to remedy the unlawful command influence if the military judge determines it cannot be cured." Where the MJ takes corrective action and concludes that the taint of UCI is purged, the court reviews the MJ's actions *de novo*. "Our task on appeal was . . . to determine beyond a reasonable doubt if the military judge was successful in purging any residual taint from the [UCI]." In those cases, the court's *de novo* review "ensured that the [UCI] had no prejudicial impact on the court-martial."

(3) Here in contrast, the MJ ended the proceedings, so there is no need for the court to review *de novo* whether there remains any prejudice to Appellant. The issue is whether the military judge erred in fashioning the remedy for the UCI that tainted the proceedings – which the court reviewed for an abuse of discretion. The abuse of discretion standard of review "recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range."

(4) While the court has long held that dismissal is a drastic remedy, "dismissal of charges is appropriate when an accused would be prejudiced or no useful purpose would be served by continuing the proceedings." The MJ "precisely identified the extent and negative impact of the [UCI] in his findings of fact." The MJ further concluded the Government failed to prove that the UCI had no impact on the proceedings. The MJ explained why other remedies were insufficient.

(5) The fact that Appellant negotiated a PTA did not undermine the MJ's conclusions, because the existence of a PTA "does not mean that [Appellant] is not entitled to a fair trial . . .." Appellant had not yet entered pleas and was free to plead not guilty. "We view the possible future guilty plea of Appellant as irrelevant."

2. *United States v. Stombaugh*, 40 M.J. 208 (C.M.A. 1994). An officer witness for the accused testified that members of the Junior Officers Protection Association pressured him not to testify. A petty officer also was harassed and advised not to get involved. Finding: UCI with regard to the petty officer. No UCI with regard to the officer, because JOPA lacked "**the mantle of command authority**;" instead unlawful interference with access to witnesses.

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3. *United States v. Gleason*, 43 M.J. 69 (1995). SGM on trial for contacting retired soldier to kill captain who reported Gleason for false travel vouchers, other misconduct. After hearing tape of accused's solicitation, battalion commander made clear that he believed accused was guilty, TDS attorney was "enemy," and that soldiers should not testify on SGM's behalf. CAAF found that unlawful command influence (UCI) pervaded entire trial (unlike Ct. Crim. App. conclusion that limited it to sentence), because this 26-year veteran, "considered almost God-like" by his soldiers, would normally have had a string of character witnesses. Accused's conviction and 7 year, TF sentence thrown out (already served time). Limited precedential value:

   a. Vague "command climate" indictment.

   b. Two-thirds of thin majority no longer a factor on court.

   c. Infrequently cited since.

4. *United States v. Levite*, 25 M.J. 334 (C.M.A. 1987). Chain of command briefed members of the command before trial on the "bad character" of the accused. During trial, the 1SG "ranted and raved" outside the courtroom about NCOs condoning drug use. After trial, NCOs who testified for the accused were told "that they had embarrassed" the unit. Court found UCI necessitated setting aside findings of guilt and the sentence.

5. *United States v. Newbold*, 45 M.J. 109 (1996). Ship commander (LCDR) held all-hands formation at which he referred to four sailors accused of rape as "rapists," "scumbags" and "low-lifes." Repeated at additional formation and in meeting with woman crewmembers. Though no retraction, CAAF found no UCI because (a) he not a CA, (b) no panel members drawn from the ship in question [what about witnesses?], and (c) accused waived Art. 32 and pleaded guilty.

B. Commander's Language – Broad Taint. *United States v. Bartley*, 47 M.J. 182 (1997) Lawyers drafted and 3-star convening authority (CA) signed poster that addresses "7 Defense Myths" about courts-martial.[1] It was displayed in CA's office and OSJA waiting room.

C. Indirect or unintended influence (despite good intentions).

1. *See United States v. Treakle*, 18 M.J. 646 (A.C.M.R. 1984), *aff'd*, 23 M.J. 151 (C.M.A. 1986). CG addressed groups over several months on the inconsistency of recommending discharge-level courts and then having leaders testify that the accused was a "good soldier" who should be retained. The message received by many was "don't testify for convicted soldiers."

2. *See also United States v. Biagase*, 50 M.J. 143 (1999). Accused's confession circulated within his unit and referred to in unit formation (Company commander and 1SG told unit that that they "will not tolerate this type of behavior").

3. *United States v. Francis*, 54 M.J. 636 (Army Ct. Crim. App. 2000). Accused's squad and platoon leaders told other NCOs and soldiers in the unit to stay away from the accused (feared "trouble by association").

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[1] *E.g.* "1. DUTY PERFORMANCE REPRESENTS THE PREEMINENT CRITERION IN EVALUATING SUBORDINATES… 5. DRUG ABUSERS CAN BE TRUSTWORTHY, DEPENDABLE AIRMEN . . . 7. ANYONE WHO CAN BE REHABILITATED SHOULD BE." *Id.* at 188.

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4. Command policies versus military justice policies - *United States v. Jameson*, 33 M.J. 669 (N.M.C.M.R. 1991); *United States v. Jones*, 33 M.J. 1040 (N.M.C.M.R. 1991). When two witnesses were relieved of drill sergeant duties immediately after testifying favorably for the accused charged with engaging in lesbian activities, the hesitancy of potential witnesses to testify in a companion or similar case was evidence of unlawful command influence.

VII. INFLEXIBLE ATTITUDE MAY DISQUALIFY CONVENING AUTHORITY.

A. Pretrial (generally not disqualified).

1. Pretrial referral is a prosecutorial function. *Cooke v. Orser*, 12 M.J. 335, 343-44 (C.M.A. 1982).

2. *United States v. Treakle*, 18 M.J. 646, 654-55 (A.C.M.R. 1984) ("We do not agree . . . that a convening authority can be deprived of his statutory power to convene courts-martial and refer charges to trial based on lack of judicial temperament.")

3. **But if you have an inflexible attitude and you express it publically or even in private to subordinates, panel members or witnesses you may still have committed UCI.**

B. Post-trial.

1. Accused is entitled "as a matter of right to a careful and individualized review of his sentence at the convening authority level. It is the accused's first and perhaps best opportunity to have his punishment ameliorated and to obtain the probationary suspension of his punitive discharge." *United States v. Howard*, 48 C.M.R. 939, 944 (C.M.A. 1974).

2. The presence of an inelastic attitude suggests that a convening authority (CA) will not adhere to the appropriate legal standards in the post-trial review process and that he will be inflexible in reviewing convictions because of his predisposition to approve certain sentences. *United States v. Fernandez*, 24 M.J. 77, 79 (C.M.A. 1987).

3. During recess interview with DC just before he was to be cross-examined on suppression motion, CA told DC that he questioned ethics of anyone who would try to get results of urinalysis suppressed. Court found no effect on trial process – partly because he was skillfully crossed, and because defense never raised the claim until after trial – but it found him disqualified for taking post-trial action because of his "regrettable insensitivity to the adversarial process." *United States v. Fisher*, 45 M.J. 159 (1996).

a. Note weight court gave to CA's decision not to follow the (admittedly non-binding) recommendation of the MJ to suspend part of the sentence.

b. Still, how do you calculate the "regrettable insensitivity" standard of post-trial disqualification.

c. Judge Crawford: just inartful expression of frustration with the system.

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4. Post-trial disqualification may be wise preemptive move. In *United States v. Crawford*, 47 M.J. 771 (C.G.Ct.Crim.App. 1997) the CA violated Art. 37's prohibition on censure of counsel when he told the DC, after trial in the presence of her client, that he "used" her and lied to her. That violation obviously had no effect on the trial, but likely would have disqualified the CA – given his evident temperament – from taking post-trial action. He disqualified himself, avoiding an issue.

5. Examples of problem areas:

   a. Division commander's letter stated that "all convicted drug dealers say the same things . . . drug peddling and drug use are the most insidious form of criminal attack on troopers . . . [s]o my answer to . . . appeals is, 'No, you are going to the Disciplinary Barracks . . for the full term of your sentence and your punitive discharge will stand.' Drug peddlers, is that clear?" CA held to be disqualified to perform review function. *United States v. Howard*, 48 C.M.R. 939, 94 (C.M.A. 1974).

   b. *United States v. Glidewell*, 19 M.J. 797 (A.C.M.R. 1985), *aff'd* 23 M.J. 153 (C.M.A. 1986) (summary disposition). Allegation that GCMCA stated that he could not understand how a battalion commander could allow a soldier to be court-martialed and then testify at trial about the soldier's good character, led court to conclude GCMCA did not possess the requisite impartiality to perform post-trial review function; action set aside.

6. Still alive.

   a. *United States v. Walker*, 56 M.J. 617 (A.F. Ct. Crim. App. 2001). Accused pled guilty to wrongfully using ecstasy. Military judge sentenced him to BCD, 3 months confinement, and reduction to E-1. Convening authority visited the base confinement facility on 12 September with appellant present and said, "I have no sympathy for you guys, you made your own decisions and you put yourselves in this situation. I'm not sympathetic, AND I SHOW NO MERCY FOR YOU. I hope you guys learn from this, but half of you will go on and try to cheat civilian laws and end up is a worst [sic] place than this." Convening authority approved the sentence on 18 September. Air Force court held convening authority disqualified himself because he "closed his mind to his statutory duties."

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b. *United States v. Davis*, 58 M.J. 100 (2003). Accused convicted at special court-martial of AWOL and illegal drug use. Appellant's defense counsel, in clemency petition, objected to convening authority taking action on accused's court-martial. As basis, defense cited several statements attributed to convening authority such as, "People caught using drugs will be prosecuted to the fullest extent and if they are convicted, they should not come crying to me about their situations or their families[`]" – or words to that effect. CAAF held convening authority's words reflected an inelastic attitude. Of note, however, CAAF stated a commander need not appear indifferent to crime. Strong anti-crime positions are ok but must be balanced.

VIII. COURT MEMBER SELECTION.

A. Article 25 Criteria. The **convening authority** chooses court members based on criteria of Article 25, UCMJ:

- age
- education
- training
- experience
- length of service, and
- judicial temperament.

B. *United States v. Upshaw*, 49 M.J. 111 (1998). Accused was not prejudiced by honest administrative mistake that resulted in systematic exclusion of E-6s from court member selection consideration. Effron J., dissenting: government was on notice of defect and must strictly comply with requirements of Article 25, UCMJ.

C. *United States v. White*, 48 M.J. 251 (1998). Convening authority's memo directing subordinate commands to nominate "best and brightest staff officers," and that "I regard all my commanders and their deputies as available to serve as members" did not constitute court packing. 48 M.J. 251 (1998). Convening authority's memo directing subordinate commands to nominate "best and brightest staff officers," and that "I regard all my commanders and their deputies as available to serve as members" did not constitute court packing.

D. *United States v. Benson*, 48 M.J. 734 (A.F. Ct. Crim. App. 1998). Memorandum from SPCMCA directing subordinate commands to nominate only E-7s and above for court-martial of E-3 constituted impermissible shortcut for Article 25(b) criteria. SPCMCA testified that his policy was based on experience level of typical E-7, although he admits that he might find an E-5 with proper qualifications. The court also observed that the SPCMCA's apparent bottom line categorical exclusion of E-5s and below violates the line drawn by CAAF at the grade of E-2. *See United States v. Yager*, 7 M.J. 171 (C.M.A. 1979). Appearance of systemic exclusion of qualified persons will be resolved in accused's favor. Government failed to demonstrate by clear and convincing evidence that no impropriety occurred in the member selection process.

E. Replacement of panel also requires that the CA use **only** Article 25 criteria. Even then, the CA must avoid using improper motive or creating the appearance of impropriety.

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1. *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986) ("the history of [art. 25(d)(2)] makes clear that Congress never intended for the statutory criteria for appointing court members to be manipulated" to select members with intent to achieve harsh sentences.)

2. *United States v. Redman*, 33 M.J. 679 (A.C.M.R. 1991) (replacement of panel because of "results that fell outside the broad range of being rational").

F. Staff Assistance

1. *United States v. Brocks*, 55 M.J. 614 (A.F.Ct. Crim App. 2001). Base legal office intentionally excluded all officers from the Medical Group from the list of court member nominees sent to the convening authority. The SJA and chief of justice based this action on fact that all four alleged conspirators to distribute cocaine and many witnesses came from the Medical Group. Decision to exclude came from desire to avoid conflicts and unnecessary challenges for cause. **HELD**: Exclusion of the Group nominees did not constitute UCI. Motive of SJA and staff was to protect the fairness of the court-martial, not to improperly influence it. *See also United States v. Simpson*. Convening authority excluded all members of U.S. Army Ordnance Center and School.

2. *United States v. McKinney*, 61 M.J.767, (A.F.Ct. Crim. App. 2005).

a. *Facts*: The case involves allegations of unlawful command influence in panel member selection at Hickam AFB. Specifically, the appellants alleged that, based on a flawed SJA pretrial advice under the provisions of Article 34, UCMJ, the convening authority improperly excluded categories of officers from consideration as panel members and thereby engaged in "court-stacking" in violation of Article 37, UCMJ. The pretrial advice at issue read as follows:

If you decide to refer the case to a General Court-martial, you are required to select the members of the panel. Article 25[,] UCMJ states, "The convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament." By law, you must select at least five officers. Although you may select a minimum of five members to serve on this court-martial panel, I recommend that you select 12 officers - 3 Colonels, 2 or 3 Lt [Lieutenant] Colonels, 3 or 4 Majors, and 3 or 4 company grade officers. Because both the United States and defense counsel have opportunities to challenge the members for cause and can each eliminate one officer peremptorily (i.e., for no reason at all), the above configuration will yield a balanced and diverse court-martial panel that will provide a sufficient number of officers. . . . At Tab 2 is a listing of officers assigned to Hickam AFB [Air Force Base]. You may select any of these officers as court-members. *Additionally, I have eliminated officers who would most likely be challenged for cause (i.e., JAGs [Judge Advocates], chaplains, IGs [Inspectors General], or officers in the accused's unit).*

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b. *Held*: The court does not recommend the "wholesale elimination of potential court members such as occurred in this case." However, the convening authority and SJA acted to promote trial efficiency and to protect the fairness of the court-martial, rather to improperly influence it. An element of court-stacking is an improper motive, which did not exist here. Therefore, the appellant failed to satisfy the first *Biagase* criterion, that is, show facts which, if true, constitute UCI. Even if there was UCI, the proceedings were fair, and the defense lodged no objection to the selection process at trial. Accordingly, the second and third *Biagase* criteria were not met.

c.

IX. NO OUTSIDE PRESSURE

A. Command policy in the courtroom.

1. "[H]ere we have a senior noncommissioned officer directly in violation of that open, express, notorious policy of the Army: Through[sic] shalt not [use marijuana]." MJ's sentencing instruction, which related Army policy regarding use of illegal drugs, implicated UCI concerns and constituted plain error which was not waived by the defense failure to object; sentence set aside. *United States v. Kirkpatrick*, 33 M.J. 132, 133 (C.M.A. 1991).

2. Disclosure, during members trial, of the terms of co-accused's pretrial agreement, does not necessarily bring the CA into court and was not, under these circumstances, plain error. *United States v. Schnitzer*, 44 M.J. 380 (1996), *reversing* 41 M.J. 603, 606 (Army Ct. Crim. App. 1994).

3. *United States v. Yerich*, 47 M.J. 615 (Army Ct. Crim. App. 1997). Testimony from government witness (SFC) that the accused had no rehabilitative potential in the military did not constitute unlawful command influence. Court rejects argument that SFC's testimony was adopted, and therefore attributable to, the commanding officer. Secondary evil of rehab potential testimony was unlawful command influence. *See United States v. Cherry*, 31 M.J. 1, 5 (C.M.A. 1990).

4. *United States v. Stoneman*, 57 M.J. 35 (2002). SPCMCA sent email to subordinate commanders "declaring war on all leaders not leading by example." Email also stated the following: "No more platoon sergeants getting DUIs, no more NCOs raping female soldiers, no more E7s coming up 'hot' for coke, no more stolen equipment, no more approved personnel actions for leaders with less than 260 on the APFT, …., -- all of this is BULLSHIT, and I'm going to CRUSH leaders who fail to lead by example, both on and off duty." At a subsequent leaders' training session, Cdr reiterated his concerns. After consulting with SJA, Cdr issued a second email to clarify the comments in the first. Cdr stated that he was expressing his concerns about misconduct, but emphasized that he was not suggesting courses of action to subordinates, and that each case should be handled individually and appropriately in light of all circumstances. He specifically addressed duties as a court-martial panel member and witness. At trial, defense counsel initially sought to stay proceedings until a new panel could be selected. After denial of this request, defense counsel challenged all panel members from the brigade based on implied bias and potential for unlawful

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command influence. After extensive voir dire, MJ denied the challenge using R.C.M. 912 as the framework. ACCA reviewed *de novo* and determined no abuse of discretion by military judge in denying challenges and the omission of specific findings of fact and conclusion that email did not constitute UCI were harmless. **HELD:** Remanded for a DuBay hearing. Military judge should have used an unlawful command influence framework to determine the facts, decide whether those facts constituted unlawful command influence, and conclude whether the proceedings were tainted. Additionally, CAAF stressed that the ROT was insufficient to resolve a potential "appearance of unlawful command influence" issue.

5. *United States v. Baldwin***,** 54 M.J. 308 (2001). Nine months after her court-martial, appellant filed affidavit alleging that GCMCA conducted OPDs and that he commented that officer court-martial sentences were too lenient and stated that the minimum should be at least one year. Appellant also alleged that her court-martial was interrupted by one of these sessions (mandatory for all officers assigned to the installation). Appellant asserted that these actions constituted UCI. **HELD:** Appellant's post-trial affidavit was sufficient to raise the issue, but insufficient record on which to decide the issue. Decision of the Army court was set aside and the record returned for limited hearing on the UCI issue.

6. *United States v. Simpson,* 58 M.J. 368 (2003). Appellant was convicted of various offenses to include rape, indecent assaults, indecent acts, and maltreatment of trainees at Aberdeen Proving Ground. He contended that he was denied a fair trial because of apparent UCI and unfair pretrial publicity permeated his case. As support, appellant cited the Army's "zero tolerance" policy on sexual harassment; a chilling effect on the command decision-making process stemming from the Secretary of the Army's creation of the Senior Review Panel to examine gender relations; public statements made by senior military officials suggestive of appellant's guilt; and public comments by members of Congress and military officials regarding the "Aberdeen sex scandal." **HELD**: No nexus between the purported unlawful or unfair actions of senior military officials and the convening authority's decision to refer the case. Additionally, no nexus between acts complained of and any unfairness at trial. No evidence that court members were influenced to return guilty verdicts because that is what the Army or superiors wanted. CAAF pointed to the military judge as the sentinel of justice: allowed extensive voir dire of members concerning exposure to the pretrial publicity and any potential taint as a result of senior leader statements. CAAF and ACCA specifically noted the military judge's eight page findings of fact in ruling on defense's UCI motion to dismiss.

B. The Commander in the Courtroom – Figuratively through Argument.

United States v. Mallett, 61 M.J.761 (A.F. Ct. Crim. App.2005).

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1. *Facts*: Pursuant to his pleas, a panel of officers sitting as a general court-martial convicted appellant of wrongfully using cocaine on divers occasions. The members sentenced appellant to a bad-conduct discharge, confinement for twelve months, and reduction to E-1. Appellant alleged that trial counsel's (TC) sentencing argument injected unlawful command influence into the proceedings because the TC referred to commanders in her argument. Specifically, the TC referred to "commander's calls" where the commander "would warn us to stay away . . . not to use drugs." After stating that the commander could not impose any particular punishment, but could only send the charges to court-martial, the TC then posited, "what would a commander say to get his unit's attention and say, 'I mean business about drugs,' if he had the authority to be the judge and jury in a case where you are, in essence, the jury deciding this?" The TC concluded that, a sentence that would "get people's attention" is "18 months [of] confinement and a bad conduct discharge." Trial defense counsel did not object to the argument.

2. *Held*: The TC's comments were improper under R.C.M. 1001(g), which expressly prohibits making reference to a convening authority or command policy in sentencing arguments and amounted to plain error, despite the lack of defense objection at trial. The TC's argument implied that unnamed commanders favored the sentence he proposed. "Moreover, the trial counsel cloaked himself with the 'mantle of command authority,' thereby creating the appearance of unlawful command influence." The comments were improper because they brought the views of outside commanders into the courtroom. Further, the argument rendered the proceedings unfair and the improper argument was the cause of the unfairness. Accordingly, appellant suffered prejudice and was entitled to relief. Sentence set aside.

C. The Commander in the courtroom - Literally. *United States v. Harvey*, 64 M.J. 13 (2006). *Facts*: Appellant was convicted of conspiracy, false official statement, communicating a threat, and several drug related offenses. During the government's closing argument on findings the convening authority was present in the courtroom wearing a flight suit. Based on the apparent recognition of the convening authority by several panel members, defense counsel moved for a mistrial, which was denied by the military judge.

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Held: The CAAF set aside the findings and sentence without prejudice, but limited the approved sentence at any rehearing to a punitive discharge. The military judge is the "last sentinel" in the trial process to protect a court-martial from unlawful command influence. The trial developments in this case raised "some evidence" of unlawful command influence and the military judge failed to inquire adequately into the issue. Specifically, the convening authority was present in the courtroom wearing a flight suit when the government's argument characterized appellant's conduct as a threat to the aviation community; the senior member of the panel was a subordinate member of the convening authority's command (and the subject of an unsuccessful challenge for cause); and there was some evidence that the panel was watching the convening authority during argument. Further, the military judge failed to place the appropriate burden on the government to rebut the existence of unlawful command influence as required by *Biagase.* (The CAAF noted that that the military judge was not required to grant a mistrial without more evidence before him at the time, and that convening authority's are not barred from a attending a court-martial. "But as this case illustrates, the presence of the convening authority at a court-martial may raise issues.") Compare to *United States v. Rosser*, 6 M.J. 267 (C.M.A. 1979) (military judge abused his discretion in denying mistrial where accuser's (company commander) presence throughout proceedings was "ubiquitous" and commander engaged in "patent meddling in the proceedings").

C. In the deliberation room.

1. *United States v. Youngblood,* 47 M.J. 342 (1997). Staff meeting at which Wing commander and SJA shared perceptions of how previous subordinate commanders had "underreacted" to misconduct created "implied bias" among three senior court members in attendance. Court focused on impact of remarks on receiver rather than intent of sender (Commander and SJA never testified). Specifically, the court weighed heavily the following factors: Despite the member's response that they could disregard the comments, the majority concluded it is "asking too much" to expect members to adjudge sentence without regard for potential impact on their careers.

   J. Crawford dissenting: "This case is another example of the clash that sometimes arises between the need for good order and discipline and the need to maintain an impartial system of military justice."

   "The primary responsibility for the maintenance of good order and discipline . . . is saddled on commanders. . . . [P]ersonal presentation of that subject by the commander is impressive, but that is as it should be. The question is not his influence but, rather, whether he chartered it through forbidden areas." Article 37(a)(1) permits instructional and informational military justice lectures. Selecting court members pursuant to Article 25 criteria "differs significantly from random selection of civilian jurors by voter-registration or driver's license lists. Implied bias should be used only in "extreme situations," especially with the military's blue ribbon panel.

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2. *United States v. Rome*, 47 M.J. 467 (1998). Court member's supervisory relationship with enlisted panel member, professional relationship with trial counsel and CID agent, and encounter with defense counsel in prior case involving issue of unlawful command influence was sufficient to create implied bias. J. Crawford, dissent. *See Youngblood, supra.* Implied bias too subjectively applied by majority.

3. Improper for senior ranking court members to use rank to influence vote within the deliberation room, *e.g.*, to coerce a subordinate to vote in a particular manner. Discussion, Mil. R. Evid. 606; *United States v. Accordino*, 20 M.J. 102 (C.M.A. 1985) (allegation that senior officer cut off discussion by junior members, remanded to determine if senior officer used rank to "enhance" an argument).

4. *United States v. Dugan*, 58 M.J. 253 (2003). Junior panel member provided defense counsel with a letter after court-martial detailing her concerns regarding statements made during sentencing deliberations. Panel member alleged that another member reminded the panel that the GCMCA would review their sentence and they needed to make sure they sent a "consistent message." (GCMCA held a "Commander's Call" several weeks before during which drug use was discussed). Defense counsel requested a post-trial Article 39a session. Military judge denied the request. CAAF disagreed with the military judge and AFCCA. CAAF determined the defense counsel successfully raised unlawful command influence and the Government must rebut the allegation. Remanded for *DuBay* hearing. Of note, CAAF pointed out the limitations in place in questioning the panel members during the *DuBay* hearing. Although M.R.E. 606(b) allows members to be questioned about what was said during deliberations, members may not be questioned about the impact of those statements or the impact of statements made previously by the GCMCA.

D. Command interference with the power of the judge.

United States v. Tilghman, 44 M.J. 493 (1996). Unlawful command interference when commander placed accused into pretrial confinement in violation of trial judge's ruling. Remedy: 18 months credit ordered against accused's sentence.

E. Judges must not be influenced - - even by structure of trial judiciary. *United States v. Campos*, 42 M.J. 253 (1995). Military judge said he was relieved of his position as senior judge for perception of softness. Based on extensive trial record, CAAF found no nexus between assignment of other judge and accused's trial, that appearance taken care of at Art. 39(a) session and trial, and no abuse of discretion in not recusing himself.

X. PRETRIAL PUNISHMENT MAY RAISE UNLAWFUL COMMAND INFLUENCE.

A. Mass Apprehension. *United States v. Cruz*, 25 M.J. 326 (C.M.A. 1987). Berating and humiliating suspected soldiers utilizing a mass apprehension in front of a formation found to be unlawful command influence (attempt to induce severe punishment) and unlawful punishment (UCMJ Art. 13). Returned for sentence rehearing.

B. Pretrial Humiliation. *United States v. Stamper*, 39 M.J. 1097 (A.C.M.R. 1994). Comments made by unit commander in front of potential witnesses that accused was a thief did not constitute UCI; no showing that any witnesses were persuaded or intimated from testifying (it did violate Art. 13).

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XI. STAFF MAY COMMIT UCI

A. The Overzealous SJA. *United States v. Lewis*, 63 M.J. 405 (2006).

1. *Facts*:

a. *The government motion*. Pursuant to his pleas, a military judge sitting as a general court-martial convicted appellant of various drug offenses involving ecstacy, ketamine, LSD, and methamphetamine. The military judge and sentenced appellant, *inter alia*, to five years confinement and a dishonorable discharge. Civilian Defense Counsel (CDC) represented appellant before a military judge. CDC did not appear at the first session of the court-martial, the arraignment, but neither side had any voir dire or challenge against the military judge at that time or at a second court session where appellant entered pleas. During a third court session held to hear motions, the trial counsel conducted voir dire of the military judge and challenged her impartiality because: (1) she presided over two companion cases; (2) she had a prior professional relationship with CDC while the CDC was on active duty; (3) the MJ's "social interaction" with the CDC; (4) the MJ expressed displeasure to another TC over a year prior when that TC asked whether the MJ had *ex parte* contact with the CDC regarding an upcoming trial. The TC moved the MJ recuse herself; the MJ denied the motion. The TC requested the MJ reconsider her denial of the motion, and presented a previously prepared written pleading. The MJ denied that motion as well. The TC requested a continuance to file a government appeal – the MJ denied the request.

b. *The defense motion to dismiss*. Based on the prosecution's actions, the defense filed a motion to dismiss for prosecutorial misconduct and unlawful command influence. The same TC who moved for the MJ's recusal conducted all government direct and cross-examinations, despite being called as a witness himself. An assistant TC questioned the TC and made argument on the motion. The defense called the SJA as a witness, who testified that he advised the TC regarding trial tactics, as well as voir dire and the motion to recuse, including assisting with research and case citations for the motion, and calling the Head of Appellate Government Division about the motion. The SJA also characterized an incident where the MJ and CDC were seen together as a "date." The SJA was combative on the witness stand, including addressing comments to the CDC, interrupting the CDC, and arguing with the CDC.

c. The MJ recused herself because she could not remain impartial following the government's attack on her character. A second MJ was detailed who also recused himself because he was "shocked and appalled" at the government's conduct. A third judge heard an expedited defense motion, and a fourth judge presided over additional motions and trial. The trial judge granted a motion for a change of venue, disqualified the SJA and the convening authority from taking post-trial action in the case, and barred the SJA from attending the remainder of the trial.

d. The NMCCA found the SJA's actions advising the trial counsel on the "voir dire assault of the MJ," his unprofessional behavior as a witness, and his

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inflammatory testimony, created a bias in the MJ and constituted unlawful command influence. But for the TC and SJA's actions, appellant would have been tried by the initial MJ. However, there was no prejudice to the appellant, whose trial was ultimately heard by diligent, deliberate judges.

2. *Held*: Improperly seeking recusal of the military judge was actual unlawful command influence. "But for the government's attack upon MAJ CW, it appears unlikely that there existed grounds for disqualification." "The record reflects that the SJA – a staff officer to and legal representative for the convening authority - was actively engaged in the effort to unseat MAJ CW as the military judge. The trial counsel, who was provided advice on voir diring MAJ CW by the SJA, became the tool through which this effort was executed." The trial counsel initially part of the unlawful command influence remained an active member of the prosecution, undermining the government's later actions and remedial steps. Further, a reasonable observer would have significant doubt about the fairness of this court-martial in light of the government's conduct. Neither actual nor apparent unlawful command influence have been cured beyond a reasonable doubt in this case; **Charges and specifications dismissed with prejudice.**

XII. EXPANDING THE SCOPE OF UCI.

A. During sentencing phase of trial, defense may litigate admissibility of NJP based on claim of command influence. *United States v. Lorenzen*, 47 M.J. 8 (1997).

1. Defense argued that NJP, which soldier had accepted, was subject to UCI.
2. *Unanimous* CAAF reverses Air Force Court and holds that proper subject of litigation at trial.
3. Court ultimately found that the defense failed to satisfy other two prongs of test (prejudice), so harmless error.

B. Strong argument that can litigate UCI regarding any collateral sentencing documents.

1. Other sanctions less "optional" than NJP (which soldier can turn down).
2. "Fundamental fairness" concern sweeps broadly.

XIII. REMEDIAL ACTIONS.

A. Before trial (**command directed**).

United States v. Rivers, 49 M.J. 434 (1998). Corrective action by government and the military judge at trial overcame three allegations of unlawful command influence (UCI). Allegations included the following: CG's command memo – "no place in our Army for illegal drugs **or for those who use them;"** Co Cdr told soldiers to "stay away from those involved with drugs;" and Btry 1SG issued rights warnings to four defense witnesses prior to interview. Corrective action included: clear and effective retraction" memo from the CG; AR 15-6 investigation against the commander who received Letter of Reprimand, and issued a public retraction and apology.

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1. Brief witnesses of duty to testify. *United States v. Sullivan*, 26 M.J. 442 (C.M.A. 1988). In response to 1SG's criticism that those who testify on behalf of drug offenders contravenes Air Force policy, the command instructed all personnel that testifying was their duty if requested as defense witnesses and transferred the 1SG to eliminate his access to the rating process.

2. Rescind or clarify letters and pronouncements. *United States v. Rivers*, 48 M.J. (1998).

3. Transfer offending actors.

4. Reprimand or relieve offending officer/NCO.

5. Consider a pre-trial agreement that waives the issue in return for favorable sentence cap. *See United States v. Weasler*, 43 M.J. 15 (1995)(permissible to bargain away accusative stage UCI).

B. At trial (**military judge-directed**).

1. *United States v. Rivers*, 49 M.J. 434 (1998). Corrective action by military judge: banned commander from courtroom; ordered production of any witness requested by defense, instructed all witnesses of duty to testify and report any retribution, announced he would "favorably consider" any other remedial measures requested by the defense; directed post-trial 39a session to gather evidence regarding adverse effects 1SG's rights warnings had on defense witnesses.

2. *United States v. Biagase*, 50 M.J. 143 (1999). Corrective action by military judge: Removed 1SG from rating chain of witnessing testifying for the accused; directed by if the evaluation of any witness were lower than last evaluation that written justification be attached; allowed defense counsel great latitude during voir dire and liberally granted challenges; offered to issue blanket order to produce any defense witnesses otherwise reluctant to testify.

3. *United States v. Clemons*, 35 M.J. 770, 772 (A.C.M.R. 1992).

   a. No aggravation witnesses;

   b. Not allowed to attack accused's credibility by opinion or reputation testimony;

   c. Defense given wide latitude with witnesses;

   d. Accused allowed to testify about what he ***thought*** witnesses might have said (as substantive evidence on merits or E&M).

4. *United States v. Souther*, 18 M.J. 795, 796 (A.C.M.R. 1984).

   a. Government precluded from presenting any evidence through direct or cross-examination concerning accused's potential for further military service;

   b. Judge offered to sustain any challenge for cause against any member who was present in command during period of UCI.

5. Dismissal. *United States v. Gore*, 60 M.J. 178 (2004). CAAF upholds military judge's decision to dismiss case with prejudice due to witness intimidation.

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C. Military Judge Must Follow-up On Remedies!

1. *United States v. Douglas*, 68 M.J. 349 (2010). The accused was an Air Force recruiter who was convicted by military judge sitting alone of a variety of offenses including distribution of methamphetamine, carnal knowledge, and sodomy of a child under the age of sixteen years.

a. UCI: Accused's supervising recruiter ordered the accused not to have contact with any witnesses; openly disparaged the accused to co-workers and others sharing the same building, and intimidated several potential character witnesses.

b. Trial: The accused filed a motion to dismiss based upon unlawful command influence. The military judge agreed that there was UCI but found that it only affected sentencing. Accordingly, the military judge declined to dismiss. Instead, he crafted a remedy that included a continuance so that trial and defense counsel could author a memo for the accused's commander designed to facilitate the cooperation of potential witnesses. The military judge also directed several other curative measures, including recommending that the accused be removed from the offending NCO's supervision.

c. Cure: After 70 days, the court reconvened. The military judge asked the defense counsel if the memorandum had in fact been produced. Defense counsel agreed that it had and offered no further objection or comment. The military judge provided counsel the opportunity to voice any concerns or raise any objections. None were raised so the trial proceeded. The accused was found guilty and appealed. None of the witnesses who were subjected to intimidation testified. On appeal, the Air Force Court of Criminal Appeals held that the military judge erred in finding that the impact of the UCI was limited to the sentencing portion of the trial. Nonetheless, based upon the curative measures taken, they affirmed.

CAAF had no objection to the curative action taken, however the **Court still set aside the findings and sentence because the record did not establish that all of the curative actions had been fully implemented**. Once UCI has been demonstrated, the Government has the burden of proving beyond a reasonable doubt that any curative action removed the taint of unlawful command influence. Although the defense counsel did not object, the record still failed to establish that all of the curative measures were implemented and that they had the effect of curing the UCI. The trial counsel and the military judge should have made further inquiry into all of the proposed remedies and ascertained why none of the potentially intimidated witnesses testified.

D. Post-trial- R.C.M. 1102: Any time before authentication or action the MJ or CA may direct a post-trial session to resolve any matter which affects the legal sufficiency of any findings of guilty or the sentence. *See United States v. Rivers*, 49 M.J. 434 (1998).

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XIV. METHODOLOGY OF PROOF - LONG FORM.

A. Raising the issue at trial level.

1. **THE BASIC TEST** comes from *Stombaugh*, 40 M.J. at 213, in which the CAAF adopted the test suggested by Judge Cox in his concurrence in *United States v. Levite*, 25 M.J. 334, 341 (C.M.A. 1987) (Cox, J. concurring). The test is:

   a. **Sufficient evidence**. "Sufficient facts which, if true, constitute" UCI. This language reappears in *Ayala* and elsewhere, reiterating the same or similar language from many other sources. Earlier the court had held, for example, that the defense must produce "sufficient evidence to render a reasonable conclusion in favor" of the allegation of unlawful command influence. *United States v. Cruz*, 20 M.J. 873, 885-886 (A.C.M.R. 1985), *rev'd in part on other grounds*, 25 M.J. 326 (C.M.A. 1987).

   b. **The proceedings were unfair**.

   c. **UCI is the proximate cause of the unfairness**.

2. Not formally part of the test, but effectively so: the actor had the **"mantle of command authority."** *Stombaugh*, 40 M.J. at 211. This is effectively a screening criterion for further analysis: did the person said to have committed the UCI act with the "mantle …"? *Id*.

3. *United States v. Biagase*, 50 M.J. 143 (1999). Distinguishes standards for assessment of unlawful command influence at the appellate level (*Stombaugh* and *Reynolds)* and the responsibility of the military judge during assessment of motions at trial.

   a. Threshold at trial is low, "more than mere allegation or speculation - some evidence."

   b. Facts, which, if true, constitute unlawful command influence, and alleged unlawful command influence has logical connection to court-martial in terms of potential to cause unfairness in the proceedings.

   c. Once raised, burden shifts to government to show either there was No unlawful command influence or that the unlawful command influence will not affect the proceedings.

4. Burden does not shift to government unless defense meets "the initial burden of producing sufficient evidence to raise unlawful command influence." *United States v. Ayala*, 43 M.J. 296, 299 (1995). The government may carry its burden of disproving UCI or proving that it did not affect the proceeding by:

   a. Disproving predicate facts on which allegation of unlawful command influence is based.

   b. Persuading the military judge or appellate court that the facts do not constitute unlawful command influence.

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c. At trial, producing evidence that unlawful command influence will not affect the proceedings.

d. On appeal, persuading the appellate court that the unlawful command influence had no prejudicial impact on the court-martial.

Burden at both levels is the same – proof beyond a reasonable doubt that there was no unlawful command influence or that the unlawful command influence did not affect the findings or sentence. *United States v. Biagase*, 50 M.J. 143 (1999).

5. If government fails to produce rebuttal evidence, "military judge must find unlawful command influence exists and then take whatever measures are necessary . . . to ensure [beyond a reasonable doubt] that the findings and sentence" are not affected. *United States v. Jones*, 30 M.J. 849, 854 (N.M.C.M.R. 1990).

6. Dismissal is last resort:

"If and only if the trial judge finds that command influence exists (because the defense successfully raised it, and the Government failed to disprove it by clear and positive evidence) and finds, further, that there is no way to prevent it from adversely affecting the findings or sentence beyond a reasonable doubt should the case be dismissed." *Jones*, 30 M.J. at 854. *Accord United States v. Thomas*, 22 M.J. 388 (1986), *United States v. Martinez*, 42 M.J. 333 (1995).

B. Appellate Standard - Beyond a Reasonable Doubt.

1. Once the issue of command influence is properly placed at issue, "no reviewing court may properly affirm <u>findings and sentence</u> unless [the court] is persuaded **<u>beyond a reasonable doubt</u>** that the findings and sentence have not been affected by the command influence." *United States v. Thomas*, 22 M.J. 388, 394 (C.M.A. 1986).

2. "Where the issue of unlawful command influence is litigated on the record, the military judge's findings of fact are reviewed under a clearly-erroneous standard, but the question of command influence flowing from those facts is a question of law that this Court reviews *de novo*." *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994).

3. There must be more than "[command influence] in the air" to justify action by an appellate court. *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991), *cert. denied*, 112 S. Ct. 1473 (1992).

Accord Ayala, 43 M.J. 296 (1995). Accused's friend submitted affidavit saying that after initial enthusiasm, most (6 of 7) of those he solicited for clemency recommendations demurred. Three judge majority (Cox, Gierke, Crawford) found it insufficient to shift burden. Key is that his affidavit lacked evidence that "anyone acting with the mantle of authority unlawfully coerced or influenced" any of the individuals approached.

a. A post-trial evidentiary hearing is not required if no reasonable person could view the opposing affidavits . . . and find the facts averred by appellant. *United States v. Dykes*, 38 M.J. 270, 172-73 (C.M.A. 1993).

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b. "[T]he threshold triggering [a *DuBay*] inquiry is low, but it must be more than a bare allegation or mere speculation." *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994).

c. *But see United States v. Bradley*, 48 M.J. 777 (A.F. Ct. Crim. App. 1998) (After *Dubay* hearing, Air Force Court very apologetic for its initial criticism of SJA alleged to have committed unlawful command influence. Court strongly hints outcome may have been different had the government submitted an affidavit from the SJA).

4. *United States v. Francis*, 54 M.J. 636 (Army Ct. Crim App. 2000). Provides good explanation of methodology at trial and appellate levels.

XV. WAIVER.

A. *United States v. Drayton*, 45 M.J. 180 (1996); *United States v. Brown*, 45 M.J. 389 (1996). *Accord United States v. Hamilton*, 41 M.J. 32 (C.M.A. 1994). (Court unanimously affirms conviction, but two judges dissent from analysis.). Majority approach for future cases.

1. **Accusatory UCI**: Forfeited if not raised at trial:

a. Accuser disqualification;

b. Commander <u>coerced</u> into signing charges, (charges are treated as unsworn); and

c. Pressure to make a certain recommendation in the transmittal process.

d. Claim that commander's recommendation coerced by superior commander waived unless can show deterred from raising it at trial by UCI. (*Drayton*).

2. **Adjudicative UCI:** Not waived by failure to raise at trial. Improper influence at:

a. Referral;

b. Trial; or

c. Post-trial review.

3. Items in 1.(a) - (c) above are not waived if there is an allegation that the party was deterred by unlawful command influence from challenging the defects at trial.

B. Old Rule: UCI motion "is not waived by failure to raise it at trial." *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994), *United States v. Blaylock*, 15 M.J. 190 (C.M.A. 1983) (note, however, that it carefully sidesteps the applicability of Art. 37 to the adjudicative phase).

C. Not jurisdictional: "[E]ven in egregious case[s] of unlawful] command influence," the court has refused to find the error is jurisdictional. *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994) (citing *United States v. Blaylock*, 15 M.J. 190 (C.M.A. 1983)).

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D. Problem case for Military Judge: *United States v. Reynolds*, 40 M.J. 198 (C.M.A. 1994) (2-1-1-1). Fractured court affirms conviction, but three judges struggle over whether accused can affirmatively halt post-trial Article 39(a) inquiry into allegations of unlawful command influence.

E. Waiver as Part of Pretrial Agreement (**Only applies to Accusatory UCI**).

United States v. Weasler, 43 M.J. 15 (1995). Accused had made (accurate) motion that acting commander improperly signed charges, at direction of commander who was going on leave, and therefore did not exercise independence. While government preparing to respond to motion, defense offered to plead guilty. Held: issue is waiveable by defense, so long as knowing, freely initiated. Strong disagreement in scathing concurrences from Judges Sullivan and Wiss, who suggest that majority is setting a standard of "tolerable" command influence.

XVI. CONCLUSION.

XVII. FURTHER READING

A. Robert A. Burrell, *Recent Developments in Unlawful Command Influence*, ARMY LAW., May 2001.

B. James F. Garrett, *Recent Developments in Unlawful Command Influence, "I Really Didn't Say Everything I Said,"* ARMY LAW., May 2002.

C. James F. Garrett, *Recent Developments in Unlawful Command Influence*, ARMY LAW., May 2004.

D. Patricia A. Ham, *Revitalizing the Last Sentinel: The Year in Unlawful Command Influence*, ARMY LAW., May 2005.

E. Patricia A. Ham, *Still Waters Run Deep? The Year in Unlawful Command Influence*, ARMY LAW., June 2006.

F. Mark L. Johnson, *Confronting the Mortal Enemy of Military Justice: New Developments in Unlawful Command Influence*, ARMY LAW., June 2007.

G. Mark L. Johnson, *Unlawful Command Influence--Still with Us; Perspectives of the Chair in the Continuing Struggle Against the "Mortal Enemy" of Military Justice*, ARMY LAW., June 2008.

H. Daniel G. Brookhart, *Physician Heal Thyself- How Judge Advocates Can Commit Unlawful Command Influence*, ARMY LAW., March 2010.

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APPENDIX A

THE 10 COMMANDMENTS

OF

UNLAWFUL COMMAND INFLUENCE

COMMANDMENT 1:	THE COMMANDER MAY NOT ORDER A SUBORDINATE TO DISPOSE OF A CASE IN A CERTAIN WAY
COMMANDMENT 2:	THE COMMANDER MUST NOT HAVE AN INFLEXIBLE POLICY ON DISPOSITION OR PUNISHMENT.
COMMANDMENT 3:	THE COMMANDER, IF ACCUSER, MAY NOT REFER THE CASE.
COMMANDMENT 4:	THE COMMANDER MAY NEITHER SELECT NOR REMOVE COURT MEMBERS IN ORDER TO OBTAIN A PARTICULAR RESULT IN A PARTICULAR TRIAL.
COMMANDMENT 5:	NO OUTSIDE PRESSURES MAY BE PLACED ON THE JUDGE OR COURT MEMBERS TO ARRIVE AT A PARTICULAR DECISION.
COMMANDMENT 6:	WITNESSES MAY NOT BE INTIMIDATED OR DISCOURAGED FROM TESTIFYING.
COMMANDMENT 7:	THE COURT DECIDES PUNISHMENT. AN ACCUSED MAY NOT BE PUNISHED BEFORE TRIAL.
COMMANDMENT 8:	COMMANDERS MUST ENSURE THAT SUBORDINATES AND STAFF DO NOT “COMMIT” COMMAND INFLUENCE” ON THEIR BEHALF.
COMMANDMENT 9:	THE COMMANDER MUST NOT HAVE AN INFLEXIBLE ATTITUDE TOWARDS CLEMENCY.
COMMANDMENT 10:	IF A MISTAKE IS MADE, RAISE THE ISSUE IMMEDIATELY.

TAB D

COURT–MARTIAL JURISDICTION

Table of Contents

I. INTRODUCTION.....1

II. JURISDICTION OVER THE OFFENSE.....2

III. JURISDICTION OVER THE PERSON.....4

IV. JURISDICTION OVER THE RESERVE COMPONENT.....11

V. PROCEDURAL CONSIDERATIONS.....13

VI. JURISDICTION OVER CIVILIANS.....13

LTC DANIEL FROEHLICH

JANUARY 2011

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COURT–MARTIAL JURISDICTION

I. INTRODUCTION.

Jurisdiction means the power of a court to try and determine a case, and to render a valid judgment. Courts-martial are courts of special and limited jurisdiction. For example, courts-martial jurisdiction applies worldwide, but is limited in application to a certain class of people—members of the armed forces. In general, three prerequisites must be met in order for courts-martial jurisdiction to vest. They are: (1) jurisdiction over the offense, (2) personal jurisdiction over the accused, and (3) a properly convened and composed court-martial.

Whether a court-martial is empowered to hear a case—whether it has jurisdiction—frequently turns on issues such as the status of the accused at the time of the offense, or the status of the accused at the time of trial. These issues of courts-martial jurisdiction relate to either subject matter jurisdiction (jurisdiction over the offense) or personal jurisdiction (personal jurisdiction over the accused). Subject matter jurisdiction focuses on the nature of the offense and the status of the accused at the time of the offense. If the offense is chargeable under the Uniform Code of Military Justice (UCMJ) and the accused is a servicemember at the time the offense is committed, subject matter jurisdiction is satisfied. Personal jurisdiction, however, focuses on the time of trial: can the government court-martial him? The answer is yes, so long as the accused has proper status; i.e., that the accused is a servicemember at the time of trial.

A. **Sources of Jurisdiction**.

1. The Constitution: Article I, section 8, clause 14
2. UCMJ, articles 2, 3 and 36
3. MCM, 2005 ed., RCM 201 - 204
4. Customary international law and treaties

B. **Five Elements of Court-Martial Jurisdiction**, R.C.M. 201(b):

1. Proper jurisdiction over the offense (subject matter jurisdiction).
2. Proper jurisdiction over the person (personal jurisdiction).
3. Properly composed court (military judge and members must have proper qualifications.) Absent evidence of coercion or ineffective assistance of counsel, accused's request to be tried by military judge alone can be inferred from the record of trial (applying "substantial compliance" doctrine to Article 16. *United States v. Turner*, 47 M.J. 348 (1997). Article 25 (request for enlisted members to serve on panel) is also satisfied by substantial compliance. *United States v. Townes*, 52 M.J. 275 (2000). *See also United States v. Morgan*, 57 M.J. 119 (2002). *[See Tab E (Court-Martial Personnel) of this Deskbook for additional information]*
4. Proper convening authority. A properly constituted court-martial may try any person subject to the UCMJ, even if the accused is not under the command of the convening authority. *United States v. Murphy*, 30 M.J. 1040 (A.C.M.R. 1990), *set aside, on other grounds*, 36 M.J. 8 (C.M.A. 1992); *accord, United States v. Randle*, 35 M.J. 789 (A.C.M.R. 1992). *See also United States v. Cantrell*, 44 M.J. 711 (A.F.Ct.Crim.App. 1996). *[See Tab E (Court-Martial Personnel) of this Deskbook for additional information]*

5. Properly referred charges. *United States v. Pate*, 54 M.J. 501 (Army Ct. Crim. App. 1997). The PTA was not signed by the GCMCA, but instead the word "accepted" was circled and a notation made indicating a voco to the SJA. The accused argued that since the CA never signed the PTA, the "new" charge to which the accused was pleading guilty was never referred and, therefore, the court-martial lacked jurisdiction over that charge. The Army Court held that jurisdiction existed since a proper referral does not need to be in writing and the lack of signature was "insignificant." *See also United States v. Williams*, 55 M.J. 302 (2001). *But see United States v. Henderson*, 59 M.J. 350 (2004). *[See Tab G (Initiation and Disposition of Charges) of this Deskbook for additional information]*

II. JURISDICTION OVER THE OFFENSE.

A. Historical Overview.

1. *O'Callahan v. Parker*, 395 U.S. 258 (1969). The Supreme Court establishes the "service-connection" test. *See also Relford v. Commandant*, U.S. Disciplinary Barracks, 401 U.S. 355 (1971) (the Court sets-forth the *Relford* factors as a template to determine "service-connection").

2. *Solorio v. United States*, 483 U.S. 435 (1987). The Supreme Court overrules *O'Callahan*, abandoning the "service-connection" test, and holds that jurisdiction of a court-martial depends solely on the accused's status as a member of the Armed Forces.

B. **BOTTOM LINE:** Subject matter jurisdiction is established by showing military status at the time of the offense.

C. **Administrative Double Jeopardy Policies.** Generally, a member of the Armed Forces will not be tried by court-martial or punished under Article 15, UCMJ, for the same act for which a civilian court has tried the Soldier. This policy is based on comity between the federal government and state or foreign governments. See AR 27-10, para. 4-2; JAGMAN, para. 0124.

D. **Capital Cases.**

1. *Loving v. United States*, 116 S.Ct. 1737 (1996). Justice Stevens (concurring) raised the question of whether a "service connection" requirement applies to capital cases. *See also United States v. Simoy*, 46 M.J. 601 (A.F. Ct. Crim. App. 1996) (a capital murder case in which the court made a specific finding that the felony murder was "service-connected").

2. *United States v. Gray*, 51 M.J. 1 (1999). The CAAF gives credence to Justice Stevens' concurring opinion in *Loving*. The CAAF makes a specific finding that there are sufficient facts present in *Gray*, a capital case, to establish a service connection to warrant trial by court-martial, but does not answer the question of whether a "service connection" requirement applies to capital cases.

E. **Subject Matter Jurisdiction Over Reservists/National Guard.**

1. The offense must be committed while the reservist has military status. *See, United States v. Chodara*, 29 M.J. 943 (A.C.M.R. 1990) (Reserve Component warrant officer ordered to AD for training; provided urine sample that tested positive for cocaine pursuant to a urinalysis administered within 36 hours of initiation of AD period. Held: no subject matter jurisdiction because the government failed to prove beyond a reasonable doubt that the accused was subject to the UCMJ at the time he "used" the cocaine). *But see, United States v.*

Lopez, 37 M.J. 702 (A.C.M.R. 1993) (in a case where accused on AD for several months before given urinalysis, the court, in dicta, questioned the validity of the *Chodara* decision). *See also*, *United States v. Smith*, Case No. 9500065, WL35319910, (unpub.) (Army Ct. Crim. App. 1998) (holding there was no federal court-martial jurisdiction over an offense that the accused allegedly committed while he was enlisted in the Mississippi National Guard).

2. Jurisdiction attaches at 0001 hours of the effective date of the orders to active duty. *United States v. Cline*, 29 M.J. 83 (C.M.A. 1989), *cert. denied*, 493 U.S. 1045 (1990).

3. Jurisdiction may exist outside the parameters of the orders. *United States v. Phillips*, 58 M.J. 217 (2003). The accused was a reserve nurse ordered to perform her two-week annual training from 12-23 July 1999. Her orders authorized her one travel day (11 July) to get to her duty station. The accused traveled to her duty station on 11 July and checked into her government quarters. That evening, she consumed some marijuana brownies that she had brought with her from home. The accused tested positive for marijuana as part of a random urinalysis test conducted on 16 July. On appeal, the accused argued that the court lacked jurisdiction over her wrongful use of marijuana, because the use occurred prior to the start of her two-week active duty period. The CAAF disagreed and affirmed AFCCA's decision holding that jurisdiction existed over all of the offenses. The CAAF held that jurisdiction existed pursuant to Art 2(c), UCMJ, which "by its express terms, establishes a specific analytical framework." Applying a two-step analysis, the CAAF first held that the accused was "serving with" the armed forces on 11 July, because she was a reservist traveling to her duty station pursuant to orders issued for the purpose of performing active duty, she occupied government quarters, and she received compensation in the form of travel reimbursement, retirement credit, and base pay and allowances. For the second step in the analysis, the CAAF applied Art 2(c)'s four-part test, finding that on 11 July the accused: (1) submitted voluntarily to military authority; (2) met the minimum age and mental qualifications; (3) received pay and allowances; and (4) performed military duties by traveling to her duty station. The CAAF emphasized that "[t]he fact that her orders did not require her to report to a specific organization until July 12 does not detract from her voluntary performance of the duty, pursuant to orders, to travel on July 11."

4. Offenses committed as part of the accused's "official duties" *may* be subject to court-martial jurisdiction even where the accused is not on active duty. *See United States v. Morse*, No. ACM 33566, 2000 CCA LEXIS 233 (A.F. Ct. Crim. App. Oct. 4, 2000) *petition for grant of review denied*, 2001 CAAF LEXIS 1021 (Aug. 24, 2001) (finding subject matter jurisdiction existed even if the reserve officer signed his false travel vouchers after he completed his travel following active duty or inactive duty training).

5. If a member of the National Guard is performing duties in a Title 10 status, a unit or commander in Title 32 status does not have jurisdiction over him. In *United States v. Dimuccio*, 61 M.J. 588 (A.F. Ct. Crim. App. 2005), the appellant was a member of the Air National Guard in Arizona who had been mobilized under Title 10 and was performing duty at Davis-Monthan Air Force Base. The commander of his Air National Guard unit, while in Title 32 status, ordered a unit urinalysis inspection of the appellant's Air National Guard unit during a Unit Training Assembly. The appellant submitted to the inspection and had a positive result for cocaine metabolites. He subsequently confessed. The military judge suppressed the urinalysis and the confession, ruling that while in a Title 10 status

and attached to another unit, the appellant was not subject to an inspection ordered by a commander from a unit that was in Title 32 status. The AFCCA affirmed.

6. Jurisdiction "is an interlocutory issue, to be decided by the military judge, with the burden placed on the Government to prove jurisdiction by a preponderance of the evidence." *United States v. Oliver*, 57 M.J. 170 (2002). The CAAF found that the medical records submitted on appeal established that the accused had been retained on active duty beyond the expiration of his orders, thus satisfying subject-matter jurisdiction over the offense.

F. Time of the Offense.

1. *United States v. Kuemmerle*, 67 M.J. 141 (C.A.A.F. 2009). Prior to joining the Navy, accused posted sexually explicit image of a child to his Yahoo! email account profile. The image was accessible to other Internet users. After accused enlisted, he continued to access his account and did not remove the image. NCIS investigators accessed the accused's profile and viewed the image. Accused was charged and convicted at a court-martial with distributing child pornography. The C.A.A.F. held that the accused committed an offense while on active duty because he continued to maintain control over his account and others viewed the image he had posted on the account.

III. JURISDICTION OVER THE PERSON.

A. General Rule: In general, a person becomes subject to court–martial jurisdiction upon enlistment in or induction into the Armed Forces, acceptance of a commission, or entry onto active duty pursuant to order. Court–martial jurisdiction terminates upon a valid discharge.

B. General Provisions: UCMJ, art. 2, provides jurisdiction over categories of persons with military status:

1. Enlistees; Inductees; Academy Cadets/Midshipmen;

2. Retirees;

a) Jurisdiction over retirees is constitutional. *Pearson v. Bloss*, 28 M.J. 376 (C.M.A. 1989); *United States v. Hooper*, 26 C.M.R. 417 (C.M.A. 1958); *Sands v. Colby*, 35 M.J. 620 (A.C.M.R. 1992).

b) *United States v. Huey*, 57 M.J. 504 (N-M. Ct. Crim. App. 2002). The accused had served 20 years on active duty and was placed on the Retired List on 1 January 1989. In 1996 he worked as a Naval civilian employee in Okinawa. He confessed to engaging in sexual intercourse several times a week over a nine-month period with his 16-year old adopted daughter. By the time the raping stopped, the accused was 58 years old and his daughter was pregnant with his child. At trial, the accused moved to dismiss for lack of personal jurisdiction based upon a violation of constitutional due process under the Fifth Amendment. The accused cited to *Toth v. Quarles*, 350 U.S. 11 (1955) and argued that he had "obtained civilian status" and was being deprived of due process rights available only in a civilian courtroom. The service court disagreed stating that

there "is no doubt that a court-martial has the power to try a person receiving retired pay."[*]

c) *United States v. Stevenson*, 65 M.J. 639 (N.M.Ct.Crim.App. 2006). Accused was a sailor on the Temporary Disability Retirement List who waived his military disability pay in favor of Veteran's Affairs disability compensation. Held: Court-martial had personal jurisdiction because accused was "entitled to pay", even if he was not receiving pay.

d) HQDA approval is required before prosecuting retirees (AR 27-10, para. 5-2). Failure to follow "policy" and obtain HQDA approval to try a retiree, however, is not jurisdictional error. *United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992).

e) The Article 2(d), UCMJ, involuntary recall process required for members of a reserve component, is not required to bring retirees and members of the Fleet Reserve or Fleet Marine Corps Reserve on to active duty in order to have jurisdiction over them. *United States v. Morris*, 54 M.J. 898 (N-M. Ct. Crim. App. 2001) *petition for review denied*, 2001 CAAF LEXIS 597 (May 22, 2001).

f) Involuntary Recall Retired Reservist. *Morgan v. Mahoney*, 50 M.J. 633 (A.F.Ct.Crim.App. 1999). Air Force retired reserve officer was involuntarily recalled to active duty under Art. 2(d)(1). Court held that the accused was subject to court-martial jurisdiction because 1) he was a "person lawfully called or ordered into…duty" under Art. 2(a)(1); 2) he could be ordered involuntarily to AD under Art. 2(d)(1) & (2) for offenses committed while the accused was on AD or IDT (within the statute of limitations); 3) he was amenable to the UCMJ under Art. 3(d) despite the termination of AD/IDT; 4) the AF Reserve is a "reserve component of the armed forces"; 5) he was in a "retired status" under 10 U.S.C. 10141(b); and 6) at the time of his recall, he was a member of the Retired Reserve. [Note: Retired Reservists who are receiving hospitalization from an armed force are subject to court-martial jurisdiction without being recalled to active duty].

3. Persons in custody;

a) Jurisdiction terminates once an accused's discharge is ordered executed (or enlistment expires) <u>and</u> he or she is released from confinement. The remaining suspended punishments are automatically remitted. *United States v. Gurganious*, 36 M.J. 1041 (N.M.C.M.R. 1993).

b) *Fisher v. Commander, Army Regional Confinement Facility*, 56 M.J. 691 (N-M. Ct. Crim. App. 2001). An accused that still has military confinement to serve pursuant to a court-martial sentence, is still a military prisoner subject to military jurisdiction under the concept of "continuing jurisdiction," notwithstanding the execution of his punitive discharge and receipt of the DD Form 214. This is true even where the prisoner is serving time in a state civilian prison. The discharge merely terminated his status of active duty, but did not terminate his status as a military prisoner.

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[*] The service court set aside the findings and sentence, dismissed the charges, and abated the proceedings in this case on 29 Aug 2002 due to the accused's death on 2 July 2002 (ten days before the opinion was decided). *See United States v. Huey*, 2002 CCA LEXIS 186 (Aug. 29, 2002).

4. P.O.W.'s;

5. In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field. (covered in more detail in Part VI of this outline)

6. Reservists. "Reserve Component" includes USAR and Army National Guard of the United States (ARNGUS) soldiers in Title 10, U.S. Code, duty status. (See sections II.E. and IV. of this outline).

C. Inception of Court-Martial Jurisdiction.

1. **Enlistment:** A Contract Which Changes "Status." UCMJ, art. 2(b).

Art. 2(b) The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under subsection (a) of this section, and a change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment.

2. **Involuntary enlistment:** *United States v. Catlow*, 23 C.M.A. 142, 48 C.M.R. 758 (1974) (coercion); *United States v. Lightfoot*, 4 M.J. 262 (C.M.A. 1978); and *United States v. Ghiglieri*, 25 M.J. 687 (A.C.M.R. 1987) (proposed enlistment as alternative to civil prosecution -no coercion).

3. **Constructive Enlistment**. The codification of *In Re Grimley*, 137 U.S. 147 (1890). UCMJ, art. 2(c) (as amended in 1979):

Art. 2(c) Notwithstanding any other provision of law, a person serving with an armed force who—

(1) Submitted voluntarily to military authority;

(2) Met the mental competence and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority;

(3) Received military pay or allowances; and

(4) Performed military duties;

is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned."

D. Termination of Jurisdiction Over the Person.

1. **General Rule:** Discharge Terminates Jurisdiction.

2. ETS/EAS by itself does not terminate jurisdiction.

a) RCM 202(a) discussion: "Completion of an enlistment or term of service does not by itself terminate court-martial jurisdiction . . . court-martial jurisdiction normally continues past the time of scheduled separation until a discharge certificate or its equivalent is delivered or until the Government fails to act within a reasonable time after the person objects to continued retention."

b) *United States v. Poole*, 30 M.J. 149 (C.M.A. 1990). Jurisdiction to court-martial a servicemember exists despite delay—even unreasonable delay—by the government in discharging that person at the end of an enlistment. Even if the member objects, it is immaterial—the significant fact is that

the member has yet to receive a discharge. Caveat: Unreasonable delay may provide a defense to "some military offenses."

c) RCM 202(c)(1): "Court-martial jurisdiction attaches over a person when action with a view to trial of that person is taken. Actions by which court-martial jurisdiction attaches include: apprehension; imposition of restraint, such as restriction, arrest, or confinement; and preferral of charges." *See United States v. Self*, 13 M.J. 132 (C.M.A. 1982); *United States v. Benford*, 27 M.J. 518 (N.M.C.M.R. 1988).

d) *United States v. Lee*, 43 M.J. 794 (N.M. Ct. Crim. App. 1995). Focusing investigation on accused as prime suspect is enough to establish a "view towards trial" and preserve military jurisdiction beyond ETS/EAS. The court cites to apprehension, imposition of restraint, and preferral of charges as other actions, which attach court-martial jurisdiction, i.e., indicate a "view towards trial." *See also Webb v. United States*, 67 M.J. 765 (A.F.C.C.A. 2009)(initiation of criminal investigation and SJA memorandum placing accused on administrative hold were each sufficient to trigger attachment of court-martial jurisdiction).

e) **Appellate Leave.** *United States v. Ray*, 24 M.J. 657 (A.F.C.M.R. 1987) (jurisdiction upheld where accused, on appellate leave, was not provided discharge due to governmental delay in executing punitive discharge).

3. When is discharge effective?

a) **On delivery.** *United States v. Melanson*, 53 M.J. 1 (2000). Jurisdiction existed because pursuant to AR 635-200, a discharge takes effect at 2400 hours on the date of notice of discharge to the soldier. *See also United States v. Williams*, 53 M.J. 316 (2000). A valid legal hold had been placed on accused prior to expiration of the date that constituted the effective date of the discharge. *United States v. Scott*, 11 C.M.A. 646, 29 C.M.R. 462 (1960). A discharge takes effect at 2400 hours on the date of discharge; even if the discharge is delivered earlier in the day (unless it is clear that it was intended to be effective at the earlier time).

b) **Valid Discharge Certificate:** Discharge Authority's Intent. Early delivery of a discharge certificate for administrative convenience (e.g., command does not want to keep personnel office open until 2400) does not terminate jurisdiction when certificate is clear on its face that the commander did not intend the discharge to take effect until later. *United States v. Batchelder*, 41 M.J. 337 (1994). *See also United States v. Guest*, 46 M.J. 778 (Army Ct. Crim. App. 1997).

c) **Final accounting of pay.** Final accounting of pay is later than the final appointment at the local finance office. Jurisdiction may still exist several days after a servicemember has undergone a clearing process and received their DD214, since the local finance office is only the first of many steps required to accomplish a final accounting of pay. *See United States v. Hart*, 66 M.J. 273 (C.A.A.F. 2008). *See also United States v. Howard*, 20 M.J. 353 (C.M.A. 1985) (jurisdiction terminates on delivery of discharge and final pay); *United States v. Coker*, 67 M.J. 571 (C.G.C.C.A. 2008) (finance office having all the information it needed to compute final pay did not make final pay "ready for delivery" within the meaning of the statute governing discharge).

d) **Undergo a clearing process.** *United States v. King*, 27 M.J. 327 (C.M.A. 1989) (sailor refused to complete re-enlistment ceremony after he received a discharge certificate). Three elements per King to effectuate an early discharge:

(1) Delivery of a valid discharge certificate;

(2) A final accounting of pay; and

(3) Undergoing a "clearing" process as required under appropriate service regulations to separate the member from military service.

4. **Erroneous Delivery.** Erroneous delivery will not terminate jurisdiction. *United States v. Garvin*, 26 M.J. 194 (C.M.A. 1988) (premature delivery of a BCD certificate); *United States v. Brunton*, 24 M.J. 566 (N.M.C.M.R. 1987) (early delivery of discharge, in violation of Navy regulations, meant discharge was not effective on receipt).

5. **Post-arraignment Discharge.** A valid discharge of a soldier prior to trial operates as a formal waiver and abandonment of court-martial in personam jurisdiction, whether or not such jurisdiction had attached prior to discharge. *Smith v. Vanderbush*, 47 M.J. 56 (1997). In personam jurisdiction was lost when accused was discharged after arraignment but before lawful authority resolved the charges. The court considered the intent of the discharge authority and found that there was no evidence to show that the discharge authority (not CA) did not intend to discharge accused on his ETS. In determining a valid discharge the court considered: 1) delivery of discharge certificate; 2) final accounting of pay; and 3) intent of discharge authority. ***Note:*** AR 27-10, para 5-16, now provides that after any charge is preferred, the DD Form 458 will automatically act to suspend all favorable action and that any issuance of a discharge certificate is void until the charge is dismissed or the convening authority takes initial action on the case (thus avoiding the issue raised in *Smith v. Vanderbush*).

6. **Post-conviction Discharge.**

a) Effect on Appellate Review and Power of Convening Authority

(1) *Steele v. Van Riper*, 50 M.J. 89 (1999). After a court-martial conviction, but before the convening authority took action, the government honorably discharged the accused. When the convening authority finally took action, he approved the findings and sentence (which included a punitive discharge), declared that the honorable discharge was erroneous, and placed the accused in an involuntary appellate leave status. The accused challenged the invalidation of his honorable discharge. In a supplemental brief, the government concurred. As such, the CAAF denied the accused's writ-appeal, but advised that the honorable discharge does not affect the power of the convening authority or appellate tribunals to act on the findings and sentence. *See also United States v. Stockman*, 50 M.J. 50 (1998).

(2) *United States v. Davis*, 63 M.J. 171 (C.A.A.F. 2006). Held: Where the appellate courts are invoked by an appellant and a rehearing is authorized, an intervening administrative discharge does not serve to terminate jurisdiction over the person of the accused for purposes of that rehearing. The power of the court-

martial over appellant was established at his initial trial, and the intervening administrative discharge does not divest the appellate courts of the power to correct error, order further proceedings, and maintain appellate jurisdiction over the person during the pendency of those proceedings.

b) **Post-conviction but Pre-Initial Action**. *United States v. Estrada*, 69 M.J.45 (C.A.A.F. 2010). Accused sentenced to a BCD. Prior to initial action, accused erroneously issued an administrative honorable discharge. Issue: Whether the administrative (honorable) discharge resulted in remission of the bad-conduct discharge. Held. The honorable discharge was automatically voided in accordance with Army Regulation (AR) 27-10, para. 5-16.

c) **Post-conviction and Post-Initial Action**. *United States v. McPherson*, 68 M.J. 526 (Army Ct.Crim.App. 2009). Accused sentenced to a BCD. Accused received two administrative honorable discharges from HRC – one before initial action, and one after initial action. Held: The honorable discharge given prior to initial action was void pursuant to AR 27-10, but the honorable discharge given after initial action served to remit the punitive discharge. (Note: As of October 2010, a "gap" continues to exist in Army regulations. The next edition of AR 27-10 may fill the gap).

7. **Execution of Punitive Discharge.**

a) *United States v. Keels*, 48 M.J. 431 (1998). Promulgation of a supplemental court-martial convening order that ordered executed a punitive discharge does not terminate court-martial jurisdiction. Even when there is a punitive discharge, jurisdiction does not terminate until delivery of the discharge certificate and final accounting of pay. There is not instantaneous termination of status upon completion of appellate review.

b) *United States v. Byrd*, 53 M.J. 35 (2000). In October 1996, the Navy-Marine Corps Court affirmed the accused's conviction and sentence, which included a punitive discharge. The accused did not petition CAAF for review until 22 January 1997. On 2 January 1997 the convening authority executed his sentence under Article 71. The service court held that since the accused did not petition CAAF for review within 60 days (a CAAF rule), the intervening discharge terminated jurisdiction. CAAF vacated the lower court's decision on the grounds that the Govt. failed to establish the petition for review as being untimely and, therefore, the sentence had been improperly executed. CAAF also held that jurisdiction existed notwithstanding execution of a punitive discharge under Article 71, and it was only a question of whether to consider the case under direct review or collateral review. *See also United States v. Engle*, 28 M.J. 299 (C.M.A. 1989).

8. **In Personam Jurisdiction in a Foreign Country.** *United States v. Murphy*, 50 M.J. 4 (1998). The accused was convicted of premeditated murder and sentenced to death for murders he committed while stationed in Germany. The accused challenged the jurisdiction of the court-martial. He argued that the military investigators misled the German Government to believe that the United States had primary jurisdiction of the case under the NATO SOFA. Based on this information, the German Government waived its jurisdiction. Had the German

Government asserted jurisdiction, the accused could not have been sentenced to death because the Constitution of Germany prohibits the death penalty. The CAAF held that the accused lacked standing to object to which sovereign prosecuted the case. The important jurisdictional question to answer is: Was the accused in a military status at the time of the offense and at the time of trial? The court found that the accused was. The case was set aside and remanded on other grounds.

9. **Exceptions to General Rule that Discharge Terminates Jurisdiction**.

a) **Exception:** UCMJ, art. 3(a).

(1) a person is subject to the UCMJ at the time of the offense;

(2) the person is discharged without trial; and

(3) the person subsequently re-enters the service and is thus subject to the UCMJ at the time of trial.

b) *Willenbring v. Neurauter*, 48 M.J. 152 (1998). The CAAF holds that under the 1986 version of Article 3(a), UCMJ, court-martial jurisdiction exists to prosecute a member of the reserve component for misconduct committed while a member of the active component so long as there has not been a complete termination of service between the active and reserve component service. In dicta, however, the CAAF advises that the current version of Article 3(a), UCMJ, "clearly provides for jurisdiction over prior-service offenses without regard to a break in service." *See also Willenbring v. United States*, 559 F.3d 225 (4th Cir. 2009) (affirming District Court denial of Willenbring's habeas corpus petition and reasoning that his service was not terminated because his early release and discharge from the regular component was conditioned upon a contractual obligation to immediately begin service in the reserve component. *But see*, *Murphy v. Dalton*, 81 F.3d 343 (3d Cir. 1996) (holding that it is improper to involuntarily recall a member of the reserve component to active duty for an Article 32(b) investigation when the alleged misconduct occurred while the service member was a member of the active component). [Note: *Murphy v. Dalton* notwithstanding, the CAAF decision in *Willenbring* is controlling legal authority]

c) Break-In-Service. *United States v. Erickson*, 63 M.J. 504 (A.F. Ct. Crim. App. 2006). Appellant was convicted of violating a lawful order, rape and sodomy of a female under the age of 12, and indecent acts and liberties with a female under the age of 16. The crimes were committed while he was on active duty in the Army, he was discharged, and subsequently enlisted in the Air Force. He was sentenced to a DD and confinement for life with the possibility of parole. Where appellant was on active duty in the Army when he committed misconduct, was discharged and subsequently enlisted in the Air Force, and was on active duty at the time of trial, as here, the court-martial had jurisdiction over the appellant by virtue of Article 3(a), UCMJ.

d) **Exception:** UCMJ, art. 3(b), person obtaining a fraudulent discharge.

(1) *Wickham v. Hall*, 12 M.J. 145 (C.M.A. 1981). May the government prosecute a soldier whose delivered discharge (Chapter 8 - pregnancy) was revoked for being obtained by fraud? C.M.A. allowed the court-martial proceedings to continue. The

5th Circuit affirmed the district court's denial of Wickham's request for habeas corpus relief. The court-martial may proceed. *Wickham v. Hall*, 706 F.2d 713 (5th Cir. 1983).

(2) *United States v. Reid*, 46 M.J. 236 (1997). The government must secure a conviction for fraudulent discharge prior to prosecuting the accused for other offenses. Article 3(b) clearly requires a two-step trial process. QUERY: What about offenses committed after the fraudulent discharge? Article 3(b) does not confer jurisdiction over offenses committed after the fraudulent discharge. The service court, in dicta, reasoned that after conviction for the fraudulent discharge, jurisdiction would exist over offenses committed after the discharge under UCMJ, art. 2.

(3) *United States v. Pou*, 43 M.J. 778 (A.F. Ct. Crim. App. 1995). Accused faked his own death. Air Force initially designated him as "missing" before declaring him "dead." Held: Declaring a missing person "dead" is not the equivalent of a discharge of that person, therefore, art. 3(b) is inapplicable, and court-martial jurisdiction exists.

e) **Exception**: UCMJ, art. 3(c) - Deserter obtaining discharge for subsequent period of service. *United States v. Huff*, 7 C.M.A. 247, 22 C.M.R. 37 (1956).

f) **Exception**: UCMJ, art. 2(a)(7) - Persons in custody of the armed forces serving a sentence imposed by court-martial. *United States v. Harry*, 25 M.J. 513 (A.F.C.M.R. 1987) (punishment cannot include another punitive discharge); *United States v. King*, 30 M.J. 334 (C.M.A. 1990) (prosecuted after BCD executed but still in confinement).

g) **Exception**: UCMJ, art. 3(d) - Separation from Active Components to Reserve Status. Leaving a Title 10 status does not terminate court-martial jurisdiction.

h) **Exception**: Intent of the Discharge Authority – When the command places a hold on the accused prior to 2359 on the date of discharge, even though the discharge certificate had been delivered earlier that day, the discharge does not terminate jurisdiction. In *United States v. Harmon*, 63 M.J. 98 (2006), the appellant was scheduled to be administratively separated from active duty on 17 May 2001. Early in the morning of 17 May, he participated in the robbery of another servicemember. By 0815, NIS had identified him as a suspect. At 0900, appellant received his DD 214 (which listed his effective discharge date and time as 2359 on 17 May) and got on a bus to go home. At 1020, appellant's command learned of his involvement in the robbery and revoked his administrative discharge. The CAAF held that because the command placed a hold on appellant prior to the time his discharge became effective, jurisdiction was never lost.

IV. JURISDICTION OVER THE RESERVE COMPONENT.

A. **BOTTOM LINE:** Reserve Component soldiers are subject to the UCMJ whenever they are in a Title 10 status: Inactive Duty Training (IDT), Active Duty Training (ADT), Annual Training (AT), or Active Duty (AD).

1. *United States v. Wall*, 1992 WL 198418 (A.F.C.M.R. 1992) (unpub. opinion) (jurisdiction existed over the accused when absented himself during second half of training day).

2. *United States v. Morse*, No. ACM 33566, 2000 CCA LEXIS 233 (A.F. Ct. Crim. App. Oct. 4, 2000) *petition for grant of review denied*, 2001 CAAF LEXIS 1021 (Aug. 24, 2001) (accused's duty was not complete until travel forms were signed even if he did not sign the fraudulent travel forms until after he completed his travel).

3. *See also*, Paragraph II.E., this outline.

B. UCMJ, art. 3(d). Prevents the termination of court-martial jurisdiction over a member of a Reserve Component who violates the UCMJ while in a Title 10 status by the member's release from active duty or inactive-duty training. Closes jurisdiction gaps recognized by *Duncan v. Usher*, 23 M.J. 29 (C.M.A. 1986).

C. Involuntary Recall to Active Duty. UCMJ, art. 2(d), authorizes a member of a Reserve Component, who is the subject of proceedings under Articles 15 or 30, UCMJ to be ordered involuntarily to active duty for: Article 32 investigations, trial by court-martial, and nonjudicial punishment.

1. Restrictions on the involuntary recall process.

a) A member may only be ordered to active duty by an active component general court-martial convening authority (GCMCA). UCMJ, art. 2(d)(4); AR 27-10, para. 21-3.

b) Unless the order to involuntary active duty was approved by the appropriate Service Secretary, the member may not be:

(1) sentenced to confinement;

(2) forced to serve any punishment involving restriction on liberty except during a period of inactive duty training or active duty; or

(3) placed in pretrial confinement. UCMJ, art. 2(d)(5).

c) General and Special Courts-Martial. Prior to arraignment the reservist must be on active duty. R.C.M. 204(b)(1).

d) Summary Courts-Martial. Can be initiated and tried within the reserve structure and without active duty involvement. R.C.M. 204(b)(2). But the summary court-martial officer must be placed on active duty. UCMJ, art. 25; R.C.M. 1301.

D. Impact on the National Guard.

1. 32 U.S.C. § 505 - Training in a state status - No federal military jurisdiction.

2. 10 U.S.C. § 672 - Training in a federal status - Guard member is subject to jurisdiction and the reserve jurisdiction legislation's major provisions. This includes involuntary recall. *But see* In *United States v. Dimuccio*, 61 M.J. 588 (A.F. Ct. Crim. App. 2005) (holding that a Guard member in Title 10 status was not subject to an inspection under MRE 313 ordered by a commander in Title 32 status and suppressing the positive urinalysis resulting from that inspection).

3. Federal status continues until the guard member has completed his federal service (excluding AWOL time) and federal jurisdiction exists notwithstanding state action to terminating jurisdiction. *United States v. Wilson*, 53 M.J. 327 (2000).

V. PROCEDURAL CONSIDERATIONS.

A. Pleading Jurisdiction. *See*, R.C.M. 307(c)(3) Discussion at (C)(iv) and (F).

B. Lack of Jurisdiction: Raised by Motion to Dismiss, R.C.M. 907. May be made at any stage of the proceeding.

C. Burden of Proof. Although R.C.M. 905 states that the burden of proof in a motion contesting jurisdiction is a preponderance of the evidence, case law suggests that, if contested at trial, the government must prove jurisdiction beyond a reasonable doubt.

1. *United States v. Bailey*, 6 M.J. 965 (N.M.C.M.R. 1979); R.C.M. 905(c)(1)(preponderance); R.C.M. 905(c)(2)(B) (burden of persuasion on government).

2. *United States v. Marsh*, 15 M.J. 252 (C.M.A. 1983) (for "peculiarly military" offenses like AWOL, an accused's military status is an element of the offense which must be proved beyond a reasonable doubt to the fact finders). *See also United States v. Roe*, 15 M.J. 819 (N.M.C.M.R. 1983).

3. *United States v. Chodara*, 29 M.J. 943 (A.C.M.R. 1990) (Reserve Component warrant officer ordered to AD for training; provided urine sample that tested positive for cocaine pursuant to a urinalysis administered within 36 hours of initiation of AD period. Held: no subject matter jurisdiction because the government failed to prove beyond a reasonable doubt that the accused was subject to the UCMJ at the time he "used" the cocaine).

VI. JURISDICTION OVER CIVILIANS

A. MEJA. Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. § 3261, Pub. L. No. 106-523.

1. The MEJA was approved by Congress and signed into law by the President on 22 November 2000. This legislation *does not expand military jurisdiction*; it extends federal criminal jurisdiction over certain civilians (DOD employees, contractors, and dependents thereof, and military dependents) accompanying the military overseas. The implementing regulations went into effect on 3 March 2005. The Act was amended in 2005 to cover civilian employees, contractors, and contractor employees of any Federal agency "to the extent such employment relates to supporting the mission of the Department of Defense overseas." See 2005 NDAA, Sec. 1088.

2. The Act applies to felony level offenses that would apply under federal law if the offense had been committed within the "special maritime and territorial jurisdiction of the United States."

3. The Act provides for an initial appearance proceeding, which may be carried out telephonically, conducted by a Federal magistrate judge. At this proceeding, the magistrate will determine if there is probable cause to believe a crime was committed and if the person committed it. If pretrial detention is an issue, the magistrate will also conduct a detention hearing as required by federal law. This detention hearing may also be conducted telephonically if the person so requests.

4. The Act directly involves the military in two ways.

a) The Act, depending on implementing rules, may authorize DOD law enforcement personnel to arrest those civilians covered by the Act.

b) The Act entitles those civilians covered by the Act, to representation by military counsel (i.e. judge advocates) at the initial hearing, if determined by the Federal magistrate.

5. MEJA Resources

a) DODI 5525.11 (3 Mar 2005)

b) DA Message (13 May 2005)

c) OTJAG Info Paper (24 May 2005)

d) AR 27-10, CH 26 (16 November 2005)

e) Secretary of Defense Memorandum, "UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations." (10 March 2008)

f) DoD General Counsel DTM 09-015 (16 February 2010)

B. Patriot Act. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107–56.

1. One reason there was a jurisdictional gap prior to MEJA was that the definition of "special maritime and territorial jurisdiction of the United States," (SMTJ) was interpreted as excluding U.S. military installations overseas. *See United States v. Gatlin*, 216 F. 3d 207 (2d Cir. 2000). In 2001, the Patriot Act amended the definition to include military installations overseas, however the definition excludes anyone already covered by the MEJA. *See* 18 U.S.C. § 7.

C. Court-martial Jurisdiction under Amended Article 2(a)(10), UCMJ.

1. The 2007 National Defense Authorization Act amended Article 2(a)(10) as follows:

a) OLD: In time of war, persons serving with or accompanying an armed force in the field.

b) NEW: In time of <u>declared war or a contingency operation</u>, persons serving with or accompanying an armed force in the field.

2. "Contingency Operation," 10 U.S.C. Sec. 101(a)(13): The term "contingency operation" means a military operation that-

a) is designated by the SECDEF as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

b) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of this title, chapter 15 of this title, or any other provision of law during a war or during a national emergency declared by the President or Congress.

c) Current operations in Afghanistan and Iraq clearly meet the definition of "contingency operation" above.

3. The only significant guidance to date on implementation of the amended Article 2(a)(10), UCMJ, is contained in a SECDEF Memorandum dated 10 March 2008.

4. There has been one civilian tried by court-martial using Article 2(a)(10) jurisdiction. In *United States v. Ali*, the accused, a Canadian/Iraqi citizen, pled guilty to three specifications involving possessing, hiding, and lying about a knife (the original charge was aggravated assault for stabbing another interpreter in the chest), and was sentenced to five months confinement (time already served in PTC). His case did not receive automatic review by the Army Court of Appeals because it was subjurisdictional. On 31 March 2010 The Judge Advocate General of the Army directed the Army Court of Criminal Appeals to review the case of United States v. Ali pursuant Article 69(d), UCMJ. TJAG requested that the court give attention to two issues: a) Whether the court-martial had jurisdiction over the accused pursuant to Article 2(a)(10), UCMJ; and b) Whether the court-martial had subject matter jurisdiction over the offenses.

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TAB E

COURT-MARTIAL PERSONNEL

Table of Contents

I. COURT-MARTIAL PERSONNEL: AN OVERVIEW 1

II. CONVENING AUTHORITY 2

III. PANEL MEMBERS 18

IV. MILITARY JUDGES 21

V. COUNSEL 39

VI. ACCUSED 43

VII. OTHER COURT-MARTIAL PERSONNEL 46

A. Staff Judge Advocates 46

B. Article 32 Investigating Officers 47

C. Court Reporters 47

D. Interpreter 48

E. Bailiff 48

F. Drivers 48

VIII. CONCLUSION 48

IX. APPENDIX – COURT-MARTIAL PERSONNEL SUMMARY 49

VIII. APPENDIX – PRETRIAL FLOWCHART 50

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JANUARY 2011

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COURT-MARTIAL PERSONNEL

Outline of Instruction

I. COURT-MARTIAL PERSONNEL: AN OVERVIEW

A. **THE MILITARY JUSTICE PROCESS**. Congress enacted the Uniform Code of Military Justice (UCMJ) to provide a coherent, fair system of criminal justice within the military. The President was granted significant authority to craft rules of procedure for this system. Those rules are entitled Rules for Courts-Martial (RCM). The UCMJ and the RCMs are grouped together in the *Manual for Courts-Martial*, the most recent edition published in 2008.

B. **HIERARCHY OF AUTHORITY**. The hierarchy of judicial authority is as follows: Constitution, statute (including UCMJ), executive orders (including RCMs), cases, regulations, and DA Pams. *See United States v. Lopez*, 35 M.J. 35 (C.M.A. 1992).

C. **ORGANIZATION OF THE MCM**:

1. Part I, Preamble.
2. Part II, Rules for Court-Martial (RCMs).
3. Part III, Military Rules of Evidence (MREs).
4. Part IV, UCMJ's punitive articles (substantive criminal law).
5. Part V, Procedures for nonjudicial punishment.
6. Appendices: Constitution (Appendix 1); full text of UCMJ as passed by Congress (Appendix 2); and additional forms, analyses, directives, executive orders etc.

D. **LEVELS OF COURTS-MARTIAL**. Congress established three levels of courts-martial: General, Special, and Summary. The levels of court differ according to the jurisdictional limitations on punishment they can impose. Punishments can include confinement, punitive discharge, forfeitures, reduction (enlisted only), hard labor without confinement (enlisted only), reprimand, a fine, and death for certain offenses. The characteristics of each type of court-martial are set out below:

1. ***Summary Courts-Martial*** (Arts. 20 and 24). This, the lowest level of court-martial, is accorded less procedural protection. Military judges do not preside over these proceedings, there is no right to defense counsel, and the "court" is composed of one officer, usually a non-lawyer. However, a finding of guilty at a SCM is not recognized as a federal conviction. The maximum punishment allowed is 1 month confinement, hard labor without confinement for 45 days, restriction for 2 months, or forfeiture of 2/3 pay (a Soldier above the rank of SPC may not be confined or given hard labor without confinement, or reduced except to the next pay grade). *See* RCM 1301 *et seq.* and DA Pam 27-7 for procedures.

2. ***Special Courts-Martial*** (Arts. 19 and 23). Similar to a civilian "misdemeanor" court, the maximum punishment that can be adjudged at a SPCM is a bad conduct discharge, reduction to the lowest enlisted grade (E-1), confinement for one year, and forfeiture of two-thirds pay per month for one year. A quorum consists of three members.

3. ***General Courts-Martial*** (Arts. 18 and 22). Reserved for the more serious offenses, a GCM may adjudge the maximum punishment allowed for a particular offense (e.g., death for murder). In a trial with panel members, at least five members must sit to constitute a quorum.

E. **TRANSITORY NATURE OF COURTS-MARTIAL**. A court-martial exists temporarily, hears only a limited number of cases, and then is permanently adjourned. The court is called into life, or "convened," by an officer who has been given such power by Congress, usually by virtue of position (e.g., a commander of an Army division is, under Article 22, UCMJ, authorized to convene a general court-martial). These commanders are "convening authorities" and they breathe life into these impermanent courts with a "convening order." A court may be convened for a certain period of time, or only to hear a specific case (this is often the practice in commands where only a small number of cases are tried, where there is no necessity for standing panels).

II. CONVENING AUTHORITY

A. **POWER TO CONVENE**. Article 22, UCMJ (general courts-martial); Article 23, UCMJ (special courts-martial); and Article 24, UCMJ (summary courts-martial).

1. ***Designation by Service Secretary***. *United States v. Smith*, 69 M.J. 613 (A. Ct. Crim. App. 2010). The Acting Commander, Fort Lewis, referred charges against the accused to court-martial. On appeal, the defense argued the commander was not designated as a court-martial convening authority by the Secretary of the Army (SECARMY) and did not have jurisdiction to take action in this case. Based on the statutory authority and formal SECARMY designations, the ACCA concluded the court-martial was properly convened and had jurisdiction over the accused.

a. ***Interplay between Article 22 and Secretary designations***. Under Article 22, UCMJ, certain commanding officers are designated as General Court-Martial Convening Authorities (GCMCAs), including commanders of an "Army Corps." Article 22 does not give statutory authorization for an installation commander to serve as a GCMCA, though it does allow for the applicable Service Secretary to designate other commanders as GCMCAs.

b. ***SECARMY orders***. In 1981, the SECARMY issued two General Orders designating GCMCAs. In Gen. Order No. 10 (dated 9 April 1981), the Commander, "Fort Lewis" was designated a GCMCA; in Gen. Order No. 27 (dated 13 November 1981) the "Commander, I Corps and Fort Lewis" was designated a GCMCA. In reviewing these orders, the ACCA noted the SECARMY merely took action to "designate" GCMCAs, without replacing or otherwise affecting prior orders. Hence, the two orders designated the installation commander as a GCMCA while also designating the "combined" positions of "Commander, I Corps and Fort Lewis" as a GCMCA.

2. ***Referral by GCMCA for accused in another jurisdiction***. *United States v. Jones*, 60 M.J. 917 (N-M. Ct. Crim. App. 2005). After allegations of an improper relationship with a midshipman at the Naval Academy, accused was reassigned. The new GCMCA preferred fraternization charges which the military judge dismissed for failure to state an offense. The Naval Academy SJA, on behalf of the old GCMCA, requested the new GCMCA refer charges anew based on additional misconduct. After further investigation, the new GCMCA did not re-refer charges but stated he would make the accused available if the old GCMCA desired to refer charges. The old GCMCA referred charges which the military judge dismissed without prejudice based on an improper referral. The N-MCCA held "a command other than the one to which the accused is attached may refer charges against the accused to a court-martial" (citing RCM 601(b)).

3. *United States v. Hardy*, 60 M.J. 620 (A.F. Ct. Crim. App. 2004). Between referral and the convening authority's (CA) action on the case, the Secretary of the Air Force issued an order which arguable revoked the CA's authority to convene courts-martial. AFCCA held, although the order was inartfully drafted, it did not revoke the CA's authority and, additionally, the Secretary of the Air Force issued a clarifying order proving his intent was

4. *United States v. Hundley*, 56 M.J. 858 (N-M. Ct. Crim. App. 2002). Case upheld because the battalion was designated as "separate" by the Secretary of the Navy and therefore under Article 23(7), UCMJ, its commanding officer had authority to convene a special court-martial

5. *United States v. Brown*, 57 M.J. 623 (N-M. Ct. Crim. App. 2002). Action taken to approve the sentence by a different SPCMCA than the one who convened the accused's court-martial was error, because the action violated the terms of Article 60(c)(1), UCMJ, and RCM 1107(a). The court rejected the Government's argument that the accused needed to demonstrate material prejudice to obtain relief. The clemency stage was an accused's best opportunity to obtain sentence relief, and the Government was required to follow the statutory and regulatory scheme as written.

B. **ACTING COMMANDERS/SUCCESSORS IN COMMAND**. Service regulations govern, but violation of regulation may not spell defeat for Government. Court engages in a functional analysis looking to who *actually* was in command at the time the action was taken. *United States v. Yates*, 28 M.J. 60 (C.M.A. 1989).

1. ***Service Regulations***. Army, AR 600-20; Navy/U.S.M.C., JAGMAN - JAGINST 5800.7C; Air Force, AFR 35-34.

2. ***Functional analysis***. *United States v. Gait*, 25 M.J. 16 (C.M.A. 1987) (concern is for realities of command, not intricacies of service regulations). *See also United States v. Jette*, 25 M.J. 16 (C.M.A. 1987).

3. ***Successor in command***. *United States v. Gilchrist*, 61 M.J. 785 (A. Ct. Crim. App. 2005). ACCA, in a published opinion, clarifies its position, stating "[a]bsent evidence to the contrary, adaptation can be presumed from the convening authority's action in sending the charges to a court-martial whose members were selected by a predecessor in command." No requirement exists for a convening authority or an acting convening authority to expressly adopt panel members selected by his predecessor. *See also United States v. Starks*, No. 20020224 (A. Ct. Crim. App. Mar. 10, 2004) (unpub.) (concurring with NMCCA in *Brewick* that "while there is no explicit statement of adoption of the selection of court members by the successor-in-command, we are not aware of any authority that so requires.") Contrary ACCA opinions requiring explicit selection overruled by the *Gilchrist* decision. *See United States v. Meredith*, No. 20021184 (A. Ct. Crim. App. Jan. 27, 2005) (unpub.); *United States v. Jost*, No. 20030975 (A. Ct. Crim. App. Mar. 29, 2005) (unpub.). These cases held that a successor in command must expressly select members selected by the previous commander. "By the simple expedient of including and correctly referencing the predecessor's recommended CMCO in the referral document, the SJA can ensure that the codal responsibilities of the convening authority are clearly met."

4. *See also United States v. Brewick*, 47 M.J. 730 (N-M. Ct. Crim. App. 1997) (holding "[t]o the extent an 'adoption' is required [where a successor in command refers a case to a CMCO who members were selected by a predecessor] or helpful, we can presume as much from [the successor's] action in sending the charge to that court-martial, absent evidence to the contrary.").

C. **LIMITATIONS ON JOINT COMMANDERS**. *United States v. Egan*, 53 M.J. 570 (A. Ct. Crim. App. 2000). In a special court-martial convened by Air Force colonel (commander of a

EUCOM joint unit), accused Soldier was convicted of drug use and distribution. SPCMCA approved the sentence, which included a BCD. ACCA held the SPCMCA did not have the authority under the applicable joint service directive to convene a special court-martial empowered to adjudge a BCD in the case of an Army soldier. BCD set aside; case further modified on other grounds.

D. **CONVENE WHAT?**

1. ***All SPCMs are "empowered to adjudge a Bad-Conduct Discharge."*** *United States v. Scott*, 59 M.J. 718 (A. Ct. Crim. App. 2004). Case referred to a special court-martial. GCMCA, following SJA's advice, signed a document referring case to SPCM empowered to adjudge a BCD. However, the instructions on the charge sheet did not include the words "empowered to adjudge a bad-conduct discharge." Based on discussion following RCM 601(e)(1), court determines that additional words in convening authority's referral or on the charge sheet are "surplusage." "We hold that all Army SPCMs are empowered to adjudge a BCD unless the convening authority expressly states that a particular SPCM is not so empowered. The convening authority should expressly state such a limitation in the referral signed by the convening authority, in special instructions on the charge sheet, or in both."

2. ***SPCMCA refers capital offense***. *United States v. Henderson*, 59 M.J. 350 (C.A.A.F. 2004). SPCMCA referred alleged violation of Article 110(a), UCMJ (willfully hazarding a vessel, a nonmandatory capital offense). Article 19, UCMJ provides that a SPCMCA can refer only noncapital offenses but can refer nonmandatory capital offenses as noncapital "under such regulations as the President may prescribe." The President, in RCM 201(f)(2)(c), authorizes a SPCMCA to refer a nonmandatory capital offense only with the permission of the GCMCA. That permission was neither sought nor granted in this case. The CAAF held the referral was jurisdictional error. The CAAF rejected three Government arguments: first, that the so-called "evolution" in the law applicable to jurisdictional defects does not extend to this situation; second, that the PTA in the case was a functional equivalent of a referral of a noncapital offense; and third, that the referral of the nonmandatory capital offense was also an implicit referral of the noncapital lesser-included offense. Findings and sentence set aside. *But see* Executive Order 13387, effective 14 November 2005, amending RCM 201(f)(1)(A)(iii)(b) to read that a special instruction is needed that the case is to be tried capital to adjudge a death sentence.

E. **SPCMCA AUTHORITY**.

1. ***Maximum punishment***. Executive Order RCM 201(f)(2)(B), effective 15 May 2002, increased the maximum punishment at a special court-martial to one year confinement. In *Taylor v. Garaffa*, 57 M.J. 645 (N-M. Ct. Crim. App. 2002), the accused used cocaine before the executive order's effective date, 15 May 2002, but his court-martial was convened and his case was referred after 15 May 2002. Denying his motion for relief, the court held the maximum punishment at his special courts-martial included confinement for up to 12 months.

2. ***AR 27-10***. Paragraph 5-28(a) authorizes Army SPCMCAs to refer cases to BCD SPCMs. In SPCMs involving confinement in excess of six months, forfeitures of pay for more than six months, or bad-conduct discharges the "servicing staff judge advocate will prepare a pretrial advice, following generally the format of RCM 406(b)."

F. **ACCUSER DISQUALIFICATION**. Article 1(9), UCMJ.

1. ***Rule***. A convening authority must be reasonably impartial. A convening authority who is not impartial is an "accuser." An accuser cannot refer charge(s) to a special or a general court-martial. An accuser with a personal (or other than official) interest in a case has additional limitations on what actions may be taken.

a. Under Article 1(9), UCMJ, "accuser" means a person who (1) signs and swears to charges; (2) directs that charges nominally be signed and sworn to by another; or (3) has an interest other than an official interest in the prosecution of the accused. *See also* RCM 601(c) discussion.

b. *Cf.* RCM 1302(b). Accuser not disqualified from convening *summary* court-martial or initiating administrative measures (Article 15, memorandum of reprimand, Bar to Reenlistment, etc.).

2. ***Statutory disqualification***.

a. If a convening authority signs and swears to charges or directs another to do so, she is said to be statutorily disqualified. An accuser who is statutorily disqualified may not refer a case to a general or special court-martial but may appoint an Article 32 Investigating Officer or forward the case with a recommendation as to disposition as long as the disqualification is noted.

b. *McKinney v. Jarvis*, 46 M.J. 870 (A. Ct. Crim. App. 1997). A convening authority who becomes an accuser by virtue of preferring charges in an official capacity as a commander is not, *per se*, disqualified from appointing an Article 32 officer to investigate those charges.

3. ***Personal disqualification***.

a. If a person has an other than official interest in the case, that person may be disqualified as an accuser. Besides being denied the right to refer, a personal accuser may not appoint an Article 32 Investigating Officer or make a recommendation when forwarding the case for action.

b. ***Test: Whether a reasonable person could impute to the convening authority a personal interest or feeling in the outcome of the case.*** *United States v. Jeter*, 35 M.J. 442 (C.M.A. 1992); *see also United States v. Gordon*, 2 C.M.R. 161 (1952); *United States v. Crossley*, 10 M.J. 376 (C.M.A. 1981); *United States v. Thomas*, 22 M.J. 388, 394 (C.M.A. 1986) (listing examples of unofficial interests that disqualified CAs).

c. *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994). Accuser concept also applies to those who forward the charges. Special court-martial convening authority's (SPCMCA's) girlfriend (later spouse) was acquainted with accused. Record did not establish that SPCMCA acted without improper motives. SPCMCA must disclose any potential personal interests, and if disqualified, forward without recommendation.

d. *United States v. Dinges*, 55 M.J. 308 (C.A.A.F. 2001). A convening authority who becomes an accuser by virtue of having such a close connection to the offense that a reasonable person would conclude he had a personal interest in the case is disqualified from taking further action as a convening authority. At a GCM the accused was convicted of sodomy arising out of his activities as an assistant scoutmaster with a local troop of the Boy Scouts. The Scout Executive terminated his status as an assistant, and contacted the CA (who was a district chairman of the Big Teepee District, Boy Scouts of America) about the matter. Prior to preferral of charges, the accused was assigned to the CA's wing (a special court-martial convening authority level command). The CAAF ordered a *DuBay* hearing to determine whether the convening authority had an other than official interest that would disqualify him under Article 1(9), UCMJ, and *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994). Based on facts gathered at the *DuBay* hearing, the CAAF held the SPCMCA did not become an accuser because he did not have

such a close connection to the offense that a reasonable person would conclude he had a personal interest in the case. As such, he was not disqualified from taking action as a CA.

4. ***Accuser disqualification – violations of orders of the convening authority***.

a. ***Rule***. *United States v. Tittel,* 53 M.J. 313 (C.A.A.F. 2000). Accused was convicted of shoplifting and several other offenses and processed for elimination when he was caught shoplifting again from the base PX. The SPCMCA signed an order barring the accused from entering any Navy PX, which the accused violated. The CAAF adopted the Navy court's reasoning that the order was a routine administrative directive and that the CA was not an "accuser" and that, in any event, the accused waived the issue.

b. *United States v. Byers*, 34 M.J. 923 (A.C.M.R. 1992) *set aside and remanded*, 37 M.J. 73 (C.M.A. 1993), *rev'd as to sentence*, 40 M.J. 321 (C.M.A. 1994), *sent. aff'd. on remand* (A.C.M.R., 23 Jan. 1995) (unpub.). Accused charged under Article 90, UCMJ for violating commanding general's (CG) order not to operate privately owned vehicle on post. Same CG referred the charge to a GCM. CG was not an accuser and involvement was official and not personal.

c. *See also United States v. Cox*, 37 M.J. 543 (N.M.C.M.R. 1993). Accused charged under Article 90, UCMJ for violating CA's restriction order. Imposition of pretrial restriction is an "official act" which does not connect the CA so closely with the offense that a reasonable person would conclude he had anything other than an official interest in the matter.

d. *United States v. Shiner*, 40 M.J. 155 (C.M.A. 1994) (whether CA was disqualified because accused allegedly violated CA's personal order was waived by failure to raise at trial). *See also United States v. Garcia*, 2003 CCA LEXIS 98 (N-M Ct. Crim. App. Apr. 9, 2003) (unpub.). Applying CAAF's opinions in *United States v. Tittel*, 53 M.J. 313 (C.A.A.F. 2000) and *United States v. Rockwood*, 52 M.J. 98 (C.A.A.F. 1999), court held that accused waived the issue by failing to raise it at trial. In any event, CA was not an "accuser" prohibited from convening a court-martial where convening authority issued the order the accused is alleged to have violated. The order was not to operate POV on Camp Pendleton. Applying the standard that whether one is an accuser depends on whether, under the particular facts and circumstances . . . a reasonable person would impute to [the convening authority] a personal feeling or interest in the outcome of the litigation," the court found that the issuance of this routine "simple, written order" did not exceed official interest

5. ***Official vs. personal involvement***.

a. ***Rule – official actions will generally not make the CA an "accuser."*** *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009). Convening authority appointed another General Officer to conduct a command investigation board into an aircraft accident that killed 20 civilians riding a cable car in the Italian Alps. The accused was eventually court-martialed as the pilot of the aircraft. Convening authority closely monitored the investigation, calling the board on a daily basis and making recommendations about areas of further inquiry; charges were not preferred until the investigation was completed. CAAF held the convening authority not become an accuser based on his hands-on involvement in the investigation, noting the repeated contacts did not show a "personal rather than a professional interest."

b. *United States v. Arindain*, 65 M.J. 726 (A.F. Ct. Crim. App. 2007). The convening authority, an Air Force GCMCA, referred charges of felony murder,

rape, and forcible sodomy to a GCM; the accused was only convicted of unpremeditated murder. Three months after the trial, the convening authority wrote an e-mail to the SJA saying: "My opinion, tho: this was not a sexual assault case . . . we all think they had consensual sex and she expired during their rather abnormal acts." E-mail was disclosed to the defense and they submitted it as part of their clemency. On appeal, defense argued the convening authority committed prosecutorial misconduct by referring "charges for which he did not have reasonable grounds to believe that offenses triable by a court-martial had been committed." AFCCA affirmed, reasoning that the SJA provided pretrial advice that provided the GCMCA with an "analysis of the available evidence . . . , and advised him that the evidence supported the specifications and referral was warranted." Also, the Article 32 investigating officer concluded that reasonable grounds existed to believe the accused committed the offenses. "Sufficient information existed at the time of referral for the convening authority to make his decision, and while his choice of language . . . was regrettable, we do not find that [his e-mails] cast doubt on the propriety of the referral . . . ."

c. *United States v. Diacont*, No. 200501425, 2007 CCA LEXIS 94 (N-M. Ct. Crim. App. Mar. 20, 2007) (unpublished). Convening authority was not personally disqualified when he visited the accused and several others in pretrial confinement and asked them "how they were doing, whether they had called their families recently, and what the command could have done to prevent the circumstances in which they found themselves."

d. *United States v. Voorhees*, 50 M.J. 494 (C.A.A.F. 1999). A CA is an "accuser" when the convening authority is so closely connected to the offense that a reasonable person would conclude that the CA had a personal interest in the matter - that it would affect the CA's ego, family, or personal property, or that it demonstrates personal animosity beyond misguided zeal. Here, CA did not become an accuser even though he threatened to "burn" accused if he did not enter into pretrial agreement.

e. *United States v. Fisher*, 45 M.J. 159 (C.A.A.F. 1996). CA's mid-trial statements critical of defense counsel will not invalidate previous pretrial actions of selecting members and referring case to trial when CA's statements do not indicate that he was other than objective in processing court-martial. CA appeared as a Government witness on a MRE 313 motion to suppress a urinalysis. During the recess, the CA stated that "any lawyer that would try to get the results of the urinalysis suppressed was unethical." No taint attributed to selection process.

f. ***CAs suspected of similar offenses <u>may</u> be disqualified***. *United States v. Kroop*, 34 M.J. 628 (A.F.C.M.R. 1992), *aff'd*, 38 M.J. 470 (C.M.A. 1993). Officer charged with adultery. CA was suspected of similar, albeit unrelated, offenses. In an "abundance of caution over the need to preserve the appearance of propriety" court set aside prior action of CA (approved sentence) and remanded for new SJA's advice and action by different CA. *United States v. Anderson*, 36 M.J. 963 (A.F.C.M.R. 1993).

g. ***Findings and sentence did not have to be set aside on grounds the CA was himself suspected of misconduct***. Conduct in question was unrelated to accused's misconduct. *United States v. Williams*, 35 M.J. 812 (A.F.C.M.R. 1992) *aff'd*, 41 M.J. 134 (C.A.A.F. 1994). Accused convicted of three rapes, robbery, sodomy, and aggravated assault was not entitled to disqualification of CA where CA was himself suspected of sexual misconduct. Suspected misconduct of CA was of a

non-violent nature. No danger of "psychological baggage" being carried over to prejudice the accused.

h. ***Disqualification and potential UCI***. *United States v. Haagenson*, 52 M.J. 34 (C.A.A.F. 1999). Accused, a CW2, was charged with fraternization and her case initially referred to a SPCM, convened by the SPCMCA who was also the accuser. The SPCMCA later withdrew the charge, on the basis of the TC's advice, and referred it to an Article 32 investigation, ultimately sending it forward with a recommendation for a GCM. Evidence revealed that the withdrawal from a SPCM may have been prompted by the XO of the Base Commander, the SPCMCA's superior, who reportedly yelled "I want [accused] out of the Marine Corps" at the SPCMCA. The military judge found that there was "no support" for the defense contention that command influence tainted the referral, but the CAAF disagreed, finding insufficient evidence to rule either for or against the defense because the record was not properly developed. Case remanded for a fact-finding proceeding on issue of whether SPCMCA became an accuser.

i. ***Command as secondary victims***. *United States v. Rockwood*, 52 M.J. 98 (C.A.A.F. 1999). Accused who was critical of Operation Uphold Democracy in Haiti attempted to "inspect" a prison in order to draw attention to the plight of its inmates. Accused was charged with a variety of offenses, to include disrespect and being absent from his place of duty. He claimed at trial that the entire command was precluded from acting in the case because his behavior so directly challenged his command's actions that the CA, the commanders, and the members had a conflict of interest. CAAF held that the accused's personal assertion of such a conflict was insufficient; he produced no evidence that the CA had anything other than an official interest in the case, that there was command influence under Article 37, UCMJ, or that the members were disqualified from serving.

j. ***Waiver***. *United States v. Gudmundson*, 57 M.J. 493 (C.A.A.F. 2002). Convening authority testified on dispositive suppression motion. Defense did not request that convening authority disqualify himself from taking post-trial action in the case but alleged on appeal that he should have disqualified himself. The CAAF held that the defense waived the issue by failing to raise it below, in light of the fact that the defense was fully aware of the ground for potential disqualification but chose not to raise it either at trial or in its post-trial submissions. In *dicta*, CAAF reviews law in area. "A convening authority's testimony at trial is not *per se* disqualifying, but it may result in disqualification if it indicates that the convening authority has a 'personal connection with the case.' However, 'if the [convening authority's] testimony is of an official or disinterested nature only,' the convening authority is not disqualified."

k. ***Inelastic predisposition***. *United States v. Davis*, 58 M.J. 100 (C.A.A.F. 2003). Accused was convicted of wrongful drug use. In its RCM 1105 submission, the defense alleged that the convening authority publicly commented that "people caught using illegal drugs would be prosecuted to the fullest extent, and if they were convicted, they should not come crying to him about their situations or their families[']." Government did not dispute that the convening authority made the statements. After reviewing the law on disqualification of convening authorities to take post-trial action, and applying a *de novo* standard of review, the CAAF held that the statements displayed an inelastic attitude toward the performance of the convening authority's post-trial responsibilities that disqualified him from taking post-trial action on accused's case. The comments "lacked balance and transcended a legitimate command concern for crime or

unlawful drugs." Action set aside, record returned to the Air Force TJAG for a new review and action before a different convening authority.

6. ***Why does statutory vs. personal disqualification matter?*** It will affect the range of options available.

Action contemplated	**If *statutorily* disqualified -**	**If *personally* disqualified -**
Appointing Article 32 investigating officer (IO)	May appoint Article 32 IO	May not appoint Article 32 IO
Dismissal of charges	May dismiss	May dismiss
Disposition by other means	May dispose of case via Article 15, Letter of Reprimand, etc.	May dispose of case via Article 15, Letter of Reprimand, etc.
Convening a court martial	May convene a SCM, but not a SPCM or a GCM	May convene a SCM, but not a SPCM or a GCM
Forwarding to superior	May forward with recommendation as to disposition (must note statutory disqualification)	May forward but may not make recommendation (must note personal disqualification)

7. ***The "Junior Accuser" Concept***. Commander who is subordinate to "accuser" may not convene a general or special court-martial. *See* RCM 504(c)(2) and Articles 22(b) and 23(b): "If . . . such an officer is an accuser, the court shall be convened by superior competent authority." *See also United States v. Corcoran*, 17 M.J. 137 (C.M.A. 1984).

8. ***Disqualification of legal officer***. *United States v. Edwards*, 45 M.J. 114 (C.A.A.F. 1996). An O-4 officer who served as the legal officer for the case in the pretrial and post-trial stages was disqualified from preparing the post-trial recommendation. Officer preferred 3 charges and 31 specifications of larceny, forgery, and false-identity offense against accused; conducted a videotaped interrogation of accused that resulted in a confession; acted as evidence custodian during the pretrial stages of the court-martial; and defense counsel only became aware of legal officer's involvement after trial and completion of post-trial recommendation.

9. ***Accuser issue is not jurisdictional – failure to raise at trial may result in waiver***. *United States v. Shiner,* 40 M.J. 155 (C.M.A. 1994) (assuming CA was an accuser, his failure to forward the charges to the next higher level of command was a nonjurisdictional error, which was waived by accused's failure to raise it at court-martial). *See also Tittel*; *United States v. Voorhees,* 50 M.J. 494 (C.A.A.F. 1999). CA did not become an accuser by threatening to "burn" accused if he did not enter into PTA; even if he did, accused affirmatively waived issue at trial.

10. ***Other Referral Issues***.

a. *United States v. Guidi*, No. 200600493, 2007 CCA LEXIS 10 (N-M. Ct. Crim. App. Jan. 30, 2007) (unpublished). The signature on the referral portion of the accused's charge sheet was illegible, and noted next to the signature, in writing was "1st Sgt By direction." Typed next to the signature was "For the Commanding Officer." The additional charge sheet was executed in the same manner, except the notation "1st Sgt" was lacking. The court concluded that a Marine Corps First Sergeant must have signed the charge sheets. However, the

court held that it is not a jurisdictional defect for the convening authority to allow another to sign on his behalf. The N-MCCA stated, "[p]rovided his actions are personally made, it is not necessary that he actually take hold of a pen."

b. *United States v. Ross*, No. 36139, 2006 CCA LEXIS 358 (A.F. Ct. Crim. App. Dec. 13, 2006) (unpublished). The accused argued that the GCMCA was improperly appointed to command and was not a proper convening authority. The GCMCA was an Air Force colonel (O-6) and was appointed as the Commander of the Third Air Force over two brigadier generals. This appointment was in violation of the applicable Air Force regulation. The GCMCA referred the case to trial by general court-martial, the accused was arraigned, and the case was recessed for 20 days. During the recess, command of the Third Air Force passed to a major general, who replaced five of the nine panel members in the case. The accused was re-arraigned and tried. At no time did the accused object to the original referral. The AFCCA held that the court-martial was properly convened, reasoning that, when an officer is in command, he may exercise the court-martial convening power that attaches to that command. Furthermore, although the appointment violated the Air Force regulation, jurisdiction still attached. "[A]ppellate courts are not justified in attaching jurisdictional significance to service regulations in the absence of their express characterization as such by Congress." Finally, any error in the referral was cured by the successor GCMCA who took action on the sentence. *See also United States v. Stamper*, No. 36191, 2006 CCA LEXIS 364 (A.F. Ct. Crim. App. Dec. 15, 2006) (unpublished).

G. **PANEL SELECTION ISSUES**.

1. ***In general***. Virtually any member of the Armed Forces is eligible to serve on a court-martial panel. However, the CA may only select those members who, in the CA's personal opinion, are "best qualified" in terms of criteria set out in Article 25, UCMJ**:** ***Age, Experience, Education, Training, Length of Service and Judicial Temperament***. *United States v. Hodge*, 26 M.J. 596 (A.C.M.R. 1988), *aff'd*, 29 M.J. 304 (C.M.A. 1989) (holding cross sectional representation of military community on court-martial panel is not required by the Constitution); *see also United States v. Carter*, 25 M.J. 471 (C.M.A. 1988) (holding no Sixth Amendment right that membership reflect a representative cross-section of the military population).

2. ***Selection process remains controversial***.

a. The National Defense Authorization Act for FY 1999, § 552, required the Secretary of Defense to develop a plan for random selection of members of courts-martial as a potential replacement for the current selection process and present the plan and views of the code committee to the Senate Committee on Armed Services and the House Committee on National Security. The Joint Service Committee unanimously concluded that, after considering alternatives, the current practice of CA selection best applies the criteria in Article 25(d) in a fair and efficient manner.

b. A Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice, sponsored by the National Institute of Military Justice and chaired by Senior Judge Walter T. Cox III of the United States Court of Appeals for the Armed Forces, was forwarded to the Secretary of Defense and Members of Congress on 5 September 2001. Observing "[t]here is no aspect of military criminal procedures that diverges further from civilian practice, or creates a greater impression of improper influence, than the antiquated process of panel selection," the Cox Commission recommended modifying the pretrial role of the convening authority in both selecting court-martial members and making other

pretrial legal decisions that "best rest within the purview of a sitting military judge."

c. Guy Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three - Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1 (1998). *Cf.* Major Christopher Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190 (2003) (numerous articles collected and cited at footnote 25).

H. **CHALLENGES TO PANEL SELECTION PROCESS – LOGISTICS**.

1. ***Proving the use of inappropriate criteria or command influence in panel selection***.

a. ***The burden***. The defense shoulders the burden of establishing the improper exclusion of qualified personnel from the selection process. Once the defense establishes such exclusion, the Government must show by competent evidence that no impropriety occurred when selecting the accused's court-martial members. *United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000).

b. ***The standard of proof***. Generally, the standard on both sides is a preponderance of the evidence. RCM 905(c)(1). However, if the defense alleges that the convening authority violated not only Article 25 but also that the convening authority tried, for example, to stack the court against him, then the challenge is essentially one of command influence, and the command influence standards apply.

(1) To raise an issue under Article 37, UCMJ, the accused must show "some evidence" (i.e., facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings). *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). Once the issue is raised at the trial level, the burden shifts to the Government, which may either show that there was no unlawful command influence or show that the unlawful command influence will not prejudice the proceedings. *Id.* The court must be persuaded beyond a reasonable doubt that the findings and sentence will not be affected by command influence. *Id.* at 151.

(2) Command influence is, generally, harder to establish, but, once established, it is harder for the Government to disprove prejudice to the accused.

c. ***Two general methods of proof***. First, counsel may attack the array. *See, e.g., United States v. Nixon*, 33 M.J. 433 (C.M.A. 1991) (panel of E-8s and E-9s creates an appearance of evil). Second, counsel can mount statistical attacks on the array. *See, e.g., United States v. Bertie*, 50 M.J. 498 (C.A.A.F. 1999) (disproportionate number of high-ranking panel members did not create presumption of impropriety in selection). *See also United States v. Fenwrick*, 59 M.J. 737 (A.F. Ct. Crim. App. 2003) (holding "the military judge may rely upon statistical evidence to discern a 'subconscious' desire by the convening authority to improperly exclude certain grades, [but] such statistical evidence must clearly indicate such an exclusion").

d. ***Attacks on the nomination and selection memoranda***. *See United States v. Upshaw*, 49 M.J. 111 (C.A.A.F. 1998); *United States v. Roland*, 50 M.J. 66 (C.A.A.F. 1999); and *United States v. Kirkland*, 53 M.J. 22 (C.A.A.F. 2000).

2. ***The convening authority's responsibility to personally select members cannot be delegated***. *United States v. Ryan*, 5 M.J. 97 (C.M.A. 1978); *United States v. McCall*, 26 M.J. 804 (A.C.M.R. 1988) (military judge said "it sounds like somebody has already selected a list of people to take in to the convening authority and have him just kind of stamp it;" ACMR agreed). *But see United States v. Benedict*, 55 M.J. 451 (C.A.A.F. 2001). The Chief of Staff (CoS) submitted a final list of members to the CA, who then personally signed the convening order without asking any questions or making any changes. Setting aside the decision of the Coast Guard Court of Criminal Appeals, the CAAF held that the CA personally selected the nine prospective members set forth by the CoS. See Judge Effron's dissent for a comprehensive discussion of the history of Article 25, UCMJ.

a. *United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991). The division deputy adjutant general gathered a list of court member nominees who, in his opinion, supported a command policy of "hard discipline." Staff members can violate the provisions of Article 37, UCMJ. Their errors will likely spillover to the CA.

b. ***Interlopers as a jurisdictional defect***. *United States v. Peden*, 52 M.J. 622 (A. Ct. Crim. App. 1999). Where Member A was selected by CA but Member B was inadvertently placed on convening order, Member B was an "interloper" whose presence constituted jurisdictional error. Convening authority not permitted to ratify presence of Member B after the fact. Sentence set aside (accused had pleaded guilty).

3. ***If members of another command are selected, they must also be personally selected by the convening authority***. *United States v. Gaspard*, 35 M.J. 678 (A.C.M.R. 1992) Accused was assigned to Fort Polk. Commanding General, Fort Polk, was disqualified after talking to victim's parents, so case convened by Commander, III Corps and Fort Hood, who referred case to a Fort Polk court-martial convening order (CMCO) with Fort Polk members. Issue on appeal was whether Corps CG personally selected the Fort Polk members. If not, court-martial was "fatally flawed." Case remanded for *DuBay* hearing.

I. CHALLENGES TO PANEL SELECTION PROCESS – CRITERIA USED BY CONVENING AUTHORITY.

1. ***In general***. While the CA must use the Article 25 criteria, much litigation has revolved around the CA's supplementing the Article 25 criteria with other criteria. Some of these criteria are discussed below. *See United States v. Dowty*, 60 M.J. 163 (C.A.A.F. 2004). Accused contended that, by soliciting volunteers to serve as court members and then drafting a list of nominees for the CA's approval, the ASJA violated the letter and spirit of Article 25, UCMJ. Court upheld conviction in face of "potentially troubling" panel selection where CA personally selected members despite unorthodox nomination process. While it was error to nominate members based on an irrelevant variable, such as volunteering, the error did not prejudice the accused. Note: accused and counsel were "given full opportunity to question potential members in open court to develop any possible biases or preconceptions, and, through appropriate causal and peremptory challenges, removed any potential member who they had reason to believe would not be capable, fair, and impartial." Also, by time of accused's trial, only three "volunteers" remained on seven-member panel.

2. ***Cross-Sectional Representation***. The commander may seek to have the panel's membership reflect the military community. *See, e.g., United States v. Smith*, 27 M.J. 242, 249 (C.A.A.F. 1988). "[A] commander is free to require representativeness in his court-martial panels and to insist that no important segment of the military community – such as blacks, Hispanics, or women – be excluded from service on court-martial

panels." CMA tacitly accepted as valid the CA's effort "to have a mix of court members with command or staff experience" to have "some female representation on the panel."

a. ***Inclusion by Race***. Convening authority may include members based upon their race so long as the motivation is compatible with Article 25, UCMJ. *United States v. Crawford*, 35 C.M.R. 3 (C.M.A. 1964) (as to black NCO, it is exclusion that is prohibited, not inclusion). *See also United States v Smith*, *infra*.

b. ***Inclusion by Gender***. Permissible if for proper reason.

(1) *United States v. Smith*, 27 M.J. 242 (C.M.A. 1988). CA may take gender (or race) into account in selecting court members if seeking in good faith to select that a court-martial panel that is representative of the military population. But, evidence indicated a hidden policy of ensuring two "hardcore" females were on all sexual assault cases based on their "unique experience."

(2) *United States v. Lewis*, 46 M.J. 338 (C.A.A.F. 1997). In a case involving attempted voluntary manslaughter and assault on the accused's wife, the convening authority did not "stack" the panel with female members when, in response to a defense request for enlisted members, two of original five female officers were relieved and one female enlisted member was added, resulting in a panel of five male and four female members. Original panel had ten members, five of whom were females.

c. ***Duty Position*.** Convening authority may select based upon duty position (e.g., commanders) in a good faith effort to comply with Article 25 criteria.

(1) *United States v. White*, 48 M.J. 251 (C.A.A.F. 1998). CA issued a memorandum directing subordinate commands to include commanders, deputies and first sergeants in the court member applicant pool. Eight of ten panel members for the accused's trial were in command positions. Court held CA did not engage in court packing absent evidence of improper motive or systematic exclusion of a class or group of candidates. Court noted "best qualified" selection for command is close to "best qualified" under Article 25. *See* Effron, J., and Sullivan, J., concurring in the result, but criticizing the majority's willingness to equate selection for command with selection for panel duty.

(2) *United States v. Cunningham*, 21 M.J. 585 (A.C.M.R. 1985) (holding preference for those in leadership positions is permissible where CA articulates Article 25 criteria; 6 commanders and 3 XOs who were 1 COL, 3 LTCs, 2 MAJs, 2 CPTs, 1 LT); *see also United States v. Lynch*, 35 M.J. 579 (C.G.C.M.R. 1993), *rev'd on other grounds*, 39 M.J. 223 (C.M.A. 1994) (holding selection process that limited members to those "with significant seagoing experience" met the requirements of Article 25, specifically the "experience" criterion given the charged offenses).

d. ***Rank*** is not a criterion listed under Article 25, UCMJ. The CA may not select members junior to an accused, but, aside from that one qualification, **the convening authority may not use rank as a device for deliberate and systematic exclusion** of otherwise qualified court members. *United States v. Daigle*, 1 M.J. 139 (C.M.A. 1975) (policy of excluding all lieutenants and WOs); *but see United States v. Yager*, 7 M.J. 171 (C.M.A. 1979) (exclusion of persons in grades E-2 and E-1 permissible).

(1) Despite the cases holding that the composition of the panel can create an "appearance of evil," more recent cases have disallowed challenges to the panel based solely on its composition at trial. *United States v. Bertie*, 50 M.J. 489 (C.A.A.F. 1999) (disproportionate number of high-ranking panel members did not create presumption of impropriety in selection).

(2) *United States v. Upshaw*, 49 M.J. 111 (C.A.A.F. 1998) (good faith administrative error resulting in exclusion of otherwise eligible members (E6s) was not error). ***But see Kirkland***, below

(3) *United States v. Roland*, 50 M.J. 66 (C.A.A.F. 1999) (SJA's memo soliciting nominees E-5 to O-6 was not error). ***But see Kirkland***, below.

(4) *United States v. Kirkland*, 53 M.J. 22 (C.A.A.F. 2000), *pet. for clarification denied*, 54 M.J. 211 (C.A.A.F. 2000). Despite evidence that CA understood and applied Article 25, sentence set aside where panel selection documents appeared to exclude NCOs below E-7. Panel selection documents may give rise to an appearance of impropriety where documents make it seem that rank was a criterion in panel selection.

(5) *United States v. Fenwrick*, 59 M.J. 737 (A.F. Ct. Crim. App. 2003). Defense raised motion to dismiss for systematic and improper exclusion of lieutenants from panel membership. The GCMCA testified on the motion regarding his selection of members IAW Article 25 criteria. The military judge, however, determined the GCMCA had systematically and improperly excluded lieutenants because in the thirteen courts-martial of the fiscal year only two lieutenants were selected and none served. The military judge granted defense's motion and ordered the GCMCA to select new panel members free from systematic exclusion of lieutenants. The GCMCA selected a new panel, without lieutenants, causing the military judge to dismiss the case with prejudice and the Government appealed. On appeal, AFCCA held "the military judge may rely upon statistical evidence to discern a 'subconscious' desire by the convening authority to improperly exclude certain grades, [but] such statistical evidence must clearly indicate such an exclusion." Such clear evidence was lacking in this case where lieutenants were not excluded from the nomination process, the GCMCA testified he applied the Article 25 criteria, and the GCMCA had previously selected six lieutenants in fifteen courts-martial in the prior fiscal year. The court recognized "it is not improper, during the selection process, for a convening authority to look first to officers and enlisted members senior in rank because they are more likely to be the best qualified under Article 25."

(6) *United States v. Smith*, 37 M.J. 773 (A.C.M.R. 1993). In handwritten note, convening authority directed major subordinate commanders to provide "E7" and "E8" members for membership on court-martial panel. ACMR found that selection was based solely on rank in violation of Article 25, UCMJ, and that the improper selection deprived the court of jurisdiction. Findings and sentence set aside.

(7) *United States v. Nixon*, 33 M.J. 433 (C.M.A. 1991). A panel consisting of only E-8s and E-9s creates an appearance of evil and is probably contrary to Congressional intent. The CG's testimony, however, established that he had complied with Article 25 and did not use rank as a selection criterion. Court noted close correlation between the selection criteria for court-martial members in Article 25(d)(2), UCMJ and the

grade of a commissioned or non-commissioned officer. "Indeed, because of that correlation, there is a danger that, in selecting court members, a convening authority may adopt the shortcut of simply choosing by grade." Resulting blanket exclusion of qualified officers or enlisted members in lower grades violates Congressional intent.

(8) *United States v. Ruiz*, 46 M.J. 503 (A.F. Ct. Crim. App. 1997), *aff'd*, 49 M.J. 340 (C.A.A.F. 1998). Convening authority did not improperly select members based on rank when, after rejecting certain senior nominees from consideration for valid reasons, he requested replacement nominees of similar ranks to keep the overall balance of nominee ranks relatively the same.

(9) *United States v. Benson*, 48 M.J. 734 (A.F. Ct. Crim. App. 1998). An Air Force convening authority violated Article 25 when, after sending a memorandum to subordinate commands directing them to nominate "officers in all grades and NCOs in the grade of master sergeant or above for service as court-members," he failed to select members below the rank of master sergeant (E-7). The convening authority, while testifying that he had no intent to violate Article 25, also testified that he had never selected a member below the rank of E-7. The court held the CA violated Article 25 by systematically excluding ranks E-4 to E-6. The findings and sentence were set aside. *This case provides an excellent review of the case law interpreting Article 25, UCMJ, and court member selection.*

3. ***Systematic exclusion of otherwise qualified personnel***. Generally, where the accused challenges the panel because the CA has allegedly excluded otherwise qualified people (e.g., she prefers to select only those who have command experience), we look to the *motivation* of the convening authority. If the motivation is compatible with Article 25, UCMJ, the selection may not be disturbed. Rank, however, is the one area where the convening authority's motive is largely irrelevant (thus, the CA may have the intention of fully complying with Article 25, but Article 25 is violated where the CA uses rank as a "shortcut" in the selection process). Moreover, where the convening authority appoints members to achieve a particular result (e.g., to guarantee a conviction, or a harsh sentence), the CA has engaged in "court stacking" or "court packing." This is not a jurisdictional challenge *per se* but rather a species of command influence, in violation of Article 37. If the accused alleges the CA has engaged in court stacking, the court will look to the motivation and intent of the CA.

a. *United States v. Melson*, No. 36523, 2007 CCA LEXIS 372 (A.F. Ct. Crim. App. Sep. 14, 2007) (unpublished). At his trial, the accused moved to dismiss the charges and specifications, alleging that the GCMCA improperly selected the panel by intentionally selecting senior members to serve. Five of the ten members were colonels (O-6s) and, although the case was tried at a different base, some of his staff were chosen as members. The GCMCA testified that he "wanted to pick members whom he knew had the best judgment and experience." He also said it "was the most serious case he had ever handled." Furthermore, he wanted to ensure that he had officers with the "requisite maturity and experience." The issue was addressed at length at trial and the military judge denied the motion, finding that the CA had properly applied Article 25. The AFCCA affirmed, stating that every panel is essentially "hand-picked." However, "[w]hat is impermissible is for the convening authority to select members with a view toward influencing the outcome of the case." The court found that the CA gave the panel selection in the case "a great deal of time and consideration . . . [and] did so in an attempt to

ensure justice, not subvert it." Therefore, the accused did not satisfy his burden to show that the members were improperly selected.

b. *United States v. Simpson*, 55 M.J. 674 (A. Ct. Crim. App. 2001). *aff'd*, 58 M.J. 368 (C.A.A.F. 2003). CA's deliberate exclusion of personnel assigned to the Army's Ordinance Center and School did not constitute unlawful "court packing" where the CA's motive was to find an unbiased and objective panel.

c. *United States v. Brocks*, 55 M.J. 614 (A.F. Ct. Crim. App. 2001). Base legal office intentionally excluded all officers from the Medical Group from the nominee list, because all four alleged conspirators and many of the witnesses were assigned to that unit. Citing *United States v. Upshaw*, 49 M.J. 111, 113 (C.A.A.F. 1998), "[a]n element of unlawful court stacking is improper motive. Thus, where the convening authority's motive is benign, systematic inclusion or exclusion may not be improper." Held: Exclusion of Medical Group officers did not constitute unlawful command influence. *But see United States v. Bartlett*, 66 M.J. 426 (C.A.A.F. 2008) (invalidating Army regulation that exempted certain special branches from court-martial duty, including medical personnel).

d. In *United States v. Redman*, 33 M.J. 679 (A.C.M.R. 1991), the court found that the Government's dissatisfaction with the panel's unusual sentences actually meant dissatisfaction with findings of not guilty or lenient sentences. The court held the intentional manipulation of Article 25 criteria to achieve particular result in cases is a clear violation of Articles 25 and 37, UCMJ.

e. *United States v. Smith*, 27 M.J. 242 (CMA 1988) (legal office policy of placing "hardcore" female members on panel in sex cases to achieve a particular outcome was ruled inappropriate); *see also United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991) (court packing occurred where functionary prepared lists of panel members based upon notions of hard discipline).

4. ***Replacing Members***.

a. *United States v. Mack*, 58 M.J. 413 (C.A.A.F. 2003). SJA memorandum to convening authority concerning operation of convening order approved by the convening authority provided that, when accused requested panel of at least one-third enlisted members, alternate enlisted members would be automatically detailed without further action by the convening authority if, among other triggering mechanisms, "before trial, the number of enlisted members of the GCM, BCD SPCM, or SPCM court-martial panel falls below one-third plus two." Prior to trial, two officer and one enlisted members were excused, leaving five officer and five enlisted members (a total of nine members, of which one-third plus two, or five, were enlisted). At trial, two additional enlisted members sat, which appeared to be inconsistent with the above triggering mechanism. The defense did not object. ACCA remanded on its own for a *DuBay* hearing concerning the presence of the additional two enlisted members. CAAF held that, "When a convening authority refers a case for trial before a panel identified in a specific convening order, and the convening order identifies particular members to be added to the panel upon a triggering event, the process of excusing primary members and adding the substitute members involves an administrative, not a jurisdictional matter. Absent objection, any alleged defects in the administrative process are tested for plain error." Here there was no error. Excusal of one officer and the one enlisted member prior to the excusal of the other officer would have reduced the panel to ten members, five of whom were officers and five of whom were enlisted. This triggered the one-third plus two triggering event. Even if there was error in the triggering event, so long as the members were listed on

the convening order and the panel met the one-third requirement, any error in the operation of the triggering mechanism was administrative, not jurisdictional.

b. ***Court-Martial Convening Orders and harmless error***. *United States v. Adams*, 66 M.J. 255 (C.A.A.F. 2008) (even though amending CMCO included plain language that a new court-martial was "hereby convened," court found mistake was a mere harmless administrative error).

J. **ENLISTED MEMBERS**. Accused may not be tried by a panel that includes enlisted members unless he makes such a request. Article 25 requires requests for enlisted court members to be made orally on the record or in writing.

1. ***Old view***. *United States v. Hood*, 37 M.J. 784 (A.C.M.R. 1993). At Article 39(a) session, accused deferred decision forum selection. Court convened with officer and enlisted members detailed and present. Nothing in the record, oral or written, indicated the accused elected trial with enlisted members. Court found this error to be jurisdictional under RCM 903(b). Findings and sentence set aside. *See also United States v. Smith*, 41 M.J. 817 (N-M. Ct. Crim. App. 1995) (accused originally requested officer members and then pleaded guilty with replacement counsel before military judge alone; findings upheld, remanded for sentencing).

2. ***Current view – Doctrine of Substantial Compliance***. *United States v. Alexander*, 61 M.J. 266 (C.A.A.F. 2005). Military judge advised the accused of his forum selection rights, which the accused requested to defer. During a later proceeding, the military judge stated that he was told an enlisted panel would be hearing the case and defense did not object to the statement. The accused, however, failed to state in writing or on the record his request for enlisted members in violation of Article 25, UCMJ and RCM 903(b)(1). The CAAF held that the error in the accused failing to personally select forum on the record is a procedural, as opposed to jurisdictional, issue. The court stated, "[the] right being addressed and protected in Article 25 is the right of an accused servicemember to select the forum[,] . . . [t]he underlying right is one of forum selection, not the ministerial nature of its recording." The CAAF held that the record reflected that the accused selected court-martial by panel members and the accused failed to show that the error in recording his forum selection resulted in any prejudice.

a. *United States v. Morgan*, 57 M.J. 119 (C.A.A.F. 2002) (military judge erred by not obtaining on record defendant's personal request for enlisted members to serve on court-martial, but error was not jurisdictional, and under circumstances, it did not materially prejudice substantial rights of defendant).

b. *United States v. Townes*, 52 M.J. 275 (C.A.A.F. 2000) (military judge had duty to obtain personal election from accused regarding the forum's composition, but where no coercion was alleged, the error did not materially prejudice the accused's substantial rights).

c. *United States v. Andreozzi*, 60 M.J. 727 (A. Ct. Crim. App. 2004). Accused failed to state in writing or on the record his request for enlisted members in violation of Article 25, UCMJ and RCM 903(b)(1). ACCA ordered two *DuBay* hearings to determine if the accused personally selected trial by one-third enlisted members. ACCA held, under the totality of the circumstances, that the accused personally elected an enlisted panel. These relevant circumstances included: the military judge telling the accused his forum rights, the defense counsel submitting trial by enlisted members paperwork to the military judge, the defense counsel's testimony that his SOP was to discuss and explain forum rights to the accused and to follow the accused's wishes, the accused's presence in the courtroom when the panel was assembled and voir dired, and the accused's active participation in his

own defense. ACCA stated "[b]ecause there was substantial compliance with Article 25, UCMJ, the failure to comply with the procedural requirements of Article 25, UCMJ, did not materially prejudice [the accused's] substantial rights."

d. *United States v. Follord*, No. 20020350 (A. Ct. Crim. App. Feb. 15, 2005) (unpub). The accused, a CW2, did not make a knowing and voluntary waiver of his statutory right to trial by five officer members because of the following errors: (1) his executed PTA erroneously listed one of his three forum options as a trial by one-third enlisted, (2) his request for military judge alone stated that any trial composed of officers would be "not of his unit," and (3) military judge advised the accused that if he requested officer members at his general court-martial that the panel must comprise "at least three members." The court stated the host of errors "constitutes a lack of substantial compliance with Article 16, UCMJ." Findings and sentence set aside.

5. ***Rejecting request for enlisted members***. *United States v. Summerset*, 37 M.J. 695 (A.C.M.R. 1993). Military judge abused his discretion when he denied as untimely accused's request for enlisted members made four days prior to trial. He made no findings of fact regarding unnecessary expense, unacceptable delay, or significant inconvenience. *See* RCM 903(a)(1) and (e).

6. ***At least one-third enlisted***. Failure to assemble court of at least one-third enlisted members is jurisdictional error necessitating setting aside panel-adjudged sentence. *United States v. Craven*, 2004 CCA LEXIS 19 (A.F. Ct. Crim. App. Jan 21, 2004) (unpub.) (following challenges for cause and peremptory strikes, enlisted members constituted only 28.6 percent (five officer and two enlisted) of membership of court).

7. ***Same unit***. Article 25(c)(1), UCMJ. Enlisted members should not be from the same company-sized "unit" as the accused.

a. Same unit" is not a jurisdictional defect. *United States v. Wilson*, 21 M.J. 193 (C.M.A. 1986). Failure to object waives the issue. *United States v. Zengel*, 32 M.J. 642 (C.G.C.M.R. 1991), *review denied*, 33 M.J. 185 (C.M.A. 1991).

b. *Cf. United States v. Milam*, 33 M.J. 1020 (A.C.M.R. 1991). Two enlisted members of the panel were assigned to the same company-sized unit as accused. A.C.M.R. holds (with defense challenge for cause) that the two members were statutorily ineligible to sit under the language of Article 25(c), UCMJ. Also relevant is the language of RCM 912(f)(1)(A). Findings and sentence set aside.

III. PANEL MEMBERS

A. **QUALIFICATIONS – ARTICLE 25 CRITERIA.** Article 25(d)(2) directs the convening authority to personally select members who are "best qualified" based on six criteria: "age, education, training, experience, length of service, and judicial temperament." Until 2008, the Army exempted certain groups of officers from serving on court-martial panels. CAAF rejected this old rule:

1. ***Old Rule***: AR 27-10, Chapter 7, exempted the following officers from duty on Army courts-martial: chaplains; medical, dental, and veterinary officers; and inspectors general.

2. ***New Rule***: In *United States v. Bartlett*, 66 M.J. 426 (C.A.A.F. 2008), CAAF held the Secretary of the Army "impermissibly contravened the provisions of Article 25" by enacting provisions in AR 27-10 that exempted certain special branches from court-martial duty. CAAF held that convening authorities must consider officers in these special branches when applying Article 25 to select panel members.

3. ***Law enforcement personnel***. *United States v. Swagger*, 16 M.J. 759 (A.C.M.R. 1983). "At the risk of being redundant - we say again - individuals assigned to military police duties should not be appointed as members of courts-martial. Those who are the principal law enforcement officers at an installation must not be."

a. *United States v. Dale*, 42 M.J. 384 (C.A.A.F. 1995). Accused charged with sexual offenses against a child. Member of panel (Air Force 0-3) was Deputy Chief of Security Police and had sat in on criminal activity briefings with base commander. Focus is on the perception and appearance of fairness. Member was intimately involved day-to-day law enforcement on the base; "the embodiment of law enforcement and crime prevention." MJ's denial of challenge for cause reversed and case set aside.

b. *United States v. Fulton*, 44 M.J. 100 (C.A.A.F. 1996). Military judge did not abuse discretion by denying challenge for cause against member who was Chief of Security Police with Bachelor of Arts in criminal justice, where member only had contact with accused's commander on serious matters requiring high level decisions, and member had no prior knowledge of accused's misconduct. *Cf. Dale*, above.

c. *United States v. Berry*, 34 M.J. 83 (C.M.A. 1992). Member was command duty investigator for NAS Alameda security and knew and worked with key Government witness. Military judge said, "I don't think he said anything that even remotely hints that he could not render a fair judgment in this case." Abuse of discretion in the face of mere naked disclaimers by member. Reversed. *But see United States v. McDavid*, 37 M.J. 861 (A.F.C.M.R. 1993) (no "per se" rule of exclusion for security policemen).

4. ***Junior in rank***. *United States v. McGee*, 15 M.J. 1004 (N.M.C.M.R. 1983). When it can be avoided, court members should not be junior in rank to the accused. Failure to object results in waiver. *United States v. Schneider*, 38 M.J. 387 (C.M.A. 1993). Defense discovered court member was junior to accused during deliberations on findings and remained silent until the morning after findings were read in open court. Issue waived. *See also* RCM 503(a) Discussion.

B. **ENLISTED MEMBERS**.

1. ***Request***. Articles 16 and 25, UCMJ, permit requests for enlisted court members to be oral on the record or in writing. *See* discussion of doctrine of substantial compliance, *supra*.

2. ***Rejecting request for enlisted members***. *United States v. Summerset*, 37 M.J. 695 (A.C.M.R. 1993). Military judge abused his discretion when he denied as untimely accused's request for enlisted members made four days prior to trial. He made no findings of fact regarding unnecessary expense, unacceptable delay, or significant inconvenience. *See* RCM 903(a)(1) and (e).

3. ***Same unit***. Article 25(c)(1), UCMJ. Enlisted members should not be from the same company-sized "unit" as the accused. *United States v. Milam*, 33 M.J. 1020 (A.C.M.R. 1991) (error where two enlisted members of the panel were assigned to the same company-sized unit as accused); *United States v. Wilson*, 21 M.J. 193 (C.M.A. 1986) ("same unit" is not a jurisdictional defect; failure to object waives the issue); *United States v. Zengel*, 32 M.J. 642 (C.G.C.M.R. 1991), *review denied*, 33 M.J. 185 (C.M.A. 1991).

4. ***Jurisdictional error***. Failure to assemble court of at least one-third enlisted members is jurisdictional error necessitating setting aside panel-adjudged sentence. *United States v. Craven*, 2004 CCA LEXIS 19 (A.F. Ct. Crim. App. Jan 21, 2004) (unpub.) (following

challenges for cause and peremptory strikes, enlisted members constituted only 28.6 percent (five officer and two enlisted) of membership of court).

C. **QUORUM**. Article 29, UCMJ.

1. Three members for SPCM, five members for GCM. *Ballew v. Georgia*, 435 U.S. 223 (1978). "Jury" of less than 6 is unconstitutional (civilian). *But see United States v. Wolff*, 5 M.J. 923 (N.C.M.R. 1978), *pet. denied*, 6 M.J. 305 (C.M.A. 1979) (holding Sixth Amendment right to trial by "jury" does not apply to courts-martial); *United States v. Hutchinson*, 17 M.J. 156 (C.M.A. 1984).

2. Twelve members for capital case. Article 25a, UCMJ requires a minimum of twelve panel members in military capital cases, except in certain circumstances. The change was effective for offenses committed after 31 December 2002.

D. **EXCUSAL**.

1. Prior to assembly, RCM 505(c)(1) allows delegation to staff judge advocate or convening authority's deputy authority to excuse up to one-third (⅓) of the members. *See* AR 27-10, para. 5-18c. *United States v. Cook*, 48 M.J. 434 (C.A.A.F. 1998). The excusal of more than one-third of the members of a panel by the convening authority's delegate rises to the level of reversible and jurisdictional error only if the defense objects to the excusals and substitutions of members at trial, and the record somehow indicates that the accused was deprived of a right to make causal or peremptory challenges. The accused was convicted of violating a lawful general regulation and possession of marijuana with intent to distribute. Prior to trial, the SJA excused five of nine members who were detailed to sit as members. The accused suffered no prejudice because he failed to object to the excusals at trial. *The CAAF skirted an issue regarding the appropriate number to determine whether one-third of the members were excused (five of nine detailed for the accused's case or five of thirty-one total members on primary and alternate member lists).*

2. Excusal after assembly can occur only as the result of a challenge or by the military judge for good cause shown. *United States v. Latimer*, 30 M.J. 554 (A.C.M.R. 1990) (panel member's upcoming appointment for physical examination was not "good cause").

3. A sleeping member is good cause for excusal. *United States v. Boswell*, 36 M.J. 807 (A.C.M.R. 1993). Military judge could have rehabilitated member by reading portions of transcript. Not an abuse of discretion, however, to excuse. What if excusal dropped court below quorum? Mistrial? *See* RCM 806(d)(1).

E. **REPLACEMENT MEMBERS**.

1. ***Sloppy paper trails***. *United States v. Gebhart*, 34 M.J. 189 (C.M.A. 1992). "The administration of this court-martial...can best be described as slipshod." "Such a lack of attention to correct court-martial procedure cannot be condoned." The amended CMCO mistakenly removed member who actually sat on panel. Order also included member who was not present without explanation for the absence. The amending order also incorrectly referred to the original order by the wrong number. Held: errors were administrative and not jurisdictional. Issue was waived by defense failure to object. *See also United States v. Sargent*, 47 M.J. 367 (C.A.A.F. 1997) and *United States v. Larson*, 33 M.J. 715 (A.C.M.R. 1991).

2. ***Triggering mechanisms***. *United States v. Mack*, 58 M.J. 413 (C.A.A.F. 2003). SJA memorandum approved by convening authority concerning operation of convening order provided that, when accused requested panel of at least one-third enlisted members, alternate enlisted members would be automatically detailed without further action by the convening authority if, among other triggering mechanisms, "before trial, the number of enlisted members . . . falls below one-third plus two." Prior to trial, two officer and one

enlisted members were excused, leaving five officer and four enlisted members (a total of nine members, of which one-third plus two, or five, were enlisted). At trial, two additional enlisted members sat, which appeared to be inconsistent with the above triggering mechanism. The defense did not object. ACCA remanded on its own for a *DuBay* hearing concerning the presence of the additional two enlisted members. CAAF held that, "When a convening authority refers a case for trial before a panel identified in a specific convening order, and the convening order identifies particular members to be added to the panel upon a triggering event, the process of excusing primary members and adding the substitute members involves an administrative, not a jurisdictional matter. Absent objection, any alleged defects in the administrative process are tested for plain error." Here there was no error. Excusal of one officer and the one enlisted member prior to the excusal of the other officer would have reduced the panel to ten members, five of who were officers and five of whom were enlisted. This triggered the one-third plus two triggering event. Even if there was error in the triggering event, so long as the members were listed on the convening order and the panel met the one-third requirement, any error in the operation of the triggering mechanism was administrative, not jurisdictional.

F. **MEMBERS CAN CALL AND QUESTION WITNESSES.** Article 46, UCMJ; RCM 921(b); RCM 801(c) and Discussion. *See also United States v. Story*, No. 20061014 (A. Ct. Crim. App. Dec. 2, 2009) (unpublished). During the accused's trial, the members were on a two-hour break after both sides had rested but before closing arguments and instructions. When the panel returned, a member asked to call an additional witness. The military judge responded, "The answer to that is, you've heard all the evidence in this case." The ACCA held the military judge erred:

1. R.C.M. 921(b) expressly allows the members to "request that the court-martial be reopened and that portions of the record be read to them or additional evidence introduced" though the rule grants the military judge latitude "in the exercise of discretion" to grant or deny such request.

2. R.C.M. 801(c) similarly provides: "The court-martial may act to obtain evidence in addition to that presented by the parties. The right of the members to have additional evidence obtained is subject to an interlocutory ruling by the military judge." The Discussion to R.C.M. 801(c) notes the members may request a witness be recalled or that a "new witness be summoned."

3. M.R.E. 614(a) also notes the military judge may call (or recall) witnesses "at the request of the members."

4. **Lampani *factors***. In *United States v. Lampani*, 14 M.J. 22, 26 (C.M.A. 1982), the COMA provided a non-exclusive list of factors a military judge must consider before denying a member's request for additional evidence: "Difficulty in obtaining witnesses and concomitant delay; the materiality of the testimony that a witness could produce; the likelihood that the testimony sought might be subject to a claim of privilege; and the objections of the parties to reopening the evidence are among the factors trial judge must consider." In this case, the military judge did not consider these factors (or any other factors) on the record, which was an abuse of discretion.

5. *See also United States v. Lents*, 32 M.J. 636 (A.C.M.R. 1991). Court member questions were essentially a request to call witnesses. Court members may request witnesses be called or recalled. The military judge must weigh difficulty, delay, and materiality; consider whether a privilege exists; and whether the parties object; *United States v. Lampani*, 14 M.J. 22 (C.M.A. 1982) (even after deliberations have begun members may request additional evidence).

IV. MILITARY JUDGES.

A. QUALIFICATIONS.

1. ***Article 26, UCMJ***. Military judge shall be a commissioned officer who is a member of the bar of a Federal court or the highest court of a State and who is certified to be qualified for duty as a military judge by TJAG.

2. ***Member of a bar***. Military judge's "inactive status" with her state bar nevertheless equated to her being a "member of the Bar" of Pennsylvania as contemplated by Article 26(b). *United States v. Cloud*, ARMY 9800299 (A. Ct. Crim. App., Dec. 14, 2000) (unpub), *aff'd*, 55 M.J. 164 (C.A.A.F. 2001) (summary disposition); *United States v. Brown*, ARMY 9801503 (A. Ct. Crim. App. Dec. 11, 2000) (unpub), *aff'd*, 55 M.J. 366 (C.A.A.F. 2001) (summary disposition) (ACCA also considered fact that judge, although "inactive" in state bar, was a member in good standing of "this [the ACCA] Federal bar"). *See also United States v. Corona*, 55 M.J. 247 (C.A.A.F. 2001) (summary disposition).

3. ***Reserve Judges***. Change to MCM.

a. Change to RCM 502; Executive Order removed holdover provision concerning qualifications for military judges.

b. MCM had mandated that military judges be commissioned officers on active duty in the armed forces. The current RCM 502(c) deletes that requirement, enabling reserve military judges to try cases while on active duty, inactive duty training, or inactive duty training and travel.

Issue: Does this mean reservists can try GCM and SPCMs? Generally, no. Only military judges assigned directly to TJAG and TJAG's delegate (Trial Judiciary) may preside at GCMs. AR 27-10, paras. 8-1(c)(2), 8-2(a).

4. ***Detail***. AR 27-10, para. 5-3.

a. Detail is a ministerial function to be exercised by the Chief Trial Judge, U.S. Army Judiciary, or his or her delegate. The order detailing military judge must be in writing, included in the record of trial or announced orally on the record.

b. Detailing in a joint environment. Military judges are normally detailed according to the regulations of the "Secretary concerned." In a joint environment, there is no "Secretary concerned." *See* Captains William H. Walsh and Thomas A. Dukes, Jr., *The Joint Commander as Convening Authority: Analysis of a Test Case*, 46 A.F. L. REV. 195 (1999). Detailing should be agreed upon by convening authority, SJA, and defense. *Id*.

5. ***Appellate Judges***. *United States v. Walker*, 60 M.J. 354 (C.A.A.F. 2004). In a capital case, the CAAF granted the accused's motion for extraordinary relief regarding the composition of judges on his N-MCCA panel. In 1995, the accused's case was assigned to the N-MCCA panel 3. Over the years the composition of panel 3 changed resulting in the presence of only one judge in the spring of 2004. Most N-MCCA judges, to include the Chief Judge, were disqualified in the case. Based on the Chief Judge's disqualification the TJAG under Article 66, UCMJ selected a new Chief Judge to handle the accused's case. Immediately prior to the TJAG's appointment, the original Chief Judge established a new court policy establishing "an order of precedence among judges on the court for the purpose of exercising the responsibility to make panel assignments in a particular case in the event of the absence or recusal of the chief judge." The problem at issue occurred when the substitute Chief Judge appointed by the TJAG retired requiring the appointment of another substitute Chief Judge to proceed over the accused's case. At that time the N-MCCA attempted to use the new policy letter to select a substitute Chief Judge with

objection from the accused. The CAAF held because the N-MCCA did not use the policy to select the first substitute Chief Judge it was not appropriate to use the policy to select the second substitute Chief Judge and a substitute appointment by the TJAG was necessary.

6. *United States v. Lane,* 64 M.J. 1 (C.A.A.F. 2006). A Member of Congress may not serve as an appellate judge for a service court because of the Ineligibility and Incompatibility Clauses of the United States Constitution. The CAAF reasoned that no Person holding any office under the United States [i.e., a service court judicial position] should simultaneously serve as a Member of either House during his Continuance in Office. In the case, Senator Lindsey Graham, a reserve military judge on the AFCCA, was challenged.

7. ***Tenure/Fixed Term and Appointment***.

a. Settled issue regarding appointment of civilians to Coast Guard Court of Criminal Appeals. *Edmond v. United States*, 520 U.S. 651 (1997), *aff'g United States v. Ryder*, 44 M.J. 9 (C.A.A.F. 1996) (holding that civilian judges on Coast Guard Court of Criminal Appeals are inferior officers and do not require additional presidential appointment; therefore, the Congressional delegation of appointment authority to Secretary of Transportation to appoint judges is consistent with Appointments Clause. *See also United States v. Graf*, 35 M.J. 450 (C.M.A. 1992); *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1993), *aff'd*, 510 U.S. 163 (1994). *United States v. Grindstaff*, 45 M.J. 634 (N-M. Ct. Crim. App. 1997) (judges of courts of criminal appeals, military judges, and convening authorities are not principal officers under Appointments Clause and do not require a second appointment).

b. *United States v. Paulk*, 66 M.J. 641 (A.F. Ct. Crim. App. 2008). Accused, an Air Force officer, pled guilty to several offenses and was sentenced to confinement for 30 days and a dismissal. On appeal, the defense argued that the Equal Protection component of the Fifth Amendment's Due Process Clause was violated because the military judge and the appellate judges serve without a fixed term of office, while those in the Army and Coast Guard judiciary enjoy such protection by regulation. "Essentially, the appellant is saying that either all or none of the services should have fixed terms, but the mixed bag currently existing violates constitutional imperatives of equal protection." The court rejected the defense argument.

B. **"PRESENCE" REQUIRED**. *United States v. Reynolds*, 44 M.J. 726 (A. Ct. Crim. App. 1996), *aff'd*, 49 M.J. 260 (C.A.A.F. 1998). The physical absence of the military judge at a pretrial proceeding does not deprive an accused of the structural due process protections created by Articles 26 and 39, UCMJ, and RCM 803, 804, and 805. The military judge held arraignment proceedings by speakerphone. The military judge was at Fort Stewart while the accused, DC and TC were in a courtroom at Fort Jackson. Military judge advised the accused of all rights and the accused consented to the speakerphone procedure. The military judge was not "present" but the accused's due process rights were not violated. The speakerphone procedure lasted for just twelve minutes of a seven hour trial and the judge was physically present for the remainder of the trial. Note, RCM 804(b) has since been amended to allow for "the use of audiovisual technology" for Article 39(a) sessions, subject to authorization by the applicable Service Secretary.

C. **DISQUALIFICATION (RECUSAL) – IN GENERAL**. Under R.C.M. 902(a), "a military judge shall disqualify himself or herself in a proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M. 902(e) allows parties to waive any ground for challenge predicated on this subsection.

1. ***Legal standard for recusal***. The Discussion to R.C.M. 902(d)(1) directs a military judge to "broadly construe grounds for challenge" but not to "step down from a case unnecessarily." On appeal, a military judge's decision regarding recusal will be reviewed for an abuse of discretion.

2. ***Non-waivable grounds for recusal***. Under RCM 902(b), five non-waivable (and rare) grounds are listed, directing that a military judge should be disqualified if he or she: (1) has a personal bias or prejudice about a party or personal knowledge of "disputed" facts in the case; (2) has acted as counsel, investigating officer legal officer, SJA, or convening authority for any of the offenses; (3) has been or will be a witness in the case, was the accuser, forwarded charges with recommendations, or expressed opinion about the accused's guilt; (4) is not qualified under RCM 502(c) or not detailed under RCM 503(b); or (5) is personally or has a family member who is a party to the proceeding, has a financial or other interest in the outcome of the proceeding, or likely to be a "material" witness.

3. ***Appellate review* – Liljeberg *factors***. On appeal, courts apply the three factors from *Liljeberg v. Health Servs. Acquisition Corp*., 486 U.S. 847 (1988), to determine if reversal is warranted when a military judge should have been recused: (1) risk of injustice to the parties in the case, (2) risk that the denial of relief will result in injustice in other cases, and (3) the risk of undermining public confidence in the judicial process.

D. **DISQUALIFICATION -- MECHANICS**.

1. ***Personal Attack?*** *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006). Trial counsel requested military judge's recusal based mainly on an alleged inappropriate professional and social relationship with the accused's civilian defense counsel (CDC). Military judge denied the Government's recusal motion and defense filed a UCI motion. During testimony on the UCI motion, the SJA alluded that the military judge lied regarding her relationship with the CDC and characterized "the [MJ] and [CDC] being seen leaving a theater together as a 'date.'" Without ruling on the UCI motion, military judge recused herself finding that there was no basis for recusal in fact or appearance but she was unable to remain impartial "following the Government's attack on her character." Another military judge was detailed who sua sponte recused himself because "he was so shocked and appalled by the unprofessional conduct of [the TC] and [the SJA] that he was not convinced he could remain objective." This required detailing two additional military judges to conduct various proceedings which eventually lead to a guilty plea by the accused. On appeal, the N-MCCA held that the actions of the TC and SJA were unprofessional and constituted unlawful command influence but that their actions did not prejudice the accused's court-martial which was tried by two impartial military judges. The CAAF, however, ruled "since the appearance of unlawful influence was created by the Government, achieving its goal of removing [the MJ] without sanction, a rehearing before any [judge] other than [the detailed MJ] would simply perpetuate this perception of unfairness." Findings and sentence set aside and charges dismissed with prejudice.

2. ***Financial Interest?*** *United States v. Reed*, 55 M.J. 719 (A. Ct. Crim. App. 2001). The accused pled guilty to conspiracy to commit larceny and to willfully and wrongfully damaging nonmilitary property in a scheme to defraud USAA automobile insurance company. During sentencing, a USAA claims handler talked about fraudulent claims and their effect on the company's policyholder members. The military judge (himself a policyholder member) immediately disclosed his affiliation with USAA and stated this would not affect his sentencing decision. The military judge allowed the defense an opportunity to voir dire, and the DC exercised it. The military judge also offered the defense the opportunity to challenge him for cause, but the defendant declined. The court, after *sua sponte* disclosing all judges of the ACCA are also policy holders of USAA, held

there was nothing improper or erroneous in the judge's failure to disclose his policy holder status until a potential ground for his disqualification unfolded. Further, it found the military judge's financial interests were so remote and insubstantial as to be nonexistent. *See also* RCM 902(b)(5)(B) (non-waivable basis for recusal if military judge has financial interest that could be "substantially affected" by outcome of case).

3. ***Potential disqualification based on background***. *United States v. Robbins*, 48 M.J. 745 (A.F. Ct. Crim. App. 1998). Military judge who was the victim of spousal abuse 13 years ago before presiding at a trial of an accused charged with battery of his pregnant wife (and intentionally inflicting grievous bodily harm on his wife and involuntary manslaughter by unlawfully causing termination of his wife's pregnancy) did not abuse her discretion in failing to recuse herself. The Air Force court directs military judges to apply a totality of the circumstances type test to resolve recusal matters involving military judges who are victims of the type of offense with which an accused is charged. The court emphasizes that our "national experience" supports a preference for "judges with real-life experiences."

4. ***Military judge and accused members of same chain of command***. *United States v. Norfleet*, 53 M.J. 262 (C.A.A.F. 2000). Presence of military judge's superiors in SPCMCA chain of command did not require military judge's recusal under RCM 902. Accused was an Air Force paralegal, assigned to AF Legal Services Agency. Commander, AFLSA, served as director of Air Force judiciary and endorser on military judge's OER. Commander of AFLSA forwarded case (without recommendation) to Commander, 11th Wing (the SPMCA), for disposition. CAAF held that this did not constitute a *per se* basis for disqualification. In light of military judge's superiors taking themselves out of the decision making process, the full disclosure by the military judge, and opportunity provided to defense to voir dire the military judge, the accused received a fair trial by an impartial judge.

E. **MILITARY JUDGE DISQUALIFICATION – JUDICIAL EXPOSURE**.

1. ***General rule***. *United States v. Soriano*, 20 M.J. 337 (C.M.A. 1985). If the military judge is accuser, witness for prosecution, or has acted as investigating officer or counsel, disqualification of military judge is automatic. But military judge need not recuse himself solely on basis of prior judicial exposure to the accused. *See also United States v. Proctor*, 34 M.J. 549 (A.F.C.M.R. 1992).

2. ***Prior judicial rulings***. *Liteky v. United States*, 510 U.S. 540 (1994). Supreme Court (interpreting 28 U.S.C. § 455(b)(1)) indicates that prior judicial rulings against a moving party almost never constitute a basis for a bias or partiality recusal motion. Recusal not required except when prior rulings or admonishments evidence deep-seated favoritism or antagonism as would make a fair judgment impossible. *Cited in United States v. Loving*, 41 M.J. 213 (C.A.A.F. 1994).

3. ***Contact with SJA/DSJA***. Military judges should not communicate with the SJA office about pending cases. In *United States v. Greatting*, 66 M.J. 226 (C.A.A.F. 2008), the military judge presided over three companion cases before hearing the present case. The accused's defense counsel questioned the military judge about the other cases and the judge admitted to having ex parte communications with "the staff judge advocate and probably his deputy" about the companion cases. Specifically, the military judge remembered saying that, for one co-accused, Government "sold the case too low given his culpability." For the other two cases, he "questioned the appropriateness of their being at a special court-martial." Based on the military judge's communications with the SJA and "probably his deputy," trial defense counsel made a motion for the judge to recuse himself under RCM 902(a) for implied bias. The military judge denied the request. In reversing, the CAAF noted, "[T]he ex parte discussion that took place between the military judge

and the SJA prior to Greatting's court-martial and while clemency matters and appeals in the companion cases were pending would lead a reasonable person to question the military judge's impartiality."

a. The military judge provided "case-specific criticism" to the SJA (and "probably his deputy") about companion cases, knowing that the accused's case was still pending. The court noted the SJA was "the very individual responsible for advising the convening authority," and the military judge made ex parte comments while clemency matters in the other cases were pending and, likely, before the accused's pretrial agreement had been finalized.

b. The military judge also commented on the accused's level of culpability as one of the "two staff NCOs." By contrast, the military judge "questioned" (his word) whether the two junior Marines should have been sent to a special court-martial at all.

4. ***Companion cases / implied bias***. As a general rule, a military judge is not per se disqualified from presiding over companion cases. In *United States v. McIlwain*, 66 M.J. 312 (C.A.A.F. 2008), before the accused made forum election, the military judge stated on the record that she had presided over two companion cases (one a guilty plea and one a mixed plea). In the course of those companion cases, the military judge conducted providence inquiries and heard evidence that implicated the accused. The military judge advised defense counsel: "[I]f your client desires to go with a judge alone, then I would not sit; I would recuse myself. If your client decides to go with a panel of either all officers or officers and enlisted members, then I'm comfortable that I will be able to objectively instruct the members, rule on objections, and that sort of thing, because my role is different." The accused elected trial by member and challenged the military judge. In response, the military judge noted she had made decisions favorable to the accused regarding witness credibility in the companion cases, decisions that "would suggest to an impartial person looking in that I can't be impartial in this case" if serving as the fact finder; however, the military judge reiterated that she would be comfortable presiding over a members case. The CAAF held the military judge abused her discretion in refusing the recusal request and set aside the findings and sentence. on the military judge's concession that an "impartial person" would have questioned her impartiality, the CAAF held the military judge abused her discretion in denying the recusal motion.

a. First, the court noted it was not relevant that the military judge was not ultimately the factfinder. "It is well-settled in military law that the military judge is more than a mere referee." "Every time she ruled on evidence, asked questions, responded to member questions, or determined instructions, the military judge exercised her discretion, a discretion that she admitted an impartial person would conclude had not been exercised in an impartial manner."

b. Second, in fashioning a remedy, the court noted that "not every judicial disqualification error requires reversal" and then applied Supreme Court's three-part test from *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988). The *Liljeberg* test considers (1) the risk of injustice to the parties; (2) the risk that the denial of relief will produce injustice in other cases; and (3) the risk of undermining public confidence in the judicial process. The court focused on the first and third factors, noting that the risk of injustice to the parties is "high" when a military judge states a bias on the record yet continues to preside over the case and that the military judge's refusal to recusal herself likely had a "corrosive impact on public confidence in the military justice system."

c. The CAAF noted that sitting on companion cases, without more, does not mandate recusal (citing *United States v. Oakley*, 33 M.J. 27, 34 (C.M.A. 1991)).

d. *See also United States v. Nave*, ACM 36851, 2008 WL 5192217 (A.F. Ct. Crim. App. Dec. 10, 2008) (unpublished) (military judge not required to recuse after presiding over three companion cases, even though two of those co-accused were set to testify in this case and the military judge had ruled in a companion case about an entrapment defense the accused planned on raising).

5. ***Repeated sua sponte (and pro-Government) decisions***. *United States v. Johnston*, 63 M.J. 666 (A.F. Ct. Crim. App. 2006). Military judge "abandoned his impartial role in th[e] case solely on the basis of his actions and rulings during the trial." The court noted the ruling was unusual because a specific ground for dismissal did not arise under RCM 902 but that after applying an objective test, based on the standpoint of a person watching the proceedings, the judge's rulings created the appearance of partiality in favor of the Government. The military judge twice sua sponte reversed a previous judge's ruling and admitted evidence regarding statements made by the accused's wife that were strongly pro-Government. The court stated that although no actual bias by the military judge was noted, the judge abused his discretion by not disqualifying himself under RCM 902. Findings and sentence reversed.

6. *United States v. Rivers*, 49 M.J. 434 (C.A.A.F. 1998). The military judge did not abuse his discretion in denying defense motion that he recuse himself based on the fact that he had ruled on a command influence issue similar to the accused's in a companion case, and that he had learned that accused had offered to plead guilty. The military judge ruled in the accused's favor on the UCI issue, and no incriminating evidence or admissions from the accused relating to the offer to plead guilty were disclosed during trial on the merits. There was no reasonable doubt about the fairness of accused's trial.

7. *United States v. Howard*, 50 M.J. 469 (C.A.A.F. 1999). No prejudicial error occurred where military judge presided at prior case involving accused (who was tried twice, first for assault, then for AWOL). Military judge noted prior adjudication on the record and accused maintained he wished to proceed with the present judge. During the sentencing phase in the AWOL case, the defense introduced the accused's version of the events underlying the prior conviction; military judge interrupted defense counsel and stated that, although he had awarded the accused "an unusually light sentence for a fractured jaw," he found him guilty during that prior trial because he had kicked the victim in the head while he was on the ground. CAAF held that there was no error.

8. ***Busted providence inquiry***.

a. *United States v. Bray*, 49 M.J. 300 (C.A.A.F. 1998). The military judge is not required, *per se*, to recuse himself from further proceedings in a trial when he has conducted a providence inquiry, reviewed a stipulation of fact, and entered findings of guilty to initial pleas. Here, accused withdrew plea based on possible defense that came out during sentencing. Later, he obtained a new pretrial agreement, and returned to plead guilty. Military judge could preside over second case unless he had formed an "intractable opinion as to the accused's guilt," and a reasonable person who knew the facts of the case would question the appearance of impurity and have doubts as to the military judge's impartiality.

b. *United States v. Winter*, 35 M.J. 93 (C.M.A. 1992). Military judge is not *per se* disqualified after conducting a providence inquiry and then rejecting accused's plea of guilty to a lesser included offense. Counsel and judges should determine whether the judge should ask the accused if accused wants to continue to be tried by judge alone when the judge has rejected the plea. *But see United States v. Rhule*, 53 M.J. 647 (A. Ct. Crim. App. 2000) (stating that the Army's preference is for the military judge to recuse himself after the withdrawal of a guilty plea).

c. *United States v. Dodge*, 59 M.J. 821 (A.F. Ct. Crim. App. 2004), *rev'd on other grounds*, 60 M.J. 368 (C.A.A.F. 2004). Accused completed the entire providence inquiry but prior to the announcement of findings the parties disagreed over the maximum punishment. The accused then requested to withdraw his plea and proceed to trial, which request the military judge granted, and the case was adjourned for sixty days. During forum selection for the now contested proceeding, the accused claimed his rights to forum were circumscribed by the continued presence of the military judge who heard his providence inquiry and that he had no practical option but to select a trial by members. Military judge allowed the accused to voir dire her regarding her potential bias and denied his challenge noting "she had not accepted [his] plea, had not formed an opinion concerning his guilt or innocence and everything she knew about the case was learned in her judicial capacity." Subsequently, accused pled guilty to the same specifications (except for one) that he attempted to plead guilty to in the first hearing. AFCCA held the accused's forum rights were not impinged citing RCM 903(c)(2)(B) and stated "there is no concomitant absolute right" to have a case tried by military judge alone. Further the court held the military judge is not disqualified "based simply on her participation in the first providence inquiry." The court declined to adopt the Army's approach in this situation stating "We are aware of the [ACCA's] approach . . . expressing a preference for recusal after withdrawal of guilty pleas" (citing *Rhule*) but "this Court rejected that approach long ago."

9. ***Knowledge of witnesses***.

a. ***Exposure to witnesses***. *United States v. Davis*, 27 M.J. 543 (C.M.A. 1988) (military judge must use special caution in cases where he has heard a witness' testimony against a co-actor at a prior trial); *United States v. Oakley*, 33 M.J. 27 (C.M.A. 1991) (exposure to motions and pleas at prior trial of co-actors did not require recusal of military judge in trial before members).

b. ***Relationship to witness***. *United States v. Wright*, 52 M.J. 136 (C.A.A.F. 1999). Military judge announced at trial that he had a prior "close" association with NCIS agent stemming from a duty station at which the military judge, as a prosecutor, worked closely with the agent on several important criminal cases. Military judge said he felt the NCIS agent was an honest and trustworthy person and a very competent NCIS agent, but that the witness would not have a "leg up" over the credibility of other witnesses, particularly the accused. The judge said he gave all members of the Marine Corps a certain "credence." CAAF noted that military judges have broad experiences and a wide array of backgrounds that are likely to develop ties with other attorneys, law firms, and agencies. Here, military judge's full disclosure, sensitivity to public perceptions, and sound analysis objectively supported his decision not to recuse himself; these factors contribute to a perception of fairness.

c. *United States v. Phillipson*, 30 M.J. 1019 (A.F.C.M.R. 1990). Inadvertent exposure to sentence limitation does not require judge to recuse himself.

d. Consultations. *United States v. Baker*, 34 M.J. 559 (A.F.C.M.R. 1992). Military judge's consultations with another judge concerning issue in a case is not improper.

e. Further actions void. *United States v. Sherrod*, 26 M.J. 30 (C.M.A. 1988) (holding when a judge is disqualified, all further actions are void). *See also United States v. Howard*, 33 M.J. 596 (A.C.M.R. 1991) (holding when military judge becomes a witness for the prosecution, he is disqualified and all further

actions, as in *Sherrod*, are void). *United States v. Wiggers*, 25 M.J. 587 (A.C.M.R. 1987) (holding when military judge recognized that his prior determination of witness' lack of credibility disqualified him from acting as fact finder, judge should have recused himself rather than direct a trial with members). *But see United States v. Burris*, 25 M.J. 846 (A.F.C.M.R. 1988) (holding presiding over earlier trial involving same urinalysis inspection did not disqualify trial judge). *See also United States v. Cornett*, 47 M.J. 128 (C.A.A.F. 1997).

f. ***Accused's waiver of disqualification under RCM 902(e)***. *United States v. Keyes*, 33 M.J. 567 (N.M.C.M.R. 1991). Military judge previously sat in a different case involving the accused. Defense had no challenge under RCM 902(b) and waived any challenge to the judge that might exist under RCM 902(a). Military judge properly recognized a *sua sponte* obligation to disqualify himself if warranted even with a defense waiver under 902(e). The military judge, however, found no basis for disqualification. Upheld by NMCMR.

F. **MILITARY JUDGE DISQUALIFICATION – EX PARTE COMMUNICATIONS & CONDUCT OUTSIDE OF COURT**.

1. ***Conduct outside of court***. *United States v. Quintanilla*, 56 M.J. 37 (C.A.A.F. 2001). The military judge became involved in verbal out-of-court confrontations with a civilian witness that included profanity and physical contact. The military judge also engaged in an *ex parte* discussion with the trial counsel on how to question this civilian witness about the scuffle. The CAAF held the military judge's failure to fully disclose the facts on the record deprived the parties of the ability to effectively evaluate the issue of judicial bias. As such, the court remanded the case for a *DuBay* hearing.

2. ***Contact with trial counsel***. *United States v. Butcher*, 56 M.J. 87 (C.A.A.F. 2001). The military judge, who was presiding over a contested trial, went to a party at the trial counsel's house and played tennis with the trial counsel. The CAAF reviewed whether the military judge abused his discretion by denying a defense request that the judge recuse himself. The CAAF advised that under the circumstances the military judge should have recused himself. However, the Court held there was no need to reverse the case, because there was no need to send a message to the field, the social interaction took place after evidence and instructions on the merits, and public confidence was not in danger (the social contact was not extensive or intimate and came late in trial).

3. ***Assisting trial counsel ex parte***. *United States v. Cornett*, 47 M.J. 128 (C.A.A.F. 1997). Military judge did not abuse discretion when he denied a defense recusal request based on an *ex parte* conversation between military judge trial counsel, wherein the judge stated, "Well, why would you need that evidence in aggravation, because I've never seen so many drug offenses? Why don't you consider holding that evidence in rebuttal and presenting it, if necessary, in rebuttal?" Military judge invited voir dire concerning any predisposition toward sentence; accused selected trial by judge alone pursuant to voluntary pretrial agreement term; counsel and accused were given a recess to confer about the challenge after the accused made his forum selection; and the military judge made full disclosure on the record and disclaimed any impact on him. RCM 902(a) requirements regarding recusal and disqualification were fully met.

4. ***Comments about accused outside of court***. *United States v. Miller*, 48 M.J. 790 (N-M. Ct. Crim. App. 1998). Assuming *arguendo* that military judge stated, upon hearing that the accused suffered a drug overdose and was medically evacuated to a hospital, that the accused was a "cocaine addict and a manipulator of the system" and that "perhaps the accused would die," such comments did not establish a personal bias or prejudice on part of the judge. Rather, the remarks indicated a high level of impatience and frustration with an unplanned delay in a scheduled court-martial proceeding. The test applied by the Navy

court was whether the remarks reasonably suggests a "deep-seated and unequivocal antagonism" towards the accused as to make fair judgment impossible. *See Liteky v. United States*, 510 U.S. 540 (1994).

G. **DISQUALIFICATION – CONDUCT OF TRIAL & JUDICIAL ADVOCACY**.

1. ***Impartial and objective stance***. *United States v. Hardy*, 30 M.J. 757 (A.C.M.R. 1990). Military judge erred in *sua sponte* initiating discussion of appropriateness of defense counsel's sentencing argument and allowing trial counsel to introduce additional rebuttal.

2. ***Praise***. *United States v. Carper*, 45 C.M.R. 809 (N.M.C.R. 1972). Improper for military judge to praise Government witness for his testimony.

3. ***Examination***. Assess whether the judge's questions assist either side of the case. The number of questions is not a significant factor, but the tenor of those questions will be. *United States v. Johnson*, 36 M.J. 866 (A.C.M.R. 1993).

a. *United States v. Foster*, 64 M.J. 331 (C.A.A.F. 2007). The accused, convicted of committing an indecent act against his daughter, argued on appeal that the military judge failed to remain impartial in his conduct toward their expert witness by: (1) limiting their expert's testimony, (2) questioning their expert, (3) failing to instruct the members that their expert was an expert and inaccurately summarizing her testimony, and (4) making inappropriate comments about their expert outside the panel's presence. The CAAF stated that a strong presumption exists that a military judge's trial conduct is impartial and "the test is whether, taken as a whole in the context of [the] trial, [the] court-martial's legality, fairness, and impartiality were put into doubt by the military judge's actions." The court held that the military judge's conduct, especially in relation to the inappropriate comments, departed from judicial propriety but "a reasonable observer would conclude that in the context of the whole trial, his actions did not compromise the court-martial's legality, fairness, or impartiality."

b. *United States v. Acosta*, 49 M.J. 14 (C.A.A.F. 1998). Accused was convicted of wrongful distribution and use of methamphetamine. Defense case was based on entrapment. Defense cross examination resulted in Government witness stating that he put undue pressure on the accused to purchase drugs. When trial counsel failed to elicit the entrapment-negating information, military judge asked the witness 89 questions about the accused's prior uncharged misconduct relating to a drug transaction that predated the drug offenses that were the basis of the court-martial. Held: no error. The law provides the military judge with wide latitude in asking questions of witnesses. The military judge has a right, equal to counsel's, to obtain evidence. Here, the information was clearly rebuttal evidence that was admissible once the defense raised the entrapment defense.

c. ***MRE 412 issues***. *United States v. Watt*, 50 M.J. 102 (C.A.A.F. 1999). The military judge abandoned his impartial role when he ruled the accused could not respond to a question from the members (he had been asked "What reason did you have to believe she would have sex with you?" His answer would have been that the complainant had a "reputation for being easy."). The military judge then repeatedly asked the accused the question, and allowed TC to badger him with similar questions. Accused repeatedly stated that he could not answer the question asked. Counsel then implied in closing that accused knew he had no reason to believe complainant would not have sex with him, as opposed to a simply inadmissible one. Accused "was left to defend himself without assistance" from defense or military judge.

d. ***Intemperate comments from the bench.*** *United States v. Kirk*, No. Misc. 20100443 (A. Ct. Crim. App. July 28, 2010) (unpublished). The Government initially filed an Article 62 appeal, challenging the military judge's decision to suppress the accused's statements based on a violation of Article 31(b), UCMJ. The ACCA reversed the military judge's ruling on the suppression issue and then (on its own accord) commented on the possible recusal of the military judge from further proceedings in the case. In ruling on the motion to suppress, the military judge noted the Government could appeal his decision but added, "I do not expect to get overturned on this issue." The military judge continued:

> [I]f this case does come, you know, back three or four months from now I will be the military judge in the case . . . that is going to hear the facts in the future including the [first sergeant]'s testimony if they believe the statements should be admissible. But if you want to appeal you are welcome to. Is that your final decision, Government? I just want to make sure.

The ACCA found that these "gratuitous comments" called into question the perception of fairness and impartiality of the military judge. The court noted that R.C.M. 902(a) directs recusal when a military judge's "impartiality might ***reasonably*** be questioned" (emphasis added by the court). While ACCA did not actually determine the military judge should be recused, the court opined "his comments suggest he prejudged the Government's evidence, and intimated the futility of appealing his decision in light of his anticipated role as ultimate fact finder." The court concluded: "We find his comments intemperate, injudicious, and inconsistent with the impartial role he is to play in the court-martial, creating at least the perception of unfairness to the parties, potentially undermining public confidence in his judicial role."

e. *United States v. Todd*, No. 200400513, 2007 CCA LEXIS 237 (N-M. Ct. Crim. App. Jul. 9, 2007) (unpublished). During the trial, the military judge made several "injudicious" comments to witnesses, counsel, and even potential panel members. The military judge even referred to the convening authority's conduct in the case as "imbecilic." The N-MCCA characterized his statements as "needless comments," "incessant sarcasm," and "pompous condescension." The N-MCCA cautioned that military judges should be "patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others . . . [and the court] will not tolerate incivility by a military judge toward any trial participant, and that includes counsel." However, the court concluded that "[w]hile we do not condone that inappropriate comments made by the military judge, in the context of the entire trial, the legality, fairness, and impartiality of the court-martial were not put in doubt." Affirmed.

f. *United States v. Sanford*, No. 200500993, 2006 CCA LEXIS 303 (N-M. Ct. Crim. App. Nov. 6, 2006) (unpublished). During a motion to suppress incriminating statements made to "Capt M," military judge did not have enough evidence to rule and notified the parties that he wanted to call three witnesses who had also given statements to Capt M in order to discern the procedures Capt M used to interview witnesses. The military judge questioned the witnesses and offered counsel an opportunity to question them. On appeal, the defense claimed that the military judge "abandon[ed] his neutral role in resolving the . . . motion to suppress." The court noted that under Article 46, UCMJ and MRE 614, the military judge is permitted to call or recall witnesses and has wide latitude in questioning witnesses. As such, the military judge did not abandon his neutral role, as his efforts in calling the witnesses were an attempt to clarify the facts pertaining to the defense motion. The court concluded that "a reasonable person

observing the . . . court-martial would not doubt its fairness or the impartiality of the military judge." *See also United States v. Johnson*, No. 36433, 2007 CCA LEXIS 127 (A.F. Ct. Crim. App. Mar. 29, 2007) (unpublished) (the military judge did not abandon his impartial role when he questioned a defense witness (also a co-actor) about what sentence the co-actor received in his own trial when the defense did not object and the answer favored the defense).

g. *United States v. Hernandez*, No. 200501599, 2007 CCA LEXIS 183 (N-M. Ct. Crim. App. Jun. 12, 2007) (unpublished) (the military judge did not become a "partisan advocate when he 'ask[ed] clearly incredulous impeaching questions' of the appellant's mother who was a defense witness" because the defense did not object or move to disqualify the military judge and "a reasonable person . . . would not have doubted the military judge's impartiality or the legality or fairness of the trial.").

h. *United States v. Paaluhi*, 50 M.J. 782 (N-M. Ct. Crim. App. 1999), *rev'd on other grounds*, 54 M.J. 181 (C.A.A.F. 2000). Military judge did not abandon his impartial role despite accused's claims that the judge detached role and became a partisan advocate when his questions laid the foundation for evidence to be admitted against the accused and when he instructed the accused to assist the Government to procure the presence of the prosecutrix.

i. *United States v. George*, 40 M.J. 540 (A.C.M.R. 1994). Military judge improperly limited defense voir dire and cross-examination, extensively questioned defense witnesses, limited number of defense witnesses, assisted TC in laying evidentiary foundations, and limited DC's sentencing argument.

j. *United States v. Morgan*, 22 M.J. 959 (C.G.C.M.R. 1986). Military judge overstepped bounds of impartiality in cross-examining accused to obtain admission of knife, which trial counsel had been unsuccessful in obtaining admission. *But see United States v. Zaccheus*, 31 M.J. 766 (A.C.M.R. 1990) (holding military judge's assistance in laying foundation for the admission of evidence was not error; actions did not make the judge a partisan advocate.).

k. ***Outer limits?*** *United States v. Bouie*, 18 M.J. 529 (A.F.C.M.R. 1984) (no error on facts of case for military judge to ask 370 questions of accused).

4. ***Assistance to a party***.

a. *United States v. Felton*, 31 M.J. 526 (A.C.M.R. 1990). Military judge should not have advised trial counsel on the order of challenges during voir dire.

b. *United States v. Hurst*, No. 200401383, 2007 CCA LEXIS 56 (N-M. Ct. Crim. App. Feb. 8, 2007) (unpublished) (holding that military judge did not abandon his impartial role by alerting the Government that they had failed to introduce evidence that two orders had been properly published, or by allowing Government to reopen the case over defense objection when the deficiency was a mere technical one and an earlier evidentiary ruling may have created confusion in the status of the evidence the military judge would consider).

c. ***The outer limits?*** *United States v. Cooper*, 51 M.J. 247 (C.A.A.F. 1999). Military judge said in front of members that defense counsel had "thank[ed] [him] for helping perfect the government's case" through questions of a Government witness. Military judge also commented disparagingly on the poor quality of the defense counsel's evidence, a videotape made by the accused's wife. These comments did not plainly cause him to lose his impartiality or the appearance of his impartiality. Because the defense did not object to the comments, CAAF

applied a plain error analysis, and found the judge's questions (which led to the "perfect the government's case" comment) were not improper. Further the military judge explained to the members his neutral intent in asking questions and instructed the members to not construe his questions as favoring the Government. CAAF found the military judge's comments about his irritation with defense was inappropriate before the members, though not sufficient to divest him of the appearance of impartiality because his comments were couched within unequivocal instructions protecting the accused from prejudice. Finally, his comments upon the quality of defense evidence were not impermissible, because just as RCM 920(e)(7) Discussion permits the military judge to comment on the evidence during instructions, so should the military judge be allowed to comment on evidence during trial. While the military judge's comments "may have been improper," the trial's legality, fairness and impartiality were not put into doubt.

5. ***Sentencing***.

a. *United States v. Green*, 64 M.J. 289 (C.A.A.F. 2007). Prior to announcing the sentence, military judge provided the accused an explanation for the adjudged sentence. He referenced the Bible and other religious principles. On appeal, accused claimed that the military judge demonstrated an impermissible bias by interjecting his own religious views into the sentencing process. Claims of judicial bias are evaluated to determine, "in view of the sentencing proceeding as a whole, whether a reasonable person would doubt the court-martial's legality, fairness, and impartiality." The court found that if there was any error, it was harmless based on several factors. First, the sentence did not "reflect prejudicial consideration of extraneous factors." Second, the defense first introduced the subject of religion during sentencing. Third, the military judge expressly stated that "he would not consider the [accused's] fealty to his religious tenets as a sentencing factor." Fourth, the defense did not object to the military judge's remarks. Lastly, the remarks focused primarily on proper sentencing principles and only incidentally referenced religion. Therefore, military judge's remarks did not reflect any bias in this case.

b. *United States v. Burton*, 52 M.J. 223 (C.A.A.F. 2000). None of the military judge's questions reflected an inflexible predisposition to impose a bad-conduct discharge. The military judge imposed only 30 days' confinement, well below the jurisdictional limit of the court-martial and the maximum punishment for the offense.

c. *United States v. Figura*, 44 M.J. 308 (C.A.A.F. 1996). Military judge did not become de facto witness for prosecution when during sentencing he gave members summary of accused statements during providence inquiry. Defense and Government agreed to have military judge give summary, rather than introduce evidence through transcript or witness testimony.

d. ***Racial bias or prejudice***. *United States v. Ettinger*, 36 M.J. 1171 (N.M.C.M.R. 1993). Although remarks by military judge may demonstrate prejudice sufficient to constitute bias, accused must be a member of that class in order for comments to be disqualifying.

e. *United States v. Thompson*, 54 M.J. 26 (C.A.A.F. 2000). Military judge did not depart from his impartial role despite issuing numerous adverse rulings against defense, taking over questioning from counsel, shutting off presentations, expressions of impatience and exasperation with counsel, and the making of condescending or berating comments about counsels' performance. Defense counsel repeatedly alluded to being "ineffective" or being forced into providing

ineffective representation. CDC requested that the military judge recuse himself under RCM 902(a), 902(b)(1), 905. Military defense counsel became tearful and complained she would think twice before raising an issue. Military judge countered "you need to investigate…a new line of work." While court noted much of the blame breakdown between parties "stems from the military judge's inappropriate and intemperate remarks to counsel on the record," CAAF found military judge's actions were not so unreasonable that he abandoned his impartial role. Nevertheless, case returned to the Court of Criminal Appeals to order affidavits from both civilian and military defense counsel or to order a *DuBay* hearing on issue of ineffective assistance of counsel.

H. **DISQUALIFICATION – "BRIDGING THE GAP" SESSIONS**.

1. ***Background***. The US Army Trial Judiciary Standard Operating Procedure encourages military judges to conduct a "post-trial critique" one-on-one with counsel after trial to improve trial skills. This practice can be problematic and judges should limit such discussions to trial advocacy tips as opposed to substantive matters. *See United States v. Copening*, 32 M.J. 512 (A.C.M.R. 1990) (suggesting "Bridging the Gap" may need reevaluation in light of issues arising concerning discussions by trial judges of legal issues that may come before them in future cases; *ex parte* discussions with counsel about the conduct of the trial; and discussions with counsel before the trial is final about rulings in the case).

2. ***Improper sentencing considerations***. *United States v. McNutt*, 62 M.J. 16 (C.A.A.F. 2005). Military judge revealed during the "Bridging the Gap" session that he framed accused's sentence to take into account good time credit. Military judge sentenced the accused to seventy days with the idea that the accused would receive ten days good time credit and would serve sixty days of confinement. CAAF reversed the sentence, finding the military judge improperly considered the collateral administrative effect of good time credit. "[S]entence determinations should be based on the facts before the military judge and not on the possibility that [the accused] may serve less time than he was sentenced to based on the Army's policy."

3. ***Improper comments about the accused***. *United States v. Hayes*, NMCCA 200600910, 2010 WL 4249518 (N-M. Ct. Crim. App. Oct. 28, 2010). Male accused pled guilty to indecent acts with another male in the barracks. Military judge made comments during a post-trial "bridging the gap" session with counsel that suggested a bias against homosexual conduct. In a unanimous decision, the N-MCCA found the military judge's comments created an appearance of bias that mandated disqualification; the court affirmed the findings and set aside the accused's sentence. Based on a *DuBay* hearing convened, the court found the following about the military judge's actions at trial and during "Bridging the Gap":

a. ***Assisting trial counsel***. The military judge reviewed the stipulation of fact, which read that the sexual contact between the accused and the other male was consensual. The military judge then asked trial counsel if the victim might contradict the stipulation of fact when he testified at sentencing. After a "lengthy" discussion with counsel, military judge told trial counsel that he would not allow the Government to go "beyond" the facts in the stipulation of fact, specifically that the trial counsel could not present evidence that the sexual interaction was non-consensual. Government then withdrew from the stipulation and the defense counsel noted on the record that both of the counsel and the accused had agreed to the stipulation and signed it, and that trial counsel only withdrew after being "prompted" by the military judge. The military judge responded he only noted a

possible conflict and notified the parties. The accused pled guilty and the victim testified during sentencing that he did not consent to their sexual interaction.

b. ***"Bridging the Gap" comments***. During a post-trial "Bridging the Gap" session, the military judge made the following comments relevant to the case: (1) "Marines should not be required to live in the barracks with people like Seaman Hayes."; (2) "[H]omosexuality has no place in our Armed Forces."; (3) There is a rational basis for the "don't ask, don't tell" (DADT) policy and "homosexual acts are incompatible with the service."; (4) Regarding DADT, homosexual conduct presents leadership challenges as males are less cautious than females, so homosexual males have a "continuing opportunity" to take advantage of other males.

c. ***Held***: Relying on R.C.M. 902(a), which requires recusal when the military judge's impartiality "might reasonably be questioned," the court noted the appearance of bias was sufficient to warrant judicial disqualification. Military judge commented about "people like Seaman Hayes" while making other comments that homosexuality is incompatible with "our Armed Forces." The N-MCCA reasoned the judge's use of terms like "our" and "people like" – coupled with his comments about the possible increased rate of sexual assaults if homosexual Sailors and Marines lived in the barracks – would cause a reasonable listener to believe the judge did not properly "compartmentalize" his beliefs when adjudging the sentence. Specifically, comments suggest the military judge believed punishment in this case must include a punitive discharge. "The perception that a military judge has pre-determined a certain punishment for a certain act or crime is, simply, unacceptable."

4. ***Suggestions for military judge***. For military judges who elect to conduct "Bridging the Gap" sessions, consider the following:

a. Never conduct *ex parte*.

b. Avoid giving substantive advice (e.g., "trial counsel, here is how you lay the foundation for that exhibit that I helped you admit;" or "here's how you properly select a panel.").

c. Always bear in mind the trial may not be truly "over." *United States v. Holt*, 46 M.J. 853 (N-M. Ct. Crim. App. 1997), *aff'd*, 52 M.J. 173 (C.A.A.F. 1999) (suggesting that, where trial judge provides post-trial "practice pointers" to counsel prior to the cases being finalized, recusal would be mandated if the case were sent back for some sort of rehearing).

I. **IMPROPER FOR RECUSED JUDGE TO SELECT REPLACEMENT**. *United States v. Roach*, 69 M.J. 17 (C.A.A.F. 2010). The accused's case was originally affirmed by an Air Force Court of Criminal Appeals panel that included the chief judge. The case went to CAAF and was remanded back to the AFCCA. While the initial CAAF review was pending, the AFCCA chief judge commented about the case at two public events. Following a motion by the defense, the chief judge recused himself from the case. The chief judge then sent an e-mail to the executive officer for the Air Force TJAG recommending that a specific judge be appointed to replace the chief judge on the case. The Air Force TJAG appointed this judge, who then convened the panel that considered the remanded case. CAAF vacated the AFCCA decision and remanded for new Article 66 review, finding the chief judge improperly took action in the case after recusal when he recommended his replacement. CAAF noted, "[E]ither a military judge is recused or he is not." Once recused, a judge shall not take further action in a case. If a military judge deviates from this requirement, "no matter how minimally," it "may leave a wider audience to wonder whether the military judge lacks the same rigor when applying the law."

J. **EXPANDED POWERS AND REMEDIAL ACTION**.

1. *United States v. Griffith*, 27 M.J. 42 (C.M.A. 1988). "Consistent with our conclusion … that Congress intended for a military judge to have the power to conduct post-trial proceedings until authentication of the record has taken place, we are convinced that … before authenticating the record of trial … he may take remedial action on behalf of the accused without awaiting an order therefor by an appellate court."

2. *United States v. Scaff*, 29 M.J. 60 (C.M.A. 1989). Article 39(a) empowers judge to convene post-trial session to consider newly discovered evidence and to take remedial action. This empowers the military judge, in proper cases, to set aside findings of guilt and sentence. If the CA disagrees, the only remedy is to direct trial counsel to move for reconsideration or to initiate Government appeal.

3. *United States v. Mahoney*, 36 M.J. 679 (A.F.C.M.R. 1993). Chief Judge for Air Force sixth judiciary circuit did not usurp power by convening a post-trial session to inquire into possible improper command intervention after commander accused into confinement, contrary to order of military judge after court-martial. Chief Judge did not usurp power by reducing accused's sentence by 18 months as remedy for commander's intervention.

4. *United States v. Meghdadi*, 60 M.J. 438 (C.A.A.F. 2005). Military judge denied defense request for a post-trial Article 39(a) based on newly discovered evidence, specifically an audiotape. Accused's conviction centered on distributing cocaine, based on testimony by CID agent and CID informant. Defense argued at trial that CID agent was trying to make several drug cases to advance his career and that the informant lied to obtain a sentencing deal offered by CID. After the accused's trial and during the CID informant's trial, an audiotape surfaced lending credence to the accused's defense theory. CAAF held the military judge abused his discretion by denying the Article 39(a) session which resulted in prejudice to the accused because of the failure "to afford [the accused] a forum in which to make his case." The CAAF stated "the [military judge] misapprehended the purpose of the Article 39(a) session, made factual findings that are not supported by the record, applied an erroneous legal standard, misperceived the evidentiary value of the audiotape, and made no record of any weighing of the new evidence against the evidence at trial, either on the merits or in sentencing."

5. *United States v. Chisholm*, 58 M.J. 733 (A. Ct. Crim. App. 2003), *aff'd*, 59 M.J. 151 (C.A.A.F. 2003). Military judges, as empowered by Congress and the President, have both a duty and a responsibility to take active roles in "directing" the timely and accurate completion of court-martial proceedings. After adjournment, but prior to authentication of the record of trial, military judge must ensure that Government is proceeding with due diligence to complete the record of trial as expeditiously as possible, given the totality of the circumstances of that accused's case. If the military judge determines that the record preparation is proceeding too slowly, he may take remedial action without awaiting an order from the intermediate appellate court. The exact nature of the remedial action is within the sound judgment and broad discretion of the military judge, but could include, among other things: (1) directing a date certain for completion of the record with confinement credit or other progressive sentence relief for each day the record completion is late; (2) ordering the accused's release from confinement until the record of trial is completed and authenticated; or, (3) if all else fails, and the accused has been prejudiced by the delay, setting aside the findings and the sentence with or without prejudice as to a rehearing. Staff judge advocates and convening authorities who disregard such remedial orders do so at their peril.

6. *United States v. Lepage*, 59 M.J. 659 (N-M. Ct. Crim. App. 2003). Military judge committed plain error by admitting record of Article 15 into evidence. He determined that admitting the exhibit was erroneous in a post-trial 39(a) session, and that the erroneously-

admitted exhibit was considered by the court in arriving at a sentence. However, military judge failed to take corrective action during that hearing, and recommended that the convening authority disapprove the Bad-Conduct Discharge; convening authority declined to follow recommendation. Held, "This case should not even be before us for review . . . the military judge had the authority under RCM 1102(b)(2) to take corrective action."

7. *United States v. Pulido*, No. 20011043 (A. Ct. Crim. App. Mar. 19, 2004) (unpub.) Findings and sentence set aside due to lack of properly authenticated or approved findings of guilty. Prior to authenticating the record, the military judge "corrected" her original announced findings (Of all charges and specifications: Guilty) to partially reflect the actual plea received in the case to one charge and its specification. The actual plea received on one Charge was by exceptions and substitutions. The amended findings neglected to reflect an announcement of guilt on a separate charge to which the accused had pled guilty. "Article 53, UCMJ, and RCM 922(a) require that the court-martial announce its findings to the parties promptly, **in an open court**, after they have been determined" (emphasis in original). Because the verdict was ambiguous, there was material prejudice to the accused's substantial rights. Military judge's options included: reviewing tapes to determine whether she announced the reported findings; if record inaccurately reported findings, she should not have authenticated it; returning record of trial to trial counsel for further examination and correction; directing proceedings in revision to correct error, so long as accused suffered no material prejudice.

8. ***Accused's forum selection***. Trial before military judge alone.

a. ***Request***. RCM 903(b)(2). Trial by judge alone may be requested orally or in writing by the accused. *See also United States v. Wright*, 5 M.J. 106 (C.M.A. 1978). Accused may withdraw request for good cause.

(1) ***Doctrine of Substantial Compliance***. *United States v. Mayfield*, 45 M.J. 176 (C.A.A.F. 1996). The absence of a written or oral request for trial by military judge alone did not establish a substantial matter leading to jurisdictional error based on the dialogue at trial, the absence of a defense objection, and accused's post-trial Article 39(a) confirmations of his desire to be tried by judge alone. A post-trial session is permissible to cure jurisdictional errors created by the failure to obtain an accused's request for trial by military judge alone. Conviction affirmed.

(2) *United States v. Turner*, 47 M.J. 348 (C.A.A.F. 1997). A written request for trial by military judge alone, which counsel made and submitted before trial, and then confirmed orally at an Article 39a session with the accused, present substantially complies with Article 16, UCMJ. While the military judge erred in failing to obtain an oral statement of selection of the forum from the accused, the error did not materially prejudice the accused.

(3) *United States v. Seward*, 49 M.J. 369 (C.A.A.F. 1998). An accused's forum request from a previous court-martial that was terminated by mistrial cannot be used to support a forum request at a subsequent court-martial. However, accused suffered no prejudice under Article 59 because his request for trial by military judge alone was apparent from the pretrial agreement (forum selection was a term), and there was a written request for the same even though offered after completion of the sentencing proceedings.

(4) *United States v. Alexander*, 61 M.J. 266 (C.A.A.F. 2005). Military judge advised the accused of his forum selection rights, which accused

requested to defer. During a later proceeding, military judge stated that he was told an enlisted panel would be hearing the case and defense did not object. The accused, however, failed to state in writing or on the record his request for enlisted members in violation of Article 25, UCMJ and RCM 903(b)(1). The CAAF held that the error in the accused failing to personally select forum on the record is a procedural, as opposed to jurisdictional, issue. The court stated "[the] right being addressed and protected in Article 25 is the right of an accused servicemember to select the forum[,] . . . [t]he underlying right is one of forum selection, not the ministerial nature of its recording." The CAAF held that the record reflected that the accused selected court-martial by panel members and the accused failed to show that the error in recording his forum selection resulted in any prejudice.

(5) *United States v. Goodwin*, 60 M.J. 849 (N-M. Ct. Crim. App. 2005). Accused failed to state in writing or orally on the record his request for a judge alone trial as required by Article 16, UCMJ. Military judge failed to advise the accused of his forum rights and the only evidence of his intent existed was a single sentence in the pretrial agreement, to request trial by judge alone (a term the military judge failed to discuss with the accused). N-MCCA held the failure to advise the accused of his forum rights did not substantially comply with Article 16, UCMJ, and found the error was not harmless. Findings and sentence set aside.

(6) *United States v. Follord*, No. 20020350 (A. Ct. Crim. App. Feb. 15, 2005) (unpub). The accused, a CW2, did not make a knowing and voluntary waiver of his statutory right to trial by five officer members because of the following errors: (1) his executed PTA erroneously listed one of his three forum options as a trial by one-third enlisted, (2) his request for military judge alone stated that any trial composed of officers would be "not of his unit," and (3) military judge advised the accused that if he requested officer members at his general court-martial that the panel must comprise "at least three members." The court stated the host of errors "constitutes a lack of substantial compliance with Article 16, UCMJ." Findings and sentence set aside.

b. *United States v. Jungbluth*, 48 M.J. 953 (N-M. Ct. Crim. App. 1998). Accused pled guilty to wrongful use of marijuana on divers occasions before a properly assemble court consisting of a panel of officer members. A military judge was forced to declare a recess after the TC became ill. At the next session of court the parties presented the military judge with a PTA. Under the PTA, the military judge *dismissed the officer panel*, conducted a providence inquiry, entered findings, and adjudged a sentence. A military judge can lawfully approve a request for trial by military judge alone *after assembly* if justified by the circumstances. RCM 903 does not expressly prohibit approval of after assembly forum requests, and in this case, military judge approved the request under the terms of a pretrial agreement. The agreement was mutually beneficial to both sides and the accused suffered no prejudice.

c. ***A Right?***

(1) *United States v. Ward*, 3 M.J. 365 (C.M.A. 1977). There is no *right* to a judge alone trial. *But see United States v. Butler*, 14 M.J. 72 (C.M.A. 1982) (military judge must state reason for denial of judge alone request).

(2) *United States v. Webster*, 24 M.J. 96 (C.M.A. 1987). Denial of a timely motion for trial by judge alone cannot be based on judge's desire to discipline counsel nor to provide court members with experience.

(3) *United States v. Edwards*, 27 M.J. 504 (C.M.A. 1988). Once military judge ruled he was not disqualified from hearing case, he abused his discretion by denying accused right to trial by judge alone, as requested.

(4) *United States v. Dodge*, 59 M.J. 821 (A.F. Ct. Crim. App. 2004), *rev'd on other grounds*, 60 M.J. 368 (C.A.A.F. 2004) (holding RCM 903(c)(2)(B) does not create a "concomitant absolute right" to be tried by military judge alone).

d. ***Replacement of military judges – RCM 505(e)(2)***. *United States v. Kosek*, 46 M.J. 349 (C.A.A.F. 1997). The Air Force did not violate a CAAF remand order by substituting a new military judge at accused's court-martial after the CAAF ordered that the record be returned to the "military judge" for reconsideration.

V. COUNSEL.

A. QUALIFICATIONS.

1. ***GCM***. Article 27(b), UCMJ. "***Trial counsel*** . . . detailed for a ***general court-martial*** –

a. must be a judge advocate who is a graduate of an accredited law school or is a member of the bar of a federal court or of the highest court of a State . . . and

b. must be certified as competent to perform such duties by The Judge Advocate General of the armed force of which he is a member."

2. ***SPCM & GCM***. RCM 502(d). ***Defense counsel*** must be Article 27(b) certified.

3. Under RCM 502(d)(2), assistant trial counsel and assistant defense counsel need only be commissioned officer.

4. Summary Court-Martial. *Middendorf v. Henry*, 425 U.S. 25 (1976). The Sixth Amendment right to counsel does not extend to SCM.

B. DISQUALIFICATION OF COUNSEL.

1. ***Due to defect in appointment or lack of qualifications***.

a. *Wright v. United States*, 2 M.J. 9 (C.M.A. 1976). Defects in appointment or qualifications of trial counsel are matters of procedure to be tested for prejudice and have no jurisdictional significance.

b. *United States v. Harness*, 44 M.J. 593 (N-M. Ct. Crim. App. 1996). Presence of defense counsel who was neither graduate of accredited law school nor properly admitted to practice did not constitute ineffective assistance of counsel under Sixth Amendment. Performance of defense counsel measured by combined efforts of entire defense team.

c. Inactive status. *United States v. Steele*, 53 M.J. 274 (C.A.A.F. 2000). Inactive status of civilian attorney in states in which he is licensed to practice does not bar practice before military courts-martial.

d. Not sworn. *United States v. Roach*, No. S31143, 2007 CCA LEXIS 402 (A.F. Ct. Crim. App. Sep. 13, 2007) (unpublished). The assistant trial counsel in the case had not been sworn under Article 42(a), UCMJ, prior to serving on the court-martial. The defect was not caught until after trial. The lack of qualified counsel is not a jurisdictional defect requiring reversal, so the error was tested for

prejudice. The defense did not object or raise the issue in clemency, and the accused's pleas were voluntary and provident. Therefore there was no prejudice.

2. ***Accuser***. *United States v. Reist*, 50 M.J. 108 (C.A.A.F. 1999). Assistant TC signed charge sheet and was present in court, identified as "accuser" on the record, and argued at sentencing that accused's conduct was "cowardly criminal conduct of a sexual pervert." While ATC was accuser under Article 1(9), UCMJ, and clearly disqualified to act as ATC (RCM 504(d)(4)(A)), the court held defense waived the issue, and found no plain error.

3. ***Due to prior duty on opposite side***. *United States v. Smith*, 26 M.J. 152 (C.M.A. 1988) (trial counsel who had been a member of the Trial Defense Service and acted as a sounding board for part of the defense case was not disqualified); *United States v. Sparks*, 29 M.J. 52 (C.M.A. 1989) (despite Article 27 violation, accused cannot complain when, "after full disclosure and inquiry by military judge," he gives informed consent to representation by defense counsel who previously acted for prosecution).

4. ***Due to potential disqualification as witness***. *United States v. Baca*, 27 M.J. 110 (C.M.A. 1988). Although the accused is not fully and absolutely entitled to counsel of choice, he is absolutely entitled to retain an established relationship with counsel absent demonstrated good cause.

5. ***Due to duty as an investigating officer***. *United States v. Strother*, 60 M.J. 476 (C.A.A.F. 2005). Trial counsel had served as the command SJA and, in that capacity, conducted interviews involving the accused's misconduct and discussed various aspects of the case, including procedural matters, substantive issues, and investigative options, with the officer ordered to conduct the preliminary inquiry. During this preliminary inquiry, a new SJA arrived and the trial assumed other legal duties. Upon completion of the preliminary inquiry, charges were preferred and an Article 32 investigation directed. At this time, trial counsel was detailed to the case. At trial and on appeal, defense asserted that the trial counsel was disqualified as a matter of due process and because under Article 27(a)(2) he acted as an "investigating officer." Article 27(a)(2) states that no person who has acted as an investigating officer may later act as a trial counsel. While "investigating officer" is not defined in Article 27, the CAAF, after a thorough historical discussion on the "investigating officer" disqualification, interpreted the language to apply to an Article 32 investigating officer. The CAAF then held trial counsel's involvement did not interfere with the accused's due process rights and that the accused did not "demonstrate that the [TC's] activities so departed from the normal role of prosecutor as to make him a de facto Article 32 'investigating officer.'"

6. ***Due to incompetence***. *United States v. Galinato*, 28 M.J. 1049 (N.M.C.M.R. 1989). Military judge had discretion to remove accused's counsel of choice, and to appoint different counsel, where counsel of choice had effectively withdrawn from proceedings.

7. ***Due to conflict of interest***.

a. *United States v. Humpherys*, 57 M.J. 83 (C.A.A.F. 2002). Assistant trial counsel (ATC) previously represented accused in legal assistance matter (child support issue). At trial, defense moved to disqualify ATC alleging that ATC used information from this prior representation while interviewing the accused's wife (a potential defense sentencing witness). Military judge denied motion to disqualify ATC because: (1) the charges did not relate to the period of time of the prior representation; (2) the subject matter of prior representation had no substantial relationship to any matter at issue in the court-martial; and (3) military judge accepted ATC's representation that she did not recall the specifics of the prior representation. When the defense called the wife as a witness, the ATC conducted cross-examination. In affirming, the court held the accused failed to

demonstrate either (1) that the subject of the prior representation was substantially related to the pending court-martial charges (adultery, sodomy, violation of lawful general regulation, and false official statements); or (2) that specific confidential information gained by ATC during the prior representation might have been used to the disadvantage of the accused in the present case. Accused could have requested military judge review legal assistance file, which still existed, or accused could have testified in closed hearing with sealed record as to the matters of prior representation. Accused's mere conclusory assertions were not sufficient.

b. *United States v. Cain*, 59 M.J. 285 (C.A.A.F. 2004). Accused alleged that his lead trial defense counsel had a coerced, homosexual relationship with him that created an actual conflict of interest and deprived him of effective assistance of counsel. At *DuBay* hearing, the military judge found the relationship was consensual and that accused desired continued representation by his counsel, despite advice from two civilian counsel to fire him. ACCA held the accused did not meet the two-pronged test to establish IAC due to an actual conflict of interest in a guilty plea: (1) that there was an actual conflict of interest; and (2) that the conflict adversely affected the voluntary nature of the guilty plea. The CAAF reversed, finding that the "volatile mixture of sex and crime in the context of the military's treatment of fraternization and sodomy as criminal offenses" resulted in a "uniquely proscribed relationship" that was "inherently prejudicial and created a per se conflict of interest in counsel's representation of the Appellant." The conflict resulted in ineffective assistance of counsel under the Sixth Amendment. Findings and sentence set aside.

c. *United States v. Beckley*, 55 M.J. 15 (C.A.A.F. 2001). At issue was the accused's right to retain civilian counsel whom the military judge determined to be disqualified because of the conflict of interest with the accused's estranged wife, who was represented by the lawyer's firm in a divorce action against the accused. After a detailed factual analysis, CAAF affirmed ACCA, holding that the civilian counsel had an actual conflict of interest and was required to withdraw.

d. *United States v. Smith*, 44 M.J. 459 (C.A.A.F. 1996). Defense counsel previously represented another airman in companion case for Article 15 proceedings. Former client did not testify at trial, but testimony presented via stipulation of expected testimony. Accused consented to representation. Court held that client could not make informed decision regarding representation, even after being advised by counsel, because counsel did not understand ramifications of conflict issue; former client was still subject to court-martial even though nonjudicial punishment had been imposed; and court was concerned that accused denied fair trial because of stipulation rather than cross-examination of important witness.

e. *United States v. Rushatz*, 31 M.J. 450 (C.M.A. 1990). Accused met with legal assistance attorney who later moved to the criminal law department. The counsel disclosed to the detailed trial counsel that he had represented the accused on an unrelated matter. Court adopted three-part test to determine if trial counsel disqualified: (1) was there former representation (2) was there a substantial relationship between subject matters, and (3) was there a subsequent proceeding. In this case, legal assistance attorney did not act as trial counsel, though he did appear with trial counsel at Article 32.

f. *United States v. McClain*, 50 M.J. 483 (C.A.A.F. 1999). Accused complained his lawyers were conspiring with the trial counsel. The accused also had several

disagreements with his defense counsel, and told the military judge his counsel had lied to him. In response, one of his counsel told the military judge that the accused has told "lies here today in court." Nevertheless, the military judge denied counsel's request for release, and accused ultimately requested both counsel represent him. The court held the issue of a conflict of interest (because of a disagreement in strategy) was waived by the accused. The defense was entitled to respond to the accused's assertions.

g. *United States v. Thompson*, 51 M.J. 431 (C.A.A.F. 1999). A pretrial complaint against defense counsel, made by accused's wife, did not create a conflict of interest disqualifying him from participation in this case. Court also held that accused was not denied effective assistance of counsel when military defense counsel cautioned him about retaining civilian counsel and discouraged him from getting help from a psychologist.

h. *United States v. Johnston*, 51 M.J. 227 (C.A.A.F. 1999). Where detailed defense counsel left active duty prior to preparation of a new SJA recommendation, failure of the convening authority to detail substitute counsel for accused deprived him of his opportunity for sentence relief with the convening authority and was prejudicial to accused's substantial rights.

i. ***Sua sponte duty to explore conflicts of interest***. *United States v. Murphy*, 50 M.J. 4 (C.A.A.F. 1998). The Government called accused's pretrial confinement cell mate as a witness. He allegedly overheard the accused make incriminating comments to another inmate and repeated this conversation to his lawyer, who then negotiated a PTA for the witness. The witness' counsel then withdrew withdraw from his case. The military judge in the accused's case was the same judge who had presided over witness' guilty plea, and the defense counsel who negotiated the witness' PTA was part of the accused's defense team. The defense did not impeach the witness, even though he had been convicted of several crimes involving dishonesty and deceit. Defense counsel and the military judge failed to discuss the potential conflict of interest on the record. The court held the military judge had a *sua sponte* duty to resolve conflict questions on the record and defense had a duty to discuss potential or actual conflicts of interest with accused. Such multiple representation creates a presumption that a conflict of interest existed, one that can be rebutted by the actual facts. In this case, there was a clear conflict of interest.

j. *United States v. Allred*, 50 M.J. 795 (N-M. Ct. Crim. App. 1999). A preexisting attorney-client relationship may be severed by Government only for good cause. "Good cause" did not exist where defense counsel had entered into relationship with accused concerning pending charges, charges were dismissed during the time accused was medically evacuated for evaluation of heart problems, and DC was told by SDC that, due to pending PCS, DC would not be detailed to case if charges re-preferred. Court found that DC's commander's finding of unavailability was abuse of discretion. Prejudice presumed and findings and sentence set aside.

8. ***Based on bar status***. *United States v. Steele*, 53 M.J. 274 (C.A.A.F. 2000). No error where accused's civilian DC was carried "inactive" by all state bars of which he was member (and such status prohibited him from practicing law). RCM 502(d)(3)(A) requires that a CDC be a member of a bar of a federal court or bar of the highest court of the state, or a lawyer authorized by a recognized licensing authority to practice law (and determined by military judge qualified to represent the accused). CAAF looked to federal case law holding that neither suspension nor disbarment creates a *per se* rule that

continued representation is constitutionally ineffective (CAAF also noted a Navy instruction permits military counsel to remain "in good standing" even though they are "inactive."). Counsel are presumed competent once licensed.

VI. ACCUSED

A. **ACCUSED'S FORUM SELECTION**. Doctrine of substantial compliance.

1. ***Trial before military judge alone***. RCM 903(b)(2). *United States v. Turner*, 47 M.J. 348 (C.A.A.F. 1997). Where the military judge fully explained the accused's rights as to forum, and defense counsel stated at trial that the accused wished to be tried by military judge alone, it was error for the accused not to state his election either in writing or orally on the record. However, the facts of the case showed substantial compliance with Article 16, UCMJ, and no material prejudice to the substantial rights of the accused.

2. ***Request for trial before members***. RCM 903(b)(1). *United States v. Alexander*, 61 M.J. 266 (C.A.A.F. 2005). Military judge advised the accused of his forum selection rights, which the accused requested to defer. During a later proceeding, the military judge stated that he was told an enlisted panel would be hearing the case and defense did not object to the judge's statement. The accused, however, failed to state in writing or on the record his request for enlisted members in violation of Article 25, UCMJ and RCM 903(b)(1). The CAAF held that the error in the accused failing to personally select forum on the record is a procedural, as opposed to jurisdictional, issue. The court stated, "[the] right being addressed and protected in Article 25 is the right of an accused servicemember to select the forum[,] . . . [t]he underlying right is one of forum selection, not the ministerial nature of its recording." The CAAF held that the record reflected that the accused selected court-martial by panel members and the accused failed to show that the error in recording his forum selection resulted in any prejudice.

a. *United States v. Morgan*, 57 M.J. 119 (C.A.A.F. 2002) (military judge erred by not obtaining on record defendant's personal request for enlisted members to serve on court-martial, but error was not jurisdictional, and under circumstances, it did not materially prejudice substantial rights of defendant)

b. *United States v. Daniels*, 50 M.J. 864 (A. Ct. Crim. App. 1999). Where accused was tried by enlisted members and there was no evidence on the record reflecting personal forum selection, jurisdiction was properly found by a military judge in an ACCA-ordered *DuBay* hearing, which established that accused had discussed her forum choices with her counsel, and that, prior to the assembly of the court, she had decided to elect trial by an enlisted panel, and that her counsel had then presented a document to TC stating that the accused requested an enlisted panel. Failure to elicit forum selection on the record was a technical defect in the application of Article 25, a defect that, as was clear from the *DuBay* hearing, did not prejudice the substantial rights of the accused.

c. *United States v. Lanier*, 50 M.J. 772 (A. Ct. Crim. App. 1999), *aff'd*, 53 M.J. 220 (C.A.A.F. 2000) (summary disposition). Counsel's consulting with the accused and announcing on the record, in response to judge's question, "We will have a court with enlisted" substantially complied with the terms of Article 25(c)(1).

d. *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999). No error where accused, who had signed his request for enlisted members with words "Negative Reading," was directed by military judge to elect a forum and he subsequently signed his name above the words "Negative Reading;" any confusion the accused experienced concerned his name and not his forum choices.

B. **TRIAL IN ABSENTIA**. RCM 804(c).

1. The accused shall be considered to have waived the right to be present if after initially present he/she (1) voluntarily absents self after arraignment, or (2) is removed for disruption. For requirements of a valid arraignment, see RCM 904.

2. *United States v. Bass*, 40 M.J. 220 (C.M.A. 1994). Accused did not return for trial after being arraigned 23 days earlier (delay for sanity board).

3. *United States v. Sharp*, 38 M.J. 33 (C.M.A. 1993). Notice to accused of exact trial date or that trial may continue in his absence, while desirable, is not a prerequisite to trial in absentia. Burden is on the defense to go forward and refute the inference of a voluntary absence. Military judge must balance public interest with right of accused to be present.

4. *United States v. Price*, 43 M.J. 823 (A. Ct. Crim. App. 1996), *rev'd*, 48 M.J. 181 (C.A.A.F. 1998). Trial in absentia is not authorized when military judge fails to conduct a proper arraignment. Reversing the ACCA, the CAAF stated that when military judge asked accused whether charges should be read, but failed to call upon the accused to plead, this constituted a defective arraignment. Waiver by voluntary absence will not operate to authorize trial *in absentia* if arraignment is defective, particularly considering that military judge failed to also inform the accused that trial would proceed in accused's absence. *See generally* RCM 904 ("Arraignment . . . shall consist of reading the charges and specifications to the accused and calling on the accused to plead.").

5. *See also United States v. Thrower*, 36 M.J. 613 (A.F.C.M.R. 1993). While giving unsworn statement during sentencing, accused succumbed to effects of sleeping pills he took earlier and remainder of statement given by defense counsel. Held to be a voluntary absence.

C. **ACCUSED'S RIGHTS TO COUNSEL**.

1. ***Pro se representation***. RCM 506(d).

a. *United States v. Mix*, 35 M.J. 283 (C.M.A. 1992). Before approving accused's request to proceed pro se, RCM 506(d) requires a finding that the accused understands: (1) the disadvantages of self representation and; (2) if the waiver of counsel was voluntary and knowing. Opinion includes an appendix of suggested questions.

b. *Cf. Iowa v. Tovar*, 541 U.S. 77 (2004). Prior to proceeding pro se at a guilty plea, the Sixth Amendment is satisfied if the trial court "informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea." Warnings that: "(1) advise the defendant that waving the assistance of counsel in deciding whether to plead guilty [entails] the risk that a viable defense will be overlooked; and (2) admonish[ing] the defendant that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty" are *not* required by the Sixth Amendment.

c. *Godinez v. Moran*, 509 U.S. 389 (1993). Supreme Court says the standard of competence to proceed pro se is no different than that required for an accused to stand trial. Military appellate courts appear to imply a higher level of competence for accused to waive counsel. *See also United States v. Freeman*, 28 M.J. 789 (N.M.C.M.R. 1989) ("[H]igher standard of competence must exist for an accused to waive counsel and conduct his own defense than would be required to merely assist in his own defense"). *United States v. Streater*, 32 M.J. 337 (C.M.A. 1991) (accused was competent to "represent himself and to actually defend himself").

2. ***Individual military counsel***. RCM 506(b); Article 38(b), UCMJ; AR 27-10, para 5-7; *United States v. Spriggs*, 52 M.J. 235 (C.A.A.F. 2000). If an individual military counsel request has been denied and the defense claims improper severance of attorney-client relationship, the defense bears the burden of demonstrating that the accused had a viable ongoing attorney-client relationship regarding the substance of the charges. Defense must demonstrate both an understanding as to the nature of future representation and active engagement by the attorney in preparation of the case. If the defense makes such showing, the burden shifts to the Government to demonstrate good cause for severance. If the defense cannot make such showing, the burden shifts to the Government to demonstrate that the judge advocate was not reasonably available under applicable criteria. If there was a prior attorney-client relationship that is no longer viable at the time of the request, the Government is not required to demonstrate good cause, but must demonstrate that the other criteria warrant disregarding the relationship under the circumstances. Absent Government misconduct, the routine separation of a judge advocate from active duty normally terminates any attorney-client relationship established on the basis of the attorney's military status, except when: (1) the attorney agrees to represent the client in his or her civilian capacity; or (2) the attorney enters the reserves and is ordered to represent the client to the extent permitted by applicable law based upon a determination by the appropriate official of reasonable availability.

3. ***Civilian Counsel***.

a. ***Delay to obtain civilian counsel***.

(1) *United States v. Wiest*, 59 M.J. 276 (C.A.A.F. 2004). Military judge abused his discretion in denying defense request for delay to obtain civilian counsel. "It should . . . be an unusual case, balancing all the factors involved, when a judge denies an initial and timely request for a continuance in order to obtain civilian counsel, particularly after the judge has criticized appointed military counsel." Applying the *Miller* factors, below, the court held that the judge erred and set aside findings and sentence.

(2) *United States v. Miller*, 47 M.J. 352 (C.A.A.F. 1997). Military judge abused his discretion by denying request for delay in post-trial hearing in order for accused to obtain civilian counsel. While the right to retain civilian counsel is not absolute, "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel." Factors used to determine whether military judge abused his discretion include: surprise, timeliness of the request, other continuance requests, good faith of moving party, and prior notice.

b. ***Delay to obtain expert witness***. *United States v. Weisbeck*, 50 M.J. 461 (C.A.A.F. 1999). In 1994, accused was tried by GCM for sexually assaulting two teenaged brothers, and he was acquitted. The key to the defense case in the 1994 court-martial was a psychiatric expert. In 1995, at another installation, accused was charged with offenses relating to two other adolescent boys. The military judge ruled the two boys from the 1994 could testify under MRE 404(b). The civilian attorney from the 1994 court joined the defense team for the 1995 case in October, then requested a delay to permit attendance of the psychiatric expert used in the 1994 court. The military judge denied this request, and the CAAF held that this was error and that the defense request was not unreasonable. Findings and sentence set aside.

4. ***Foreign counsel***. RCM 502(d)(3)(b); *Soriano v. Hosken*, 9 M.J. 221 (C.M.A. 1980). Military judge determines if individual foreign civilian counsel is qualified.

VII. OTHER COURT-MARTIAL PERSONNEL

A. STAFF JUDGE ADVOCATES.

1. ***Disqualification – in general.***

a. *United States v. Gutierrez*, 57 M.J. 148 (C.A.A.F. 2002). The accused pled guilty to multiple specifications of larceny, conspiracy to commit larceny, robbery, conspiracy to commit robbery and receiving stolen property. Prior to entry of pleas, the accused moved to dismiss all charges and specifications for lack of speedy trial. The Chief of Justice testified in opposition to the motion and the military judge denied the motion. Later, the COJ assumed duties as the SJA and prepared the post-trial recommendation (PTR) in the accused's case. DC responded to the PTR claiming that the COJ was disqualified from preparing the PTR because of her involvement in the case, specifically her testimony in opposition to the speedy trial motion. Since Government counsel assumed a prosecutorial role in accused's case prior to her appointment as SJA, she was disqualified from preparing the SJA post-trial recommendation which involved evaluating the prosecution. While a staff legal officer who merely gives general advice to prosecutors or investigators is not disqualified from participating in the post-trial process, when the same advisor becomes a participant in the prosecution, she is disqualified.

b. *United States v. Taylor*, 60 M.J. 190 (C.A.A.F. 2004). Eight days after the accused's court-martial, trial counsel published an article in the base newspaper warning commanders to properly prepare adverse personnel records. The article resulted from the trial counsel's inability to admit the accused's adverse personal records, because of numerous administrative errors, which the trial counsel characterized as a disservice to justice. Based on the article, the defense sought the disqualification of the SJA. The SJA, while stating the article could be imputed to him in an addendum recommendation, took action on the case. The CAAF held where a SJA imputes a disqualification to himself his participation in the post-trial review process is error, that the accused made a "colorable showing of prejudice," and returned the case for a new post-trial review.

2. ***Disqualification – performing trial counsel duties can effectively cause staff judge advocate to be "trial counsel."*** *United States v. Stefan*, 69 M.J. 256 (C.A.A.F. 2010). Chief of Justice caused charges to be served on the accused (a duty reserved for detailed trial counsel under RCM 602) and then signed charge sheets as "Trial Counsel." The Chief of Justice later, in her capacity as Acting SJA, signed the addendum to the post-trial staff judge advocate's recommendation (SJAR), recommending the convening authority not grant clemency. Defense argued that under Article 6(c), no person who has acted as trial counsel may later act as SJA in the same case. CAAF held the Acting SJA was disqualified based her limited administrative actions as trial counsel. However, the court affirmed, finding the error did not prejudice the accused.

3. ***Disqualification – individual cannot serve as SJA and military judge in same case.*** Under RCM 1106(b) and Article 6(c), UCMJ, a person cannot serve as the SJA and military judge in the "same case." RCM 1106(b) governs the post-trial SJA recommendation. Article 6(c) more broadly governs action an SJA assisting "any reviewing authority." *See United States v. Moorefield*, 66 M.J. 170 (C.A.A.F. 2008) (per curiam). The staff judge advocate (SJA) served as a military judge in a prior, unrelated, court-martial of the accused. On appeal, the defense argued the SJA should have been

disqualified, citing RCM 1106 and Article 6, UCMJ. In a short per curiam opinion, the CAAF held the SJA was not disqualified. The two courts-martial were several years apart and involved different victims and evidence. The judge advocate properly acted as SJA and military judge in the two cases as they were "neither the same case for purposes of RCM 1106 or Article 6, UCMJ, nor the same matter, for purposes of [Navy professional responsibility rules]."

4. ***Processing immunity requests.*** *United States v. Ivey*, 55 M.J. 251 (C.A.A.F. 2001). At issue was whether Government failed to process the accused's requests for immunity for four civilian witnesses. Here, the CA did not deny the defense request for immunity until after trial and chose not to forward the request to Department of Justice. In addition, military judge denied the defense request to grant immunity or to abate the proceedings to wait for CA action. The CAAF held trial counsel and SJAs do not have the authority to *de facto* deny a request for immunity by withholding it from the convening authority. All requests for immunity, from either the Government or the defense, must be submitted to the CA for a decision; the CA does not have to forward an immunity request for a civilian to DOJ if the CA intends to deny that request; and all three prongs of RCM 704(e) must be met before a military judge may overrule a CA's decision to deny a request for immunity: (1) the witness intends to invoke the right against self-incrimination to the extent permitted by law if called to testify; (2) Government has engaged in discriminatory use of immunity to obtain a tactical advantage, or the Government, through its own overreaching, has forced the witness to invoke the privilege against self-incrimination; and (3) the witness' testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source and does more than merely affect the credibility of other witnesses. In this case, the military judge did not abuse his discretion by refusing to abate proceedings (to wait for CA action) where he found there had been no discriminatory use of immunity or Government overreaching, and proffered testimony was not clearly exculpatory.

5. ***Pocket Immunity.*** *United States v. Jones*, 52 M.J. 60 (C.A.A.F. 1999). Accused was charged with conspiracy to submit a false claim, larceny, and other offenses. His co-accused were offered punishment under Article 15 if they agreed to testify against the accused. When the co-conspirators invoked their rights and seemed hesitant to cooperate, the SJA called the RDC and said that the three soldiers would be court-martialed if they did not testify in accordance with their agreement. The CAAF said the informal agreements were tantamount to a grant of *de facto* immunity, that the President had not formulated rules governing such "informal immunity," but that there was no command influence and no material prejudice to the accused.

B. **ARTICLE 32 INVESTIGATING OFFICERS**. *United States v. Holt*, 52 M.J. 173 (C.A.A.F. 1999). Article 32 investigating officer recommended accused's case be referred capital for his alleged murder of a fellow biker. After referral, the Article 32 investigating officer attended a forensic evidence course and, upon returning to the command, gave trial counsel the name and phone number of a forensic expert. Ultimately, this expert testified for Government that the spatter patterns on jeans seized from the accused were consistent with a stabbing. CAAF noted that an "investigating officer is disqualified" from acting subsequently "in the same case in any other capacity" under RCM 405(d)(1), and that his provision of information solely to the assigned prosecutor may have created at least the appearance of impropriety by providing trial counsel with information that was neither transmitted to the commander who ordered the investigation nor served on the accused. Nevertheless, the court found no prejudicial error that would warrant giving the accused a new trial; the decision to submit the jeans for testing and to call the expert witness were solely the decisions of the trial counsel.

C. **COURT REPORTERS**. RCM 502(e). *See United States v. Yarbrough*, 22 M.J. 138 (C.M.A. 1986). Accuser improperly acted as court reporter but reversal not required where

accuser only operated microphone system and did not transcribe proceedings or prepare the record of trial.

D. **INTERPRETER**. RCM 502(e). Must be qualified and sworn.

E. **BAILIFF**. RCM 502(e). Cannot be a witness. *United States v. Martinez*, 40 M.J. 82 (C.M.A. 1994). Military judge committed prejudicial error when, during sentencing deliberations, he conducted an ex-parte communication with bailiff.

F. **DRIVERS**.

1. *United States v. Aue*, 37 M.J. 528 (A.C.M.R. 1993). Military judge's assigned driver told witnesses waiting to testify that the MJ told her that "he had already decided the case." Military judge addressed issue at post-trial Article 39(a) hearing as motion for mistrial and found that: (1) he had never made such a statement; and (2) that driver was trying to impress witnesses with her apparent "inside information." ACMR returns for *DuBay* hearing and indicates that MJ should have recused himself at the post-trial Article 39(a) session. Otherwise, no misconduct by military judge and no prejudice to accused.

2. *United States v. Knight*, 41 M.J. 867 (A. Ct. Crim. App. 1995). Three senior enlisted court members solicited daily information from driver about his opinions regarding witness veracity, medical testimony, and what transpired during Article 39(a) sessions. Defense motion for mistrial made during deliberations denied. CA grants immunity to members in post-trial Article 39(a) session. ACCA said SJA, CA, and military judge "were remiss" in failing to apply presumption of prejudice absent clear and positive showing by Government.

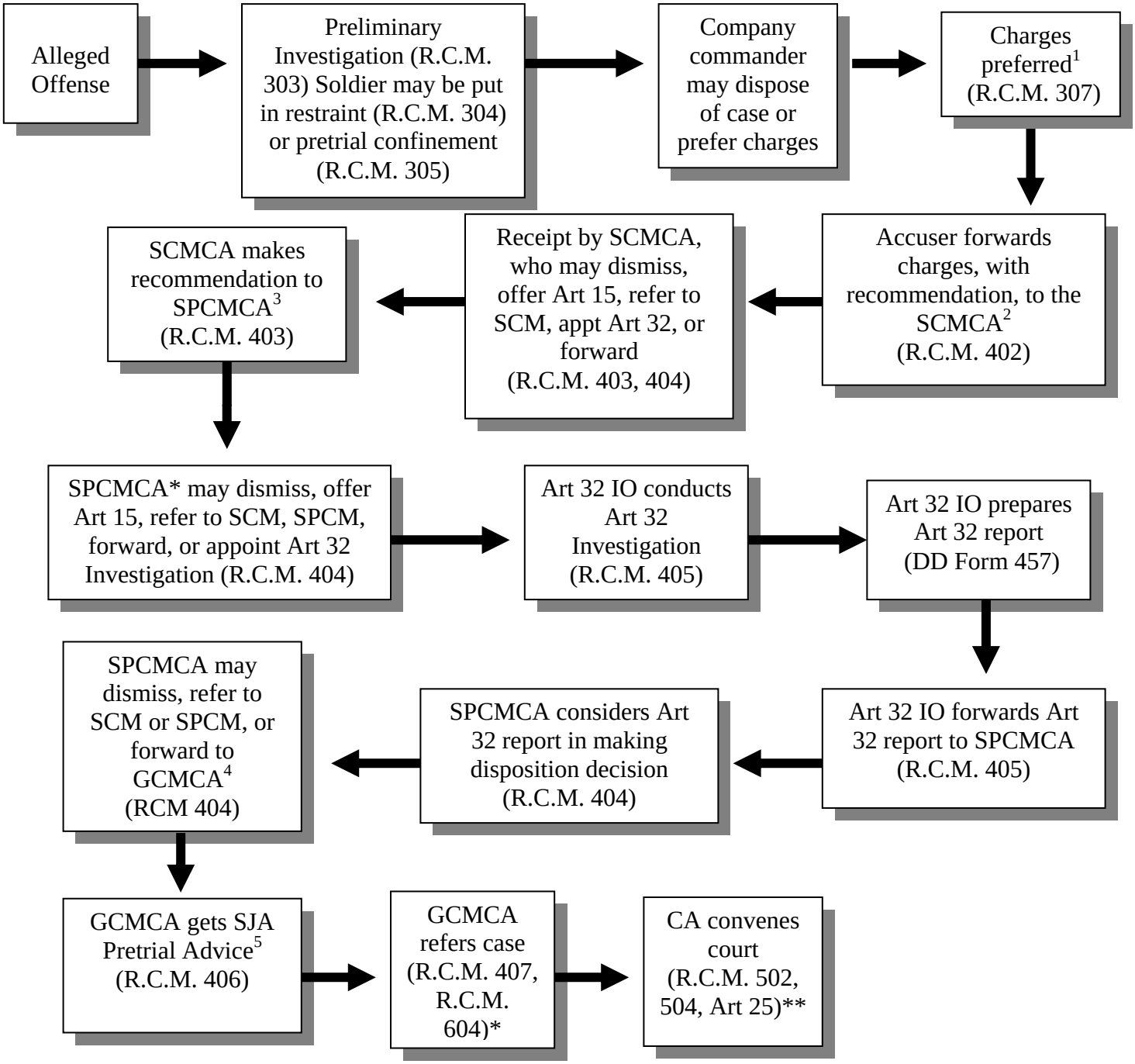
VIII. CONCLUSION

IX. APPENDIX – COURT-MARTIAL PERSONNEL SUMMARY

MAJOR POINT	*SUMMARY*
THE CONVENING AUTHORITY	• A convening authority (CA) has personal responsibility to select members and refer cases to courts-martial. Article 25(d) and Article 1(9), UCMJ. When considering selection and referral issues, look at the practical effect of the action as well as the RCMs to ensure that this is an appropriate situation for application of the practical effects test. • A convening authority with a personal interest in a case is disqualified from referring a case to trial and taking most other actions. A convening authority with a statutory disqualification is also disqualified from referral action, but can appoint the Article 32 investigator and make a recommendation on the disposition of the case.
ACCUSED'S RIGHTS: COUNSEL QUALIFICATIONS AND PRO SE REPRESENTATION	• The accused is entitled to qualified counsel at trial. When confronted with issues regarding counsel qualifications, determine whether the defect results in prejudice to the accused. Such defects are, however, nonjurisdictional. • Regarding prior representation, determine on the record whether there was former representation, whether there was a substantial relationship between the subject matters, and whether there was a subsequent proceeding. • An accused may proceed pro se if military judge makes the accused aware on the record of the disadvantages of self-representation and secures a voluntary and knowing waiver of counsel.
COURT MEMBERS	• CA may violate the law if she uses anything other than the Article 25(d) criteria (age, experience, education, training, length of service, judicial temperament) to select members. Rank may not be a sole selection criterion. Gender or race may be a criterion if the CA is seeking to include members of these categories for purposes of fairness and cross-sectional representation. The CA's motive is crucial. • CA cannot systematically exclude otherwise qualified personnel. *See US v. Bartlett*, 66 M.J. 426 (C.A.A.F. 2008) • Enlisted members cannot be from the accused's company-size unit. A military judge should grant a challenge against such a member. This issue, however, is waivable.
THE MILITARY JUDGE	• A military judge must carefully consider motions for recusal. The standard is: a military judge should disqualify himself when his partiality might reasonably be questioned. To ensure that such motions are properly handled, the military judge should follow RCM 902 by making full disclosure on the record of the potentially disqualifying matter, and permit voir dire and challenge. When in doubt, the military judge should grant recusal. • The MJ must be careful not to engage in judicial advocacy. The MJ should not assist one side or the other through questioning witnesses or praising witnesses. • The MJ must be mindful not to discuss cases with other court personnel. Such contact or discussion may lead to situations where drivers, bailiffs and court reporters communicate to others their interpretation of MJ comments about findings or sentence, raising issues of partiality and unfairness. • If the MJ engages in a "Bridging the Gap" session, he should scrupulously keep the core of the deliberative process privileged.
TRIAL BY JUDGE ALONE OR BY A PANEL OF ⅓ ENLISTED MEMBERS	• Article 16 requires that the accused make a forum request in writing or orally on the record. To eliminate the possibility of error, the MJ should obtain an oral or written forum request on the record, especially in trials with multiple pretrial proceedings. Other means *might* substantially comply with Article 16 (counsel makes request in accused presence; request made after assembly). • The doctrine of substantial compliance applies to requests for trial by one-third enlisted members as well. Such requests are controlled by Article 25, UCMJ.
TRIAL IN ABSENTIA ▸ **PRESENCE ▸ ▸ ▸**	• Trial in absentia is only possible after an effective arraignment. *The MJ must ensure that the accused is given an opportunity to have the charges read, and then call upon the accused to plead.* Arraignment does not include entry of the plea. *See* RCM 904 for requirements of arraignment. • The UCMJ and RCMs require that all parties to a trial be *physically* present in one occasion to conduct valid court-martial proceedings. This ensures that the MJ is able to preside over the trial, and evaluate whether the accused genuinely desires to proceed with a particular forum or waive or pursue rights under the Constitution and UCMJ.

X. APPENDIX – PRETRIAL FLOWCHART

(Typical Court-Martial Case Processing from Offense to Referral)



[1]Usually the company commander (the accused's immediate commander) prefers charges, becoming the Accuser; forwards charges (once forwarded, charges may be disposed of only by a convening authority (CA)).
[2]Summary Court-Martial Convening Authority
[3]Special Court-Martial Convening Authority
[4]General Court-Martial Convening Authority
[5]The SJA will normally "bundle" the subordinate commanders' recommendations with his Pretrial Advice.
*GCMCAs and SPCMCAs who are accusers may not act as CAs. Art 1(9), Art 22(b), Art 23(b). If statutorily disqualified (because she signed charge sheet), CA may dismiss, offer Art 15, appt Art 32, forward with rec. for GCM (must note disqualification). If personally disqualified (e.g., personal interest in case), may not appt Art 32, must forward with no rec. (only SCMCA may be accuser and a CA).
**Usually CA will have previously convened court, e.g., by creating a "standing panel."

TAB F

PRETRIAL RESTRAINT AND SPEEDY TRIAL

TABLE OF CONTENTS

I. PRETRIAL RESTRAINT. UCMJ ART. 9(A); R.C.M. 304 1

II. PRETRIAL CONFINEMENT. UCMJ ART. 9-13; R.C.M. 305 2

III. SENTENCE CREDIT FOR PRETRIAL CONFINEMENT 7

IV. INTRODUCTION TO SPEEDY TRIAL.....17

V. R.C.M. 707: THE 120 DAY RULE. 17

VI. UCMJ ART. 10: PRETRIAL CONFINEMENT AND ARREST.....23

VII. THE SIXTH AMENDMENT RIGHT TO SPEEDY TRIAL.. 28

VIII. FIFTH AMENDMENT RIGHT TO DUE PROCESS.....28

IX. LITIGATING SPEEDY TRIAL ISSUES 28

MAJ Jay Thoman
January 2011

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PRETRIAL RESTRAINT AND SPEEDY TRIAL

Outline of Instruction

I. PRETRIAL RESTRAINT. UCMJ ART. 9(A); R.C.M. 304.

A. Types of Pretrial Restraint. R.C.M. 304(a).

1. **Conditions on liberty**. "[O]rders directing a person to do or refrain from doing specified acts."

2. **Restriction in lieu of arrest**. "[O]rders directing the person to remain within specified limits." Restricted person normally performs full military duties.

   United States v. Blye, 37 M.J. 92 (C.M.A. 1993). Servicemember may be lawfully ordered to abstain from alcohol as a condition of pretrial restriction

3. **Arrest**. "[R]estraint ... directing the person to remain within specified limits.... [P]erson in status of arrest may not be required to perform full military duties...."

4. **Pretrial Confinement**. "Pretrial confinement is physical restraint . . . "

B. When A Person May Be Restrained

1. A Soldier may be placed under pretrial restraint when there is a reasonable belief that:

   a. An offense triable by court-martial has been committed;

   b. The person to be restrained committed it; and

   c. The restraint ordered is "required by the circumstances." R.C.M. 304(c); Article 9(d) (probable cause); Article 10 ("as circumstances may require"). Note that the person ordering restraint should consider the provisions of R.C.M. 305(h)(2)(B), before ordering restraint. These provisions further elaborate on when restraint is "required by the circumstances" because it is foreseeable that:

      (1) The Soldier will not appear at trial, pretrial hearing, or investigation, **or**;

      (2) The Soldier will engage in serious criminal misconduct, **and**;

   d. Lesser forms of restraint are inadequate.

2. **BUT:** "An accused pending charges should ordinarily continue the performance of normal duties within the accused's organization while awaiting trial." AR 27-10, para. 5-15a (16 Nov 05).

   U.S. v. Doane, 54 M.J. 978 (A.F.Ct.Crim.App., 2001). While an accused's mental condition is an appropriate consideration in deciding whether to place or maintain an accused in pretrial confinement (PTC), SM should not be placed in PTC solely to protect against the risk that an accused might kill himself.

C. Who May Order Pretrial Restraint? Article 9(b) and; R.C.M. 304(b).

1. Of officers. "Only a commander to whose authority" they are subject. This authority may not be delegated.

2. Of enlisted personnel. "Any commissioned officer." Authority may be delegated by a commanding officer to warrant, petty, and noncommissioned officers of his/her command.

3. Authority for subordinates to order restraint may be withheld by a superior competent authority.

D. Procedures for Ordering Pretrial Restraint. Article 9(b) and (c); R.C.M. 304(d).

1. Confinement is "imposed pursuant to orders by a competent authority by the delivery of a person to a place of confinement."

2. Other types of pretrial restraint are "imposed by notifying the person orally or in writing of the restraint, including its terms or limits."

E. Notice. A person placed under restraint "shall be informed of the nature of the offense which is the basis for such restraint." R.C.M. 304(e).

F. **Restraint is Not Punishment**. Article 13; R.C.M. 304(f). Persons restrained pending trial may not be punished for the offense that is the basis of the restraint. Prohibitions include "punitive duty hours or training," "punitive labor," or "special uniforms prescribed only for post-trial prisoners."

II. PRETRIAL CONFINEMENT. UCMJ ART. 9-13; R.C.M. 305.

A. Basis for Pretrial Confinement. R.C.M. 305(d). Probable cause (reasonable belief) that:

1. An offense triable by a court-martial has been committed;

2. The person confined committed it; and

3. Confinement is *required by the circumstances*. Again, consider R.C.M. 305(h)(2)(B), that it is reasonably foreseeable that the Soldier:

a. Will not appear at trial, pretrial hearing, or investigation, **or**

b. Will engage in serious criminal misconduct, **and**

4. Lesser forms of restraint are inadequate.

B. Regulatory Requirements. "In any case of pretrial confinement, the **SJA** concerned, or that officer's designee, **will be notified** prior to the accused's entry into confinement or as soon as practicable afterwards." AR 27-10, paragraph 5-15a. Also consider requirements of local policies / regulations (for example, no PTC without the concurrence of the SJA).

C. Advice to Accused Upon Confinement. Article 10; R.C.M. 305(e).

"Each person confined shall be promptly informed of:

(1) The nature of the offenses for which held;

(2) The right to remain silent and that any statement may be used against the person;

(3) The right to retain civilian counsel at no expense to the United States, and the right to request assignment of military counsel; and

(4) The procedures by which pretrial confinement will be reviewed."

D. Military Counsel. R.C.M. 305(f); AR 27-10, para. 5-15.

1. Prisoner must request military counsel and request must be known to military authorities. Counsel is to be made available prior to R.C.M. 305(i) review, or within 72 hours of request, whichever occurs earlier. R.C.M. 305. **BUT:** AR 27-10, para. 5-15 imposes duty on SJA to request TDS appointment of counsel. If no TDS counsel available within 72 hours the SJA may appoint government counsel for this limited purpose.

2. "Consultation between the accused and counsel *preferably* will be accomplished *before the accused's entry into confinement*." If not possible, every effort will be made to have consultation within 72 hours of accused's entry into confinement. AR 27-10.

3. No right to military counsel of the prisoner's own selection. Counsel "may be assigned for the limited purpose of representing the accused only during the pretrial confinement proceedings before charges are referred." R.C.M. 305(f).

E. R.C.M. 305(i)(1) 48-hour Review:

1. Embodiment of the Constitutional review from *County of Riverside v. McLaughlin*, 111 S.Ct. 1661 (1991) and *United States v. Rexroat*, 38 M.J. 292 (C.M.A. 1993), *cert. denied*, 127 L. Ed. 2d 648, 114 S. Ct. 1296 (1994).

2. History:

a. *Gerstein v. Pugh*, 420 U.S. 103 (1975). Fourth Amendment ("right of the people to be secure in their persons . . . against unreasonable . . . seizures") requires a "**prompt**" judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest. *Gerstein* is binding upon the military. *Courtney v. Williams*, 1 M.J. 267 (C.M.A. 1976).

b. What is "prompt?" *County of Riverside v. McLaughlin*, 111 S.Ct. 1661 (1991). "Taking into account the competing interests articulated in *Gerstein*, we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*."

c. *County of Riverside v. McLaughlin* applies to the military. *United States v. Rexroat*, 38 M.J. 292 (C.M.A. 1993), *cert. denied*, 127 L. Ed. 2d 648, 114 S. Ct. 1296 (1994).

3. Review must be by a "neutral and detached officer," e.g. an "independent" commander/officer, a military magistrate, or a military judge. The accused's commander may do the review under either R.C.M. 305(d) or R.C.M. 305(h) **if truly neutral and detached**.

a. *United States v. McLeod*, 39 M.J. 278 (C.M.A. 1994). Both the brigade commander's and SJA's review of company commander's initial decision to impose pretrial confinement were neutral and detached. Neither was directly or particularly involved in command's law enforcement function.

b. *United States v. Bell*, 44 M.J. 677 (N.M. Ct. Crim. App. 1996). A ship's command duty officer can be neutral and detached, and constitutionally qualified to make a judicial probable cause determination which satisfies *United States v. Rexroat*.

4. Substance of the review. Probable cause review by a neutral and detached officer. Is there a reasonable belief that:

   a. An offense triable by a court-martial has been committed;

   b. The prisoner committed it; and

   c. Confinement is necessary because it is foreseeable that:

      (1) The prisoner will not appear at a trial, pretrial hearing, or investigation, **or**

      (2) The prisoner will engage in serious criminal misconduct; **<u>and</u>**

   d. Less severe forms of restraint are inadequate.

F. Commander's 72-hour Review. Article 11; R.C.M. 305(h).

1. Report of confinement to prisoner's commander within 24 hours, if ordered by someone other than the commander.

2. Commander shall review confinement not later than 72 hours after ordering confinement, or receiving notice of confinement, and shall order release "unless the commander believes upon ... reasonable grounds, that:

   (i) An offense triable by a court-martial has been committed;

   (ii) The prisoner committed it; and

   (iii) Confinement is necessary because it is foreseeable that:

      (a) The prisoner will not appear at a trial, pretrial hearing, or investigation, or

      (b) The prisoner will engage in serious criminal misconduct; and

   (iv) Less severe forms of restraint are inadequate."

3. Can be completed immediately after ordering PTC. R.C.M. 305(h)(2)(A).

4. *What Constitutes Serious Criminal Misconduct?*

   Serious criminal misconduct: "includes intimidation of witnesses or other obstruction of justice, seriously injuring others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command...." R.C.M. 305(h)(2)(B)(iv).

   "[T]he **'quitter'** who disobeys orders and refuses to perform duties" can have an "immensely adverse effect on morale and discipline." "[A]lthough the 'pain in the neck' [Soldier]... may not be confined ... solely on that basis, the accused whose behavior is not merely an irritant to the commander, but is ... an **infection in the unit** may be ... confined." Analysis of Rules for Courts-Martial, MCM, p. A21-18.

   United States v. Rosato, 29 M.J. 1052 (A.F.C.M.R. 1990), *rev'd in part*, 32 M.J. 93 (C.M.A. 1991). Accused who was willfully disobedient and disrespectful to superiors in the presence of 10-15 members of a student squadron was properly placed in pretrial confinement "to protect the unit's discipline and morale from the accused's disruptive behavior." Unit consisted of new, junior personnel, accused had a history of disciplinary problems, student representatives complained about him, and the accused ignored first sergeant's admonitions.

United States v. Savoy, 65 M.J. 854 (A.F. Ct. Crim. App. 2008) While suicide prevention is an improper basis for continued pretrial confinement, a detainee's status as a suicide risk may be considered in evaluating the detainees likelihood to be a flight risk or commit other serious misconduct.

5. Commander shall prepare written memorandum stating the reasons for conclusion that requirements for confinement have been met. (Need not be done if such a memo written PRIOR to ordering PTC). Memorandum is forwarded to reviewing officer (military magistrate). (See AR 27-10, para. 9-5b(2): DA Form 5112-R, Checklist for Pretrial Confinement, will be completed and serves as "memorandum.")

   United States v. Shelton, 27 M.J. 540 (A.C.M.R. 1988). The only timeliness requirement attached to this memorandum is that it must be available for the military magistrate's review.

G. R.C.M. 305(i)(2) 7-day Review. AR 27-10, chapter 9 (Military Magistrate Program).

1. Review of "probable cause determination and necessity for continued pretrial confinement" by a "neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned" within 7 days of imposition of confinement. (Time can be extended by the reviewing officer to 10 days for good cause).

2. Reviewing officer reviews commander's memorandum and any additional written matters, including any submitted by accused. Prisoner and counsel "shall be allowed to appear before the reviewing officer and make a statement, if practicable." Representative of command may appear to make a statement.

   a. *United States v. Bell*, 25 M.J. 676 (A.C.M.R. 1987), *petition denied*, 27 M.J. 161 (C.M.A. 1988). Ex parte discussion by magistrate with prisoner's commander and trial counsel held not prohibited, at least when defense counsel was given access to all the information and an opportunity to respond.

   b. *United States v. Fisher*, 37 M.J. 812 (N.M.C.M.R. 1993). Magistrate (and commander) should utilize a "totality-of-the-circumstances" test in determining whether pretrial confinement is warranted.

3. Military Rules of Evidence do not apply. Requirements for confinement must be shown by preponderance.

4. Reviewing officer "shall approve continued confinement or order immediate release." Magistrate must decide within 7 days of imposition of confinement. *United States v. McCants*, 39 M.J. 91 (C.M.A. 1994). Method for calculating total number of days of pretrial confinement: count both the initial date of confinement and date of magistrate review. R.C.M. 305(i)(1).

5. Reviewing officer shall make written memorandum of factual findings and conclusions. Memorandum, and all documents considered must be available to parties on request. R.C.M. 305(i)(6). **Note** that AR 27-10, para. 9-5b(1), requires the magistrate to serve a copy of the memorandum upon the SJA and the accused.

a. Failure to serve copy of reviewing officer's memo after defense request violates RCM 305(i). *See United States v. McCants*, 39 M.J. 91 (C.M.A. 1994).

b. *United States v. Williams*, 29 M.J. 570 (A.F.C.M.R. 1989), *petition denied*, 30 M.J. 106 (C.M.A. 1990). "[T]here is no specified format for the contents [of the reviewing officer's memorandum] other than it must state the reviewing officer's conclusions and the factual findings on which they are based." Failure to precisely state the reasons for continued pretrial confinement is not an abuse of discretion requiring additional credit.

6. Reviewing officer shall, after notice to parties, reconsider the decision to approve continued confinement, upon request based upon any significant information not previously considered. R.C.M. 305(i)(2)(E).

H. Review by Military Judge. R.C.M. 305(j).

1. Once charges are referred, military judge may review propriety of confinement on motion for appropriate relief.

2. Military judge may order release only if:

a. Reviewing officer's decision was abuse of discretion and no information presented to military judge justifying confinement; **or**

b. Information not presented to reviewing officer establishes that prisoner should be released; **or**

c. There has been no initial review and the military judge determines that the requirements for confinement have not been met.

3. The military judge can order day-for-day administrative credit for any pretrial confinement served as a result of failure to comply with subsection (f), (h), (i) or (j) of R.C.M. 305. The MJ may order additional credit for any pretrial confinement that involves the abuse of discretion or unusually harsh circumstances. When simultaneous noncompliance with multiple provisions occurs, only day-for-day credit will be applied. In other words, a pretrial confinee is not entitled to extra additional days of credit when multiple provisions of R.C.M. 305 are violated on one day or over the same period. *United States v. Plowman*, 53 M.J. 511, 514 (N.M. Ct. Crim. App. 2000). See also, *United states v. Huey*, 57 M.J. 504 (N-M. Ct. Crim. App. 2002), for the proposition that once the case is referred, the military judge has the authority to review the propriety of pretrial confinement regardless of whether the IRO has conducted his review.

I. Who May Direct Release. R.C.M. 305(g).

1. Any commander of the prisoner.

United States v. Shelton, 27 M.J. 540 (A.C.M.R. 1988). The following commanders may review pretrial confinement and direct the accused's release: the accused's unit commander, the confinement facility commander, the commander of the unit to which the accused is attached while serving confinement, or the commander of the installation on which the confinement facility is located.

2. Officer appointed to review confinement (military magistrate).

3. The detailed military judge, once charges have been referred.

J. Reconfinement After Release. R.C.M. 305(1).

Once release from confinement is directed by a commander, a reviewing officer, or a military judge, the accused may not be confined again before completion of trial except upon discovery, after release, of evidence or misconduct which either alone or in conjunction with all other evidence, justifies confinement.

III. SENTENCE CREDIT FOR PRETRIAL CONFINEMENT.

A. Allen Credit. *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984). Day for day credit for <u>any</u> military pretrial confinement. "[A]ny part of a day in pretrial confinement must be calculated as a full day for purposes of pretrial confinement credit . . . except where a day of pretrial confinement is also the day the sentence is imposed." *United States v. DeLeon*, 53 M.J. 658, 660 (Army Ct. Crim. App. 2000) (abrogating the court's decision in *United States v. New*, 23 M.J. 889 (A.C.M.R. 1987)).

1. <u>What about civilian confinement</u>? The CAAF has never squarely addressed the issue of *Allen* credit for time spent in civilian confinement. While the Army Court intimated that such credit "must be given ... for time spent in pretrial confinement in state or federal civilian confinement facilities," *United States v. Ballesteros*, 25 M.J. 891 (A.C.M.R. 1988), *aff'd*, 29 M.J. 14 (C.M.A. 1989), the Court of Military Appeals decided the case on other grounds.

2. *United States v. Chaney*, 53 M.J. 621 (N.M. Ct. Crim. App. 2000). Appellant was apprehended by civilian police based on information that he was a deserter from the Marine Corps. Marijuana was found on him during the apprehension. The appellant was placed in confinement based on offenses for which he later received a sentence at a court-martial (marijuana possession and unauthorized absence). The pending state charges against him were dismissed and he was then transferred to military authorities. He was not given credit under *United States v. All*en, 17 M.J. 126 (C.M.A. 1984) at trial for the 40 days he spent in pretrial confinement imposed by civilian authorities. Ultimately, the accused never received any credit for the 40 days (civilian or military credit). The appellate court concluded that he was entitled to 40 days credit because "[h]e was placed in official detention prior to the date his court-martial sentence commenced as a result of the offense for which the sentence was imposed and due to another charge for which he was arrested after the commission of the offense for which the sentence was imposed."

3. *United States v. Murray*, 43 M.J. 507 (A.F. Ct. Crim App. 1995). Relying on a DoDD 1325.4 and 18 U.S.C. Section 3585(b), the Air Force Court determined that an accused who had been arrested and held by civilian authorities prior to his court-martial was entitled to administrative credit for the time spent in civilian confinement.

NOTE: Clearly, additional R.C.M. 305(k) credit does not apply to a Soldier in civilian confinement unless the Soldier is in that confinement solely for a military offense and with notice and approval of military authorities. *United States v. Lamb*, 47 M.J. 384 (1998).

B. Mason Credit - *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985) (summary disposition). Day for day credit given for "pretrial restriction equivalent to confinement." The calculation for Mason credit includes any partial day of restriction tantamount to confinement. *United States v. Chapa*, 53 M.J. 769 (Army Ct. Crim. App. 2000).

1. The test: *United States v. Smith*, 20 M.J. 528 (A.C.M.R. 1985), *petition denied*, 21 M.J. 169 (C.M.A. 1985). "The determination whether the conditions of restriction are tantamount to confinement must be based on the totality of the conditions imposed."

   Some factors: limits of the restricted area; physical restraints; escort requirements (occasional v. constant and armed v. unarmed); sign-in requirements; circumstances of duty; assigned duties; degree of privacy enjoyed; location of sleeping accommodations; access to visitors, telephones, recreational, religious, medical, and educational facilities, entertainment, civilian clothing, personal property, etc. *See also King infra.*, 58 M.J. 110.

2. Restriction tantamount to confinement.

   United States v. Smith, *supra*. 56 days of "restriction" found tantamount to confinement and credit given; accused was restricted to barracks building and was prohibited, among other things, from performing normal duties and leaving the building without permission and an escort; required to *sign in every 30 minutes* during non-duty hours and to remain in room after 2200 hours.

   United States v. Regan, 62 M.J. 299 (C.A.A.F. 2006). Officer who repeatedly tested positive for cocaine was offered inpatient drug treatment or pretrial confinement. She opted for inpatient treatment. The court awarded 21 days of Mason credit because the conditions of inpatient treatment constituted significant restriction and it was suffered upon threat of being confined.

3. Restriction **not** tantamount to confinement.

   Washington v. Greenwald, 20 M.J. 699 (A.C.M.R. 1985) *pet. denied* 20 M.J. 324 (C.M.A. 1985). 88 days of pretrial restriction found not tantamount to confinement; credit denied. Washington was restricted to company area, place of duty, dining facility, and chaplain's office; he performed normal duties; was restricted to room after 2200 hours; *signed in every hour* at CQ's office when not at work; could travel to any place on post he needed to go during duty hours without an escort if he obtained permission and during non-duty hours with an escort.

   United States v. Delano, 2008 WL 5333565 (A.F.Ct.Crim.App.). Servicemember's pretrial restriction was not tantamount to confinement but was implemented to maintain good order and discipline and not imposed as punishment for the Airmen in the Transition Flight. The court held that, "while strict, the restrictions were not equivalent to confinement and were not punishment under *Article 13, UCMJ*."

4. Waiver.

   United States v. King, 58 MJ 110 (C.A.A.F. 2003). If the issue is not raised at trial, it is waived and cannot be raised at the appellate level. Note particularly Judge Baker's concurrence in which he advises MJs to ask on the record whether the accused seeks any pretrial confinement credit beyond simple *Allen* credit.

United States v. Barrett, 2009 WL 295012 (A.F.Ct.Crim.App.). Barrett explicitly waived his right to raise the issue that his treatment was tantamount to confinement at trial and on appeal as part of his plea agreement. Thus, the appellate court held the issue is waived.

C. R.C.M. 305(k) Credit. Remedy for noncompliance with subsection (f), (h), (i) or (j), is administrative credit (day-for-day) against the sentence adjudged. Military judge may also award additional credit (not limited to day-for-day) if the pretrial confinement involves abuse of discretion or unusually harsh circumstances. Applies in addition to *Allen* or *Mason* credit. R.C.M. 305(k), analysis. However, when simultaneous non-compliance with multiple provisions of R.C.M. 305 occurs , only day-for-day credit will be applied. *United States v. Plowman*, 53 M.J. 511, 514 (N.M. Ct. Crim. App. 2000).

1. Restriction tantamount to confinement.

a. *United States v. Gregory*, 21 M.J. 952 (A.C.M.R. 1986), *aff'd*, 23 M.J. 246 (C.M.A. 1986) (summary disposition). When restriction is tantamount to confinement, the procedures for pretrial confinement in R.C.M. 305 apply, and when they are not complied with, day-for-day credit under 305(k) is required in addition to *Allen-Mason* credit.

b. *United States v. Rendon*, 58 M.J. 221 (C.A.A.F. 2003). CAAF "clarified" Gregory in that RCM 305 is only implicated by restriction tantamount to confinement in which actual physical restraint is imposed. The court did not offer a definition or give many useful examples.

c. But: 48-hour review does not apply to simple restriction. *United States v. Perez*, 45 M.J. 323 (1996) (Court refuses to "[e]xtend the requirement for a probable cause hearing to pretrial restriction," noting a "world of difference between restriction and confinement"). However, if restriction is tantamount to confinement it **<u>would</u>** trigger *Rexroat* and R.C.M. 305 review requirements.

2. *Rexroat* Violations. *United States v. Stuart*, 36 M.J. 747 (A.C.M.R. 1993). Accused entitled to day-for-day credit under R.C.M. 305(k) for lack of 48-hour probable cause review.

3. Civilian Confinement.

a. "If the prisoner was apprehended by civilian authorities and remains in civilian custody at the request of military authorities, reasonable efforts will be made to bring the prisoner under military control in a timely fashion" R.C.M. 305(i)(1).

b. R.C.M. 305(k) credit provisions only apply to a Soldier in civilian confinement if the Soldier is in confinement a) solely for a military offense and b) his confinement is with notice and approval of military authorities. Burden is on the accused to allege that R.C.M. 305 applies and that the civilian authorities did not conduct the required 48-hour probable cause review. *United States v. Lamb*, 47 M.J. 384 (C.A.A.F. 1998).

c. *United States v. Durbin*, 2008 WL 5192441 (A.F.Ct.Crim.App.). "[C]onfinement in violation of AFI 31-205 (Air Force Instruction on confinement requiring pretrial detainees in civilian confinement be treated in a manner consistent with a presumption of innocence standard) does not create for the appellant a per se right to sentencing credit; it only provides the military judge with the discretion to award additional sentencing credit for abuse of discretion by pretrial confinement authorities."

4. Reconfinement after release. *United States v. Williams*, 47 M.J. 621 (Army Ct. Crim. App. 1997). Even though a violation of R.C.M. 305(l) is not listed as a basis for awarding R.C.M. 305(k) credit, a violation of R.C.M. 305(l) and *Keaton v. Marsh*, 43 M.J. 757 (A.C.C.A. 1996), results in additional credit under R.C.M. 305(k).

5. Waiver.

a. *United States v. Chapa III*, 57 M.J. 140 (C.A.A.F. 2002). At trial, was awarded 136 days sentence credit in violation of Article 13, UCMJ. On appeal, appellant alleged for the first time an entitlement to additional credit for the Government's failure to comply with R.C.M. 305(h) and (i) (i.e., the 72-hour and 48-hour pretrial confinement review requirements respectively). The ACCA held that the appellant failed to properly raise the issue at trial and therefore waived any entitlement to credit. 53 M.J. 769 (Army Ct. Crim. App. 2000). The CAAF held that appellant waived any issue regarding credit and no plain error by the MJ for failing, sua sponte, to award R.C.M. 305(k) credit.

D. Credit for Violations of Article 13. Two parts: "Unduly harsh circumstances" and pretrial punishment.

1. Unduly harsh circumstances of <u>pretrial confinement</u> (was under *United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983), but is now incorporated into R.C.M. 305(k)).

2. *United States v. Avila*, 53 M.J. 99 (C.A.A.F. 2000). By brig policy, based solely on the serious nature of his pending charges, appellant was housed in windowless cell; not allowed to communicate with other pretrial confinees; given only one hour of daily recreation; made to wear shackles outside of his cell, and; only allowed to see visitors separated by a window. The court agreed with the lower court's holding that the brig policy of assigning all pretrial confinees facing a possible sentence of 5 or more years to maximum (solitary) confinement was unreasonable. Appellant was given an additional 140 days credit for the period of pretrial confinement he already served. However, the court found that these conditions did not amount to cruel and unusual punishment under the Eighth Amendment. *But see United States v. James*, 28 M.J. 214 (C.M.A. 1989) (finding no Article 13 violation for accused who was confined with sentenced prisoners, wore an orange jumpsuit instead of uniform and rank, enjoyed limited recreational facilities, and had visitation privileges narrower than those required by AR 190-47).

United States v. Gilchrist, ARMY20020342 (ACCA 2005). Gilchrist was placed in pretrial confinement (PTC) prior to his plea of guilty for various offenses. The government transported Gilchrist from Fort Knox where he was in PTC to his Article 32 at Fort Bliss. The detention cell was full at Fort Bliss so the command shackled him to a cot in "The Ice House" overnight to prevent him from fleeing. Article 13 credit was denied at trial for the cot incident. ACCA determined the shackling of Gilchrist was not per se unduly harsh. However, they awarded Article 13 credit because other methods could have been used to insure Gilchrist's presence at trial.

United States v. Yunk, 53 M.J. 145 (C.A.A.F. 2000). Reviewing the same unreasonable brig policy in *Avila*, the court commented that the appropriate time to raise matters of illegal pretrial confinement is with the magistrate considering the imposition of pretrial confinement. However, the court refused to find waiver of the issue when it is raised for the first time on appeal. Citing *United States v. Huffman*, 40 M.J. 225 (C.M.A. 1994).

United States v. King, 61 M.J. 225 (C.A.A.F. 2005). King was placed in pretrial confinement and classified as a "maximum security" prisoner. He was placed in a double occupancy cell with another pretrial confinee. The following conditions governed King's pretrial confinement: remain in the cell with the exception of appointments or emergencies; eat all meals in the cell (meals were delivered to the cell); no library or gym privileges (books & gym equipment were delivered to the cell); no sleeping during duty hours; must wear a yellow jumpsuit and shackles when released for appointments; must have two escorts, one of whom was armed, when King was moved to appointments; and may only watch a TV placed outside the cell. King's cellmate was subsequently convicted at a court-martial and for some time, the two continued to reside in the same cell. For administration purposes (overcrowding and prohibition on mixing pre- and post-trial confinees), King spent fifteen days by himself in a windowless segregation cell. At trial, the military judge denied Article 13 relief, finding that "[t]he conditions were based on legitimate non-punitive reasons. The conditions of [King's] confinement were not more rigorous than necessary." The CAAF awarded Article 13 credit for his time spent in the segregated cell. However, no credit was given for the conditions of his pretrial confinement prior to being segregated. The CAAF stated it was "reluctant to second-guess the security determinations of confinement officials."

United States v. Crawford, 62 M.J. 411 (C.A.A.F. 2006). Marine officer accused was segregated for a week of observation and then retained as a "maximum custody" prisoner for almost nine months, the entire time he was in pretrial confinement. This did not establish that he was confined in conditions more rigorous than those required to assure his presence at trial in violation of pretrial confinement regulations. The court considered that there were serious charges pending against the accused, there was a potential for lengthy confinement, the accused had made threats and had an apparent ability to execute those threats, his access to unknown quantities of weapons and explosives, and his professed willingness to resort to violent means against what he viewed as government oppression provided sufficient reason to classify the accused as a high-risk inmate.

United States v. Adcock, 65 M.J. 18 (C.A.A.F. 2007). 1LT Adcock received credit under R.C.M. 305(k) for "abuse of discretion" when she was housed in a civilian confinement facility that did not conform to USAF Regulations (AFI 31-205 forbids pretrial detainees from being commingled with post-trial inmates and mandates that detainees retain rank insignia, conditions violated by the Solano County, CA jail.)

United States v. Gomez, 66 M.J. 663 (C.G. Ct. Crim. App. 2008). The Coast Guard court declined to give relief to an accused who wasn't visited regularly by his chain of command, despite Coast Guard regulation requiring regular visits.

United States v. Williams, 68 MJ 252 (C.A.A.F. 2010). Accused, who was placed on suicide watch when he was confined prior to trial, received sentencing credit for the entire period, but did not receive additional credit based on conditions of confinement. (He was denied books, radio, and CD player, subjected to 24 hour lighting, and required to wear a suicide gown.) This is because there was a non-punitive objective—suicide watch status.

3. Pretrial punishment.

   a. Does NOT depend upon the Soldier being in pretrial confinement. *United States v. Combs*, 47 M.J. 330 (C.A.A.F. 1997). Air Force E-6, whose conviction for homicide was overturned on appeal, was required to serve 20 months on active duty as an E-1. CAAF held that reduction is a punishment and rejected the Government argument that Article 13 only applies in pretrial confinement situations.

   b. *United States v. Smith*, 53 M.J. 168 (C.A.A.F. 2000) (*citing* Francis A. Gilligan & Fredric I. Lederer, *Court-Martial Procedure* sect. 4-900.00 at 6-37 (2d ed. 1999)). Reviewing previous cases dealing with pretrial punishment, the court identified the following factors to assist in determining whether pretrial restraint amounts to pretrial punishment:

      (1) Similarities between sentenced persons and those awaiting disciplinary disposition in daily routine, work assignments, clothing attire, and other restraints and control conditions;

      (2) relevance of those similarities to customary and traditional military command and control measures;

      (3) the relation of requirements and procedures to command and control needs, and;

      (4) if there was an intent to punish or stigmatize the person pending disciplinary action.

   c. *United States v. Mosby*, 56 M.J. 309 (C.A.A.F. 2002). Appellant was convicted of involuntary manslaughter of his five-week old son and sentenced to reduction to E-1, nine years confinement and a BCD. Prior to trial, the appellant was placed in solitary confinement at the Marine Corps Base Brig at Camp Lejeune, North Carolina. At trial, the Military Judge denied a Defense Article 13 motion for additional sentence credit based on illegal pretrial punishment finding that: there was no intent to punish appellant by placing him in solitary confinement; the conditions

were not "unduly rigorous" or "so excessive as to constitute punishment"; and the conditions were "reasonably related to legitimate governmental objectives." Held – The military judge's findings of no intent to punish were not clearly erroneous; appellant was NOT entitled to additional sentence credit. See also *United States v. Fulton,* 55 M.J. 88 (C.A.A.F. 2001) and *United States v. Coreteguera, Jr.*, 56 M.J. 330 (C.A.A.F. 2002).

d. *United States v. Fischer*, 61 M.J. 415 (C.A.A.F. 2005). Fischer was placed in pretrial confinement on 4 May 2001. On 29 June 2001 his pay and benefits were terminated based on him reaching his end of obligated service (ETS or EAS). The defense counsel tried unsuccessfully to have his pay continued past his ETS date. This attempt was unsuccessful. On appeal, Fischer argued that the government violated Article 13, UCMJ, when it refused to pay him past his ETS. The CAAF disagreed. In refusing to award Article 13 credit, the CAAF stated there was a neutral non-punitive policy that allowed for refusing to pay a pretrial confine that has reached his ETS and is not performing duties.

4. Public humiliation or degradation.

a. *United States v. Starr*, 53 M.J. 380 (C.A.A.F. 2000). While under investigation, appellant, a member of the Security Forces (SF) Squadron, was ordered by his First Sergeant to surrender his SF beret. The First Sergeant also assigned appellant to "X Flight," a group of other SF personnel who, for a variety of reasons, were not authorized to bear arms or to perform other normal SF duties. Members of X Flight could not wear berets but those members assigned there for medical reasons could wear their berets to other squadron functions. According to the First Sergeant, custom in the SF career field prohibits one unable to perform SF work from wearing the beret. For 275 days the appellant wore no beret and remained in X Flight. The court found no intent to punish or stigmatize him while disciplinary action was pending and that the limitations were imposed for legitimate, operational and military purposes.

b. *United States v. Cruz*, 25 M.J. 326 (C.M.A. 1987). Cruz and about 40 other Soldiers suspected of drug offenses were called out of a mass formation, escorted before the DIVARTY commander who did not return their salute, called "criminals" by the commander, searched and handcuffed, billeted separately pending trial, and assembled into what become known as the "Peyote Platoon." Held: the "public denunciation by the commander and subsequent military degradation before the troops prior to courts-martial constitute[d] unlawful pretrial punishment prohibited by Article 13."

c. *United States v. Stamper*, 39 M.J. 1097 (A.C.M.R. 1994). Company commander's disparaging remarks to accused such as "don't go out stealing car stereos this weekend" and "getting any five-finger discounts lately, Stamper?" constituted pretrial punishment.

5. Other examples.

a. "Incorrective" training.

United States v. Hoover, 24 M.J. 874 (A.C.M.R. 1987), *petition denied*, 25 M.J. 437 (C.M.A. 1987). After damaging his barracks room, Hoover was required to sleep in a pup tent for 3 weeks between 2200 and 0400 hours. Held: Art 13 violation; "corrective or extra training" must be "directly related to the deficiency" and "oriented to improve . . . performance in the problem area." *See also United States v. Fitzsimmons*, 33 M.J. 710 (A.C.M.R. 1991). Court set aside BCD as a consequence of "pup tent" pretrial punishment.

b. Violating the Order of the Military Judge.

United States v. Tilghman, 44 M.J. 493 (C.A.A.F. 1996). Accused convicted at end of day; government desires to put him in confinement until sentencing hearing next day. MJ determines insufficient basis for confinement. Commander nevertheless orders accused into pretrial confinement. MJ orders additional 10 day credit for each day of illegal pretrial confinement. At post-trial 39a session Chief Judge awards additional 18 months credit.

c. Constitutional Deprivation.

United States v. Mack, 65 M.J. 108 (C.A.A.F. 2007). While the appellate case does not address this issue directly and faulted the trial judge in other areas, CAAF seemed to support the trial judge's decision to award credit for Constitutional violations. These included the accused's commanding officer ordering him to have no unsupervised visits with his wife, even though she had no involvement with the case, something the judge found "not directly linked to a valid, governmental purpose and intruded on the sanctity of his marriage, a right which is often protected under a number of rights in the Constitution of the United States." The judge also took exception that the accused's telephone conversations to his counsel were monitored which "chilled his ability and freedom to speak in a protected environment under the attorney/client relationship, intruding upon [Appellant's] ... Fifth and Sixth Amendment rights to counsel." Accordingly, the trial judge found these restrictions were violations of his constitutional rights and warranted day for day credit.

6. Waiver

a. In *United States v. Inong*, 58 M.J. 460 (2003), CAAF held that an accused must raise illegal pretrial punishment at trial, or the issue will be waived for appellate purposes, absent plain error. In doing so it specifically overruled *United States v. Huffman*, 40 M.J. 11 (C.M.A. 1994, as well as the "tantamount to affirmative waiver" rule established by *United States v. Tanksley*, 54 M.J. 169 (2000) and *United States v. Southwick*, 53 M.J. 412 (2000).

E. Applying credits.

1. Adjudged v. Approved sentence. Pretrial confinement credit applies to the approved sentence.

a. *United States v. Rock*, 52 M.J. 154 (C.A.A.F. 1999). CAAF held that pretrial confinement credit applies to adjudged sentence, unless there is a PTA that provides for lesser sentence, in which case it applies to lesser sentence. In *United States v. Spaustat*, 57 M.J. 256 (C.A.A.F. 2002), the court confirmed its ruling in *Rock* and clarified it by stating: "this court will require the convening authority to direct application of all confinement credits for violation of Article 13 or RCM 305 and all Allen credit against the approved sentence; i.e., the lesser of the adjudged sentence or the sentence that may be approved under the pretrial agreement." See also *United States v. King*, 58 M.J. 110 (C.A.A.F. 2003), Judge Baker's concurrence, for a succinct discussion of the state of this issue.

2. When a SM is tried after receiving NJP for the same offense, the SM must get complete credit for any prior punishment, "day-for-day, dollar-for-dollar, stripe-for-stripe," according to *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989, which in footnote 5 lays out a method to reconcile punishments that do not directly convert. "Extra duty for 45 days is equivalent to 60 days' restriction (1 1/2 for 2); add the 45 days' restriction also imposed = 105 days' restriction. Confinement for 1 day is equivalent to 2 days' restriction, so 105 days' restriction = 52 1/2 days' confinement."

F. Litigating Issues Related to Pretrial Restraint.

1. Pretrial.

a. Violation of Article 13:

United States v. McFayden, 51 M.J. 289 (C.A.A.F. 1999). Court of Appeals for the Armed Forces specified the issue of whether a pretrial agreement requiring the accused to waive his right to challenge a violation of Article 13 violates public policy. The court held that R.C.M. 705(c)(1)(B) does not specifically prohibit an accused from waiving his right to make such a deal. However, as this can be done only with the accused's full knowledge of the implications of the waiver, the military judge should inquire into the facts and circumstances of the pretrial confinement as well as the voluntariness and understanding of the accused of the waiver before accepting the plea.

b. Judicial Review:

Whenever reviewing the legality of confinement *already served*, the military judge should apply an abuse of discretion standard & limit the examination to the evidence previously considered by the magistrate at the R.C.M. 305(i) hearing. R.C.M. 305(j)(1)(A). When determining whether to release the prisoner, the military judge should hold a *de novo* hearing. R.C.M. 305(j)(1)(B). *See United States v. Gaither*, 45 M.J. 349 (C.A.A.F. 1996).

c. Other Violations:

Article 12 (which forbids American Soldiers from being confined in "immediate association" with Enemy prisoners or other foreign nationals) should be interpreted to forbid placement of EPW's, as well as illegal aliens commonly held in local confinement facilities waiting for deportation, and Americans in the same cell. *United States v. Wise*, 64 M.J. 468 (C.A.A.F. 2007).

2. At Trial.

"Trial counsel shall inform the court-martial of the data on the charge sheet relating to . . . the duration and nature of any pretrial restraint. . . . If the defense objects to the data as being materially inaccurate or incomplete . . . the military judge shall determine the issue. Objections not asserted are **waived**." R.C.M. 1001(b)(1).

a. *Mason* credit:

United States v. Ecoffey, 23 M.J. 629 (A.C.M.R. 1986). Failure by defense counsel to raise the issue of administrative credit for restriction tantamount to confinement by timely and specific objection to the presentation of data at trial concerning the nature of such restraint will waive consideration of the issue on appeal. *But see United States v. Guerrero*, 28 M.J. 223 (C.M.A. 1989). Court considered request for *Mason* credit made for first time on appeal, but rejected claim.

b. R.C.M. 305(k)/*Rexroat* credit.

United States v. Rollins, 36 M.J. 795 (A.C.M.R. 1993). Failure to raise *Rexroat*/48 hour review issue at trial constitutes waiver. *Accord, United States v. Sanders*, 36 M.J. 1013 (A.C.M.R. 1993).

SPEEDY TRIAL

IV. SPEEDY TRIAL INTRODUCTION.

SOURCES OF THE RIGHT TO A SPEEDY TRIAL IN THE MILITARY INCLUDE:

A. R.C.M. 707: **120 day** rule.

B. UCMJ articles 10 & 33.

C. Sixth Amendment.

D. Fifth Amendment / Statute of Limitations.

V. R.C.M. 707: THE 120 DAY RULE.

A. The Rule. "The accused shall be brought to trial within 120 days after the earlier of: (1) Preferral of charges under R.C.M. 307/ 308; or (2) The imposition of restraint under R.C.M. 304(a) (2)-(4) [**restriction, arrest, confinement**]; or (3) Entry on active duty under R.C.M. 204." R.C.M. 707(a).

1. "Conditions on liberty" (a "moral" restraint) is **not** a type of restraint which triggers R.C.M. 707.

2. "Specified Limits" - An individual must be required to remain within specified limits to constitute pretrial **restriction**. R.C.M. 304.

United States v. Wilkinson, 27 M.J. 645 (A.C.M.R. 1988), *petition denied*, 28 M.J. 230 (C.M.A. 1989). Denial of off-post pass that left the accused free access to the entire installation with all its support and recreational facilities was at most a condition on liberty that did not affect speedy trial clock. "[The lack of pass privileges] will, in the usual case, have no impact on rules relating to speedy trial."

But see United States v. Wagner, 39 M.J. 832 (A.C.M.R. 1994). In dicta, court seriously questioned *Wilkinson's* application to married Soldier living off post, especially in foreign country. Court should consider extent and duration of disruption of spousal and parental responsibilities.

See also United States v. Melvin, 2009 WL 613883 (A.F.Ct.Crim.App.). Maj. Melvin was an Air Force ROTC instructor. He was charged with providing underage cadets in his detachment with alcohol, had sexual intercourse with a female cadet, and encouraged cadets to lie to investigating officers. He was adjudged a dismissal and six months confinement. One issue on appeal was the trial judge's decision to start the 120 day clock at preferral of charges. Maj. Melvin asserted it should have started when he received a no contact order with the cadets and was sent TDY away from the university area and more significantly, his family that lived there. Maj. Melvin's contention that since he was forced away from his family and could not return home without taking leave was this equated to restriction in lieu of arrest and pretrial restraint under R.C.M. 304(a)(2)-(4). Alternatively, Maj. Melvin argued that his extension on active duty was a second triggering date before preferral. The appellate court agreed with the trial judge that neither of these positions contained merit.

3. Administrative restraint imposed under R.C.M. 304(h) "for operational or other military purposes independent of military justice, including administrative hold or medical reasons" does not start the speedy trial clock.

"Primary Purpose" Test - If the primary purpose of restraint is administrative and not for military justice, the speedy trial clock is not triggered.

United States v. Bradford, 25 M.J. 181 (C.M.A. 1987). Denial of sailor's port liberty while sailor was a suspect of offense found to be "administrative restraint" under R.C.M. 304(h). "[We] believe the test is . . . the primary purpose. . . ." "Where the evidence supports a conclusion that the primary purpose of the command . . . is related to an upcoming court-martial, R.C.M. 707 applies."

4. Starting the count: Include the day of arraignment; do not include the day of preferral or imposition of restraint or entry on active duty. R.C.M. 707(b)(1).

5. Termination: At arraignment under R.C.M. 904. *See United States v. Doty*, 51 M.J. 464 (C.A.A.F. 1999), wherein the CAAF holds that arraignment at day 119 was not a "sham" to toll the speedy trial clock. For sentence rehearings, the clock stops when the accused is first brought to the "bar" for resentencing, typically at the initial UCMJ art. 39(a) session. R.C.M. 707(a) and (b)(1). *United States v. Becker*, 53 M.J. 229, 232 (A.F. Ct. Crim. App. 2000). *See also United States v. Gammon*, NMCCA 200800324 (2009) an unpublished case where, based on the dispersal of trial participants, the appellate court approved of the judge's decision to delay the arraignment until trial because of the "unjustifiable expense" in bringing everyone together and excluding the period of time from when the delay could have occurred but for the cost factor until when it actually did happen.

B. Restarting the clock at zero. R.C.M. 707(b)(3).

1. First restart. If charges are dismissed or a mistrial is granted, speedy trial clock is reset to begin on; date of dismissal in cases where the accused remains in pretrial restraint; date of mistrial, or; earlier of re-preferral or imposition of restraint for all other cases. R.C.M. 707(b)(3)(A).

Dismissal (R.C.M. 401) or withdrawal (R.C.M. 604)? General Rule: Withdrawal does not toll running of speedy trial clock. *United States v. Weatherspoon*, 39 M.J. 762 (A.C.M.R. 1994). Dismissal of charges does. *United States v. Bolado*, 34 M.J. 732 (N.M.C.M.R. 1991); *aff'd*, 36 M.J. 2 (C.M.A. 1992). A commander can dismiss charges even if there is an intent to re-institute charges at a later date. Convening authority ordered charges dismissed since two NIS witnesses were deployed on Operation Desert Shield/Storm for an uncertain time period. Charges lined through, dismissal document executed, accused informed and allowed to go on leave, although not allowed to work in MOS. Charges were re-preferred 9 months later following return of the witnesses. See also *United States v. Tippit*, 65 M.J 69 (C.A.A.F. 2007), Upon the SJA's advice the Special Court-Martial Convening Authority signed a withdrawal of charges (which were not referred). The Court honored the SPCMCA intent to dismiss the charges despite the misnomer and found no violation of R.C.M. 707.

United States v. Young, ARMY 20000358 (A.C.C.A. 2005). Young deserted his unit after he was found guilty of various offenses but prior to sentencing. The court sentenced him, *in abstentia*, to confinement for life. After his initial trial, his command preferred a new charge for desertion in 1995. Young was apprehended six months later and began serving his life sentence. The desertion charge was not acted upon until the Chief of Staff at the USBD signed a DA form 4833 stating, "the [prior] command and the USBD have declined prosecution of the desertion offense." The command decided to go forward on the desertion

charge when the sentence from Young's initial trial was set aside on appeal. Believing the initial desertion charge had been dismissed, the command preferred the desertion charge anew in 1999. Young moved the trial court to dismiss the desertion charge because there had been no dismissal of the original desertion charge and therefore the speedy trial clock had run continuously since 1995. The trial court disagreed and found the DA form 4833 equaled a dismissal. ACCA reversed the case finding that the government had violated Young's right to a speedy trial. The court noted that the DA form 4833 was NOT a dismissal but rather a decision to take "no action".

United States v. Robinson, 47 MJ 506 (N.M.C.C.A. 1997). Dismissal of charges on day 115 and repreferral of substantially identical charges one week later, without any significant change in A's status held to be a **subterfuge** to avoid the 120 day speedy trial clock. Distinguishes *Bolado*, which held convening authority need not explain reasons for dismissal. Any other solution would allow CA to routinely violate spirit of RCM 707.

Factors courts will consider to decide if subterfuge: Convening Authority intent, notice and documentation of action, restoration of rights and privileges of accused, prejudice to accused, amended or additional charges. *See also United States v. Anderson*, 50 M.J. 447 (C.A.A.F. 1999), wherein CAAF finds no subterfuge under the facts of the case and declares, contrary to the Government's concession, that the speedy trial clock was restarted on the date of dismissal.

2. Second restart provision. If the accused is released from pretrial restraint for a significant period, the time under this rule shall run from the earliest date on which charges are preferred, or restraint is re-instituted, or entry on active duty. R.C.M. 707(b)(3)(B).

What is a significant period?

United States v. Hulsey, 21 M.J. 717 (A.F.C.M.R. 1985), *petition denied*, 22 M.J. 353 (C.M.A. 1986). 5 day release from pretrial restraint held a "significant period" and not a "subterfuge designed to circumvent R.C.M. 707," clock restarted with reinstitution of restraint.

United States v. Miller, 26 M.J. 959 (A.C.M.R. 1988), *petition denied*, 28 M.J. 164 (C.M.A. 1989). 5 day release from pretrial restriction tantamount to confinement held to be a "significant period" even though accused was held in administrative restraint in the hospital for the 5 days. Factors: (1) hospitalization for suicide attempt, (2) hospital, not command, imposed restraint, and (3) no showing of improper gamesmanship.

United States v. Campbell, 32 M.J. 564 (A.C.M.R. 1991). Thirteen day period of restriction imposed as punishment under Article 15 was a "significant period" of "release" from ongoing restriction that restarted the speedy trial clock. Article 15 was for offenses that were unrelated to the court-martial charges and was not a subterfuge to avoid speedy trial issues.

United States v. Reynolds, 36 M.J. 1128 (A.C.M.R. 1993). 19 day period of conditions on liberty between release from 5 weeks of restriction and preferral of charges was a significant period. Speedy trial clock commenced running upon preferral.

Note: Time between release from pretrial restraint and preferral of charges need not be a "significant period" to stop the speedy trial clock. *United States v. Ruffin*, 48 M.J. 211 (C.A.A.F. 1998). Charges preferred one day after two month restriction was lifted. Restriction never reimposed. The requirement to wait a "significant period" of time only applies to cases involving re-imposition of restraint; it does not require the government to wait a "significant period" before preferring charges once released from confinement. Purpose of rule is to avoid sham releases to stop and start the speedy trial clock. Here, because restriction was never reimposed, release was for a "significant period" which restarted the speedy trial clock at preferral.

3. Third restart provision. Government appeal under R.C.M. 908 - begin on date of notice to the parties of final action on the appeal. R.C.M. 707(b)(3)(C).

4. Fourth restart provision. Rehearings--begin on date "responsible convening authority receives record of trial and opinion authorizing or directing a rehearing." R.C.M. 707(b)(3)(D). *See United States v. Becker*, 53 M.J. 229 (C.A.A.F. 2000) (applying R.C.M. 707 timing requirements to a *sentence* rehearing but finding that remedy of dismissal of charges too severe).

5. Fifth restart provision. Return of accused from the custody of the Attorney General. R.C.M. 707 (b)(3)(E).

6. Multiple charges: When charges are preferred at different times each charge may have a separate starting date based on date of preferral, restraint, or entry on active duty related to particular charge. R.C.M. 707(b)(2). *United State v. Bray*, 52 M.J. 659 (A.F. Ct. Crim. App. 2000). Speedy trial clock begins to run when accused is placed into pretrial confinement for all offenses the government knows (or reasonably should know) are part of the misconduct (rape charge was dismissed with prejudice).

   See United States v. Robinson, 26 M.J. 954 (A.C.M.R. 1988) *aff'd*, 28 M.J. 481 (C.M.A. 1989). "We hold that, in order to commence the speedy trial clock, the imposition of restraint . . . must be 'in connection with' the specification being challenged."

7. Post-trial Speedy Trial Clock: *United States v. Collazo*, 53 M.J. 721 (Army Ct. Crim. App. 2000). "Every soldier (sic) deserves a fair, impartial, and timely trial, *to include the post-trial processing of his case*." The court reduced appellant's sentence to confinement by four months after finding ten month delay in processing too long for 519-page record of trial.

   United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006). The *Moreno* decision demonstrated that while the CAAF was not willing to return to an inflexible *Dunlap*-style 90-day rule, it was willing to apply heightened scrutiny and find due process violations in cases where post-trial processing crossed certain defined boundaries. In *Moreno*, the CAAF announced that it would apply a presumption of unreasonable delay to any case completed after 11 June 2006 that: (1) did not have initial action taken within 120 days of the completion of the trial; (2) was not docketed within 30 days of the convening authority's action; or, (3) did not have appellate review completed by the Court of Criminal Appeals within 18 months of docketing. Once the post-trial delay in a case is determined to be unreasonable, the court must balance: (1) the length of the delay against; (2) the reason for the delay; (3) the appellant's assertion of the right to timely review and appeal; and,

(4) prejudice. This test represented an adaptation of the *Barker v. Wingo*, 407 U.S. 514 (1972), test that had previously only been used to review speedy trial issues in a Sixth Amendment context. While failure to meet the *Moreno* timelines triggers the *Barker v. Wingo* analysis, the government can still rebut the presumption of prejudice by showing that the delay was not unreasonable.

C. Excludable Delays. R.C.M. 707(c). "All periods of time during which appellate courts have issued stays in the proceedings, or the accused is hospitalized due to incompetence, or is otherwise in the custody of the Attorney General, shall be excluded when determining whether the period in subsection (a) of this rule has run. All other pretrial delays approved by a military judge or the convening authority shall be similarly excluded."

1. Independent determination as to whether there is in fact good cause for a delay, and for only so long as is necessary.

2. Approval Authority: Convening Authority and the Military Judge (after referral). Discussion following R.C.M. 707(c)(1) indicates the CA's authority can be delegated to the 32b Investigating Officer (IO).

United States v. Lazauskas, 62 M.J. 39 (C.A.A.F. 2005). Lazauskas made a motion to dismiss the charges at his arraignment on the basis that the government had not brought him to trial within 120 days IAW RCM 707. The military judge denied the motion at trial. The AFCCA affirmed. CAAF affirmed as well. At issue were two delays in the proceedings totaling 11 days. The first delay was six days in order to secure witnesses for the Article 32. The CAAF held this time was excludable because the IO may grant reasonable delay requests (excludable IAW RCM 707(c)) if the convening authority had properly delegated delay authority. Furthermore, the delays are excludable unless there was an abuse of discretion by the person who granted the delay. The second delay was the five day statutory waiting period IAW Article 35, UCMJ. The CAAF held that Article 35 provides a shield so that the accused is not brought to trial too quickly. Therefore, Article 35 may not be used as a sword for the accused to attack the government for not bringing him to trial sooner.

3. Pretrial delays should not be granted *ex parte*. Discussion to R.C.M. 707(c)(1).

4. Approved delays subject to review on 2 grounds:

a. Abuse of discretion. "Granting a continuance is within the sound discretion of the military judge, and a denial will be reversed only for an abuse of discretion." *United States v. Sharp*, 38 M.J. 33, 37 (C.M.A. 1993).

b. Reasonableness of the period of delay: "Reasons to grant a delay might, for example, include the need for: time to enable counsel to prepare for trial in complex cases; time to allow examination into the mental capacity of the accused; time to process a member of the reserve component to active duty for disciplinary action; time to complete other proceedings related to the case; time requested by the defense; time to secure the availability of the accused, substantial witnesses, or other evidence; time to obtain appropriate security clearances for access to classified information or time to declassify evidence; or additional time for other good cause." R.C.M. 707 discussion.

5. Attribution of delay period.

a. *United States v. McKnight*, 30 M.J. 205 (C.M.A. 1990). Defense is not entitled to request a delay until a day certain and then insist the government proceed on that very day. Defense must accommodate government's scheduling needs and remains accountable for reasonable delays occasioned by initial request.

6. Exceptions to the Rule requiring pre-approved delay:

a. *United States v. Dies*, 45 M.J. 376 (C.A.A.F. 1996). Accused's unauthorized absence is automatically excluded from government accountability even though government never secured a delay from competent authority to cover time. By his voluntary absence, an accused "waives" his speedy trial right as to that interim period. Further, R.C.M. 707 does not require that the government be held accountable for all periods of time not covered by stays or delays.

b. *United States v. Thompson*, 46 M.J. 472 (C.A.A.F. 1997). After the fact approval of defense requested delay by the SPCMCA held excludable delay. Although purpose of revised rule was to obtain delays as you go, CAAF focused on fact the specific text of RCM 707(c) "does not require specifically that the delay be approved in advance for it to be excluded." But government runs risk that such post hoc determinations will be viewed with skepticism. CAAF avoided certified issue of whether quasi-judicial 32b IO has power to exclude delays.

c. *United States v. Melvin*, 2009 WL 613883 (A.F.Ct.Crim.App.). Maj. Melvin was an Air Force ROTC instructor. He was charged with providing underage cadets in his detachment with alcohol, had sexual intercourse with a female cadet, and encouraged cadets to lie to investigating officers. He was adjudged a dismissal and six months confinement. One issue on appeal was the trial judge's decision to exclude the time (158 days) it took to process the servicemember's request for resignation in lieu of trial, determining that only seventy "countable" days had passed between preferral and arraignment. The Air Force appellate court held that exclusion of this time was proper even though he had submitted a speedy trial request because there was no evidence he wanted to proceed to trial while the resignation request was pending. The lesson to take away from this aspect of the case is understanding that calculating the 120 day clock is more than counting days on a calendar. The TC needs to know what time will be excluded and then make a clear appellate record.

d. Request for delay need not originate from either party; convening authority may initiate *sua sponte*. *United States v. Anderson*, 46 M.J. 540 (N.M.C.C.A. 1997).

D. Remedy for violation is dismissal of charges upon timely motion. R.C.M. 707(d).

1. In dismissing with or without prejudice, the military judge considers these factors: "[s]eriousness of the offense . . . facts and circumstances that lead to dismissal . . . impact of re-prosecution . . . and any prejudice to the accused . . ." R.C.M. 707(d). *United States v. Bray*, 52 M.J. 659, 663 (A.F. Ct. Crim. App. 2000).

   a. *United States v. Edmond*, 41 M.J. 419 (C.A.A.F. 1995). Dismissal without prejudice appropriate for 41 day violation of R.C.M. 707. Sex crimes against inebriated victim were serious offenses; no government bad faith involved; dismissal with prejudice would not lead to better administration of justice; no indication accused suffered prejudice.

   b. *United States v. Bolado*, 34 M.J. 732, 739 n.6 (N.M.C.M.R. 1991); *aff'd*, 36 M.J. 2 (C.M.A. 1992). "A commander's decision to reassign an accused to another duty assignment is not the kind of prejudice envisioned in R.C.M. 707(d)." Court also states "backwater of suspicion" following dismissal is no different than that existing pre-preferral and constitutes minimal prejudice.

   c. *United States v. Dooley*, 61 M.J. 258 (C.A.A.F. 2005). In 1998, Dooley was convicted of various child pornography related offenses. In 2004, his conviction was set aside. The convening authority decided to retry Dooley on the charges but did not bring him off appellate leave and onto active duty and arraign him until 125 days after the convening authority received the record of trial. The military judge dismissed the case with prejudice. The N-MCCA reversed the judge based on the fact the he had abused his discretion when ordering dismissal with prejudice. CAAF reversed the N-MCCA and reinstated the trial court's dismissal with prejudice. Under the abuse of discretion standard, mere disagreement with the conclusion of the trial judge is not enough to warrant reversal. Here the N-MCCA did not find that the trial judge's decisions were "clearly erroneous" but rather that it "did not concur" with the trial judge.

   d. *United States v. McClain*, 65 M.J. 894 (A. Ct. Crim. App. 2008). Mistrial is not an appropriate remedy for a violation of R.C.M. 707.

VI. UCMJ ART. 10: PRETRIAL CONFINEMENT AND ARREST.

A. **UCMJ Art. 10**:

"When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him."

B. **Historical Development**.

1. The rule of *United States v. Burton*, 44 C.M.R. 166 (C.M.A. 1971):

   Pretrial confinement over 90 days created a presumptive speedy trial violation under UCMJ, art. 10. The government could overcome the presumption by demonstrating due diligence.

2. R.C.M. 707(d) - contained 90 day rule for accused in pretrial confinement.

3. *United States v. Kossman*, 38 M.J. 258 (C.M.A. 1993). The death of *Burton*. THERE IS NO LONGER A 90 DAY RULE!

a. "Reasonable diligence" is the standard for measuring compliance with UCMJ, art. 10.

b. Article 10 <u>may</u> be violated where accused is tried in less than 120 days, or even in less than 90 days. Many circumstances, however, may justify delays beyond these traditional periods. "The touch stone . . . is not constant motion, but reasonable diligence in bringing the charges to trial. Brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive." *Kossman*, at 262 (*citing United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965)).

c. Article 10 motion will lie when government "could readily have gone to trial . . . but negligently or spitefully chose not to." *Kossman*, at 261.

C. Analysis for application of Article 10.

1. Compliance with R.C.M. 707 does NOT equal compliance with Article 10.

a. *United States v. Hatfield*, 44 M.J. 22 (C.A.A.F 1996). Overall lack of forward motion toward resolving relatively simple case. CAAF particularly concerned with 2-month delay in appointing defense counsel due to incomplete paperwork.

b. *United States v. Collins*, 39 M.J. 739 (N.M.C.M.R. 1994). 6 to 8 phone calls by non-JAG attempting to obtain evidence of forged checks from an exchange on another installation is not proceeding with due diligence. Delays in requesting copy of service record and requesting legal services do not reflect due diligence.

c. *United States v. Laminman*, 41 M.J. 518 (C.G.Ct. Crim. App. 1994). Government failed to proceed with reasonable diligence when it brought the accused to trial 134 days after initial restraint. (21 days attributed to defense delay.) Case provides detailed analysis of Article 10 and the government's burden of proof when confronted with motion to dismiss based on Article 10. Court found government's failure to provide evidence explaining several delays supported military judge's finding of lack of diligence. (In footnote, court suggested that the best way for the military judge to proceed would be to have parties enter a stipulation of fact as to the undisputed portions of chronology and then to present evidence on those relevant matters upon which there is disagreement.)

d. *United States v. Calloway*, 47 M.J. 782 (N.M.Ct.Crim.App. 1998). Accused placed in pretrial confinement for 20 days before government took any action on his case. Another 7 days passed before magistrate review. The government took another 34 days to prefer charges, another 22 days to serve charges on the accused after referral, and another 18 days to arraign the accused. TDS counsel was not provided until 66 days of pretrial confinement. Several other cases without pretrial confinement were tried before the accused. Military judge failed to make specific findings of fact and explanation for the delays, especially regarding (1) overall lack of forward motion, (2) delay in appointing DC. Judge also criticized for relying too much on RCM 707 type analysis.

e. *United States v. Mizgala*, 61 M.J. 217 (C.A.A.F. 2005). Mizgala was placed in pretrial confinement (PTC) for 117 days. His initial PTC began

on 28 February. Based on various factors (i.e., waiting on a police report, moving the SJA office because of a fire) the government did not prefer charges until 14 May. On 16 April, Mizgala made a demand for a speedy trial. After the Article 32 on 22 May, the charges were referred on 20 June. At the arraignment, the military judge denied Mizgala's motion to dismiss for violating Article 10, UCMJ. The military judge used a "gross negligence" standard when deciding that the government had not violated Article 10, UCMJ. The CAAF affirmed the trial court decision that the government did not violate Mizgala's speedy trial rights but pointed out several errors that the military judge made when deciding the motion. First, the RCM 707 120 day requirement is irrelevant when determining whether there was an Article 10 violation. Second, reasonable diligence, not gross negligence, is the proper standard when analyzing Article 10 claims. Finally, Article 10 is more exacting than the Sixth Amendment so the military judge should not have limited his consideration to the *Barko v. Wingo* factors (see infra). The CAAF also held that an unconditional guilty plea does NOT waive consideration of an Article 10 claim on appeal.

f. *United States v. Simmons*, Army 20070486 (A.C.C.A 2009). Simmons pled guilty at a general court-martial to AWOL, failure to be at his place of duty or follow orders, and, disorderly conduct. While he was also arraigned on charges of rape, kidnapping, and multiple assaults, those charges were dismissed. The issue on appeal in this case was whether the judge erred by failing to dismiss the charges for Art. 10 violations. While this is an unpublished opinion and, as such, does not serve as precedent, it provides multiple teaching points for counsel dealing with an accused in PTC. Simmons was placed into PTC following the alleged rape of his wife while he was AWOL. He remained in PTC for 133 days before his trial, although was arraigned on day 107. The events of this case took place in South Korea, where Simmons was assigned. The first delay of this case resulted from the government's errant belief that the SOFA gave primary jurisdiction to the Koreans and the U.S. military was barred from going forward with the case. In addition to identifying the SOFA from allowing them to move forward, the government also cited a brigade training exercise in hindering their forward movement. The court noted that, "[w]hile operational considerations are relevant, they are not an absolute excuse." Particularly so when, it was just an annual exercise as in this case. The government also pointed to a plodding CID investigation that caused further delay due to a couple of follow up interviews that took an extended time to conduct. When the SOFA confusion was resolved, first one, then a second replacement investigating officer (IO) was appointed to the case on day 46 of Simmons' PTC. Despite the IO's appointing memorandum authorizing him seven calendar days to conduct the investigation, he took forty-one days to forward his report from the time he was appointed, day eighty-six of the PTC. This was due in part to the IO's refusal to move forward with the investigation due to his prior plans to visit friends over a four day weekend. Eleven days after receiving the IO's report, the convening authority referred the case to a general court-martial. When Simmons was arraigned, the judge docketed the case forty days later "because there was nothing else

available on the docket." Ultimately, Simmons spent 134 days in PTC before being sentenced to 120 days of confinement, a BCD and reduction to E-1. **Holding:** Due to the extent of the delay, ACCA did not believe the government exhibited reasonable diligence in processing the case. Consequently, the court dismissed the case with prejudice, the remedy for a violation of Art.10. **Analysis:** First, inexperienced trial counsel should be closely monitored or assigned a second chair from the outset when the accused is placed into PTC since the lack of experience will not provide the government an excuse for the case not moving forward in a timely manner. Secondly, if there is a delay involved due to a SOFA or some other international agreement or regulation, contact the subject matter expert and make sure that your interpretation requiring a delay in the case moving forward is one they share. When operational realities do arise, consider if another trial counsel can still move the case forward and if the "operation reality" is really a training event, and if so, which should have priority. Similarly, if a lengthy CID investigation is causing a delay, determine if the information they are still tracking down is case-changing or whether the case can go forward while CID ties up loose ends, especially as in this case where there were no complex evidentiary issues, no physical evidence and as such no need for time-consuming forensic evaluation, and no co-accused, thereby eliminating any need for the procedurally complex witness immunity burden. Also keep in mind that the prosecution may request that the Convening Authority exclude the time it takes for certain actions from counting against the government "clock" under the provisions of R.C.M. 707(c). Another factor to consider, while obvious, is to identify a "good" Art. 32 officer before charges are preferred at the GCM level or as soon as a servicemember is placed into PTC, for if overlooked, it can cause lengthy delay. A "good" Art. 32 officer is one who is not about to go on leave or TDY and is not so burdened with normal responsibilities that they will prioritize completion of the Art. 32 process. If, despite one's best efforts in selecting a "good" Art. 32 officer, the IO does not move forward in a timely manner and prodding from the TC is unable to achieve the desired results, involve the commander to direct the investigating officer to comply with the suspense he or she received in their appointment letter. To avoid UCI, a reminder to the commander not to discuss the merits of the case, with the Art. 32 officer, may be appropriate. Another tool to help keep the case moving along is Art. 98, UCMJ, that subjects "any person . . . who is responsible for unnecessary delay in the disposition of any case of a person accused of an offense" under the UCMJ to criminal prosecution. Another issue highlighted by *Simmons* is to have a plan for rapid action by the convening authority. Depending on the timing of the next scheduled appointment, perhaps a specially scheduled appointment to address a pending case is appropriate. A final lesson drawn from this case is that when a servicemember is in confinement, the speedy trial clock does not stop at arraignment. While the judge assumes greater responsibility for the case at this stage of the trial, the government still has an obligation to move the case forward as expeditiously as possible. Options for the government include requesting that another case be moved back on the docket that does not have an accused in PTC and replace it with one where there is an Art. 10 issue, or alternatively

requesting the assistance of an alternate judge who is available. Finally, the government must establish a proper record for the appellate court so that their efforts remain known.

g. *United States v. Roberts II*, 2009 WL 613877 (A.F.Ct.Crim.App.). The prosecution took 270 days from the time Roberts was placed into PTC until he was brought to trial. Based on the Record of Trial, the appellate court opined that the government "exercised reasonable diligence in accomplishing those tasks necessary to try him." As such, Roberts did not receive any credit for speedy trial violations despite the amount of time it took to get the case to trial.

h. *United States v. Thompson*, 68 MJ 308 (C.A.A.F. 2010). Accused spent 145 days in PTC. Much of the delay centered around the handover of the off-post offenses from the civilian authorities to the military. Additional delay came from the TC attending a weeklong, out-of-town sexual assault course and then taking 4 days of leave, before being snowed in for an additional day. Further exacerbating the problem was a deployment that ultimately resulted in 3 different TC handling the case. The trial judge found that there was a 37 day period where the government failed to act with reasonable diligence and dismissed all charges with prejudice for violating Thompson's Art. 10 right to a speedy trial. Unlike the judge, ACCA found it reasonable that the TC resolve all of the jurisdictional issues with the civilian authorities before proceeding, as well as taking what ACCA termed "mandatory job-related training" and taking a short leave in conjunction with that duty. ACCA was also influenced by defense not making a speedy trial demand until Thompson had been in confinement for over 140 days, which was not during the 37 day period. ACCA was further impacted by a 39 day defense delay to prepare for the Art. 32 hearing, which came after the 37 day period the judge determined the defense did not proceed with reasonable diligence. ACCA returned the case to the judge for action not inconsistent with their opinion, after writing, "appellee does not allege, nor do we find, that she suffered any hindrance to the preparation of her case because of any delay." CAAF upheld ACCA based on the 37 days needed to determine who was going to prosecute the case. *See also United States v. Labout*, NMCCA 201000383 January 2011 where 146 days of PTC was not a violation.

2. Factors from *Barker v. Wingo*, 407 U.S. 514 (S.Ct. 1972). An appropriate analysis of Article 10 includes consideration of these factors. *See United States v. Birge*, 52 M.J. 209 (C.A.A.F. 1999), *United States v. Cooper*, 58 MJ 54 (C.A.A.F. 2003).

3. Arraignment does not necessarily terminate government's Article 10 speedy trial obligations. *United States v. Cooper*, 58 MJ 54 (C.A.A.F. 2003): "We therefore hold that the Article 10 duty imposed on the Government immediately to try an accused who is placed in pretrial confinement does not terminate simply because the accused is arraigned." The court goes on to say that post arraignment, the MJ has much more control of the course of the trial, but the "affirmative obligation of reasonable diligence upon the government does not change."

D. Remedy for an Article 10 violation remains dismissal **<u>with prejudice</u>**.

VII. THE SIXTH AMENDMENT RIGHT TO SPEEDY TRIAL. BARKER V. WINGO, 407 U.S. 514 (U.S. S.Ct. 1972).

A. The Trigger: Preferral of charges. *United States v. Grom*, 21 M.J. 53 (C.M.A. 1985).

B. A Balancing Test: The *Barker* Factors.

1. Length of delay.
2. Reason for delay.
3. Assertion of the right.
4. Prejudice to accused.

C. Applying *Barker v. Wingo*.

1. *United States v. Edmond*, 41 M.J. 419 (C.A.A.F. 1995). No Sixth Amendment violation under *Barker* test. Length of delay: 176 days from preferral to trial. Reason for delay: witnesses unavailable due to homeport change and necessity of trying co-accused shipmates before granting immunity. Assertion of right: Accused did demand speedy trial. Prejudice: only slight prejudice; accused's defense was not impaired; he was not restrained; he had not suffered abnormal anxiety because of charges. Accused had been paid and had been allowed to work in his rating, albeit only duties not requiring a security clearance. Held: balance weighed in favor of government.

D. Constitutional right to a speedy trial does not arise until after an indictment is filed or charges are preferred. *United States v. McGraner*, 13 M.J. 408 (C.M.A. 1982).

1. *United States v. Vogan*, 35 M.J. 32 (C.M.A. 1992). Accused committed mail fraud while serving a prior court-martial sentence. He was placed in administrative segregation pending year-long investigation. Held: Sixth Amendment right to a speedy trial did not apply because of accused's post-trial restraint.

VIII. FIFTH AMENDMENT RIGHT TO DUE PROCESS.

A. Applies during investigatory stage, prior to preferral.

B. Requires a showing of:

1. Egregious or intentional tactical delay by the Government and
2. Actual prejudice to the accused or his case.

C. *United States v. Reed*, 41 M.J. 449 (C.A.A.F. 1995). Seventeen month delay between identification of accused as a suspect and preferral of charges did not violate due process. Appellant failed to meet his burden of proof to show an egregious or intentional tactical delay ***and*** actual prejudice. (The Court also noted that when the accused is not confined, the statute of limitations is the "primary protection" against pre-accusation delay.)

IX. LITIGATING SPEEDY TRIAL ISSUES.

A. Accused raises issue at trial by a motion to dismiss. R.C.M. 907.

B. Speedy trial issue is waived if not raised before final adjournment. R.C.M. 907(b)(2). *But see United States v. Britton*, 26 M.J. 24 (C.M.A. 1988). "While it is the general rule that failure to make a timely motion at trial may estop one from raising the issue on appeal, failure to raise the issue does not preclude the Court of Military Review in the exercise of its powers from granting relief."

C. Waiver by guilty plea. "Except as provided in (conditional pleas), a plea of guilty which results in a finding of guilty waives any speedy trial issue as to that offense." R.C.M. 707(e).

D. Once defense raises issue, government has burden of persuasion to show no denial of speedy trial. R.C.M. 905(c)(2)(B).

E. The government's burden of proof on any factual issue is by a preponderance of the evidence. R.C.M. 905(c)(1). *United States v. Cummings*, 21 M.J. 987 (N.M.C.M.R. 1986).

F. Parties must put on evidence or agree to stipulation of fact. *See United States v. Cummings, supra; United States v. Thompson*, 29 C.M.R. 68 (C.M.A. 1960). The court is not permitted to consider matters in an offer of proof. A proffer is not evidence.

G. Pretrial agreement provisions. *See United States v. McLaughlin*, 50 M.J. 217 (C.A.A.F. 1999). Arising in the context of a pretrial agreement provision, the accused challenged a provision in the PTA that **required** a waiver of a speedy trial motion. Finding that such a provision is impermissible, the CAAF said the Military Judge should have set aside that provision and held the Government to the balance of the PTA, giving the defense the chance to raise or waive the motion at trial. Absent this "cleaner" waiver process, the CAAF says that the accused must make a colorable or *prima facie* claim that he would have been entitled to relief on his speedy trial motion. The CAAF said the defense failed in this case, when the accused had been in PTC for 95 days, no prejudice was claimed by the defense and no demand for immediate trial was made.

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TAB G

INITIATION AND DISPOSITION OF CHARGES

Table of Contents

I. INTRODUCTION. 1
- A. References 1
- B. Purpose of Class 1

II. INITIATION AND DISPOSITION OF CHARGES. 1
- A. Who reports an offense? 1
- B. Immediate commander with Article 15 jurisdiction 1
- C. Commander's Options 1
- D. Commander's Discretion 3
- E. Chain of Command Options 3
- F. SCMCA. [UCMJ arts. 20 and 24] 3
- G. SPCMCA. [UCMJ arts. 19 and 23] 4
- H. GCMCA. [UCMJ, arts. 18 and 22; R.C.M. 407] 5
- I. Trial Alternatives. 6

III. CONCLUSION. 7
- A. Know how the court-martial system is initiated 7
- B. Know what immediate commander does to determine how to dispose of allegations of misconduct. 7
- C. Know what options all levels of commanders have at their disposal. 7

LTC Brookhart
January 2011

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INITIATION AND DISPOSITION OF CHARGES

Outline of Instruction

I. INTRODUCTION.

A. References:

1. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005) [hereinafter MCM], chs. III-IV.

2. Dep't of Army, Reg. 27-10, Legal Services, Military Justice (15 November 2005) [hereinafter AR 27-10].

3. JA 310, TRIAL COUNSEL AND DEFENSE COUNSEL HANDBOOK (1995).

B. Purpose of Class: Understand how court-martial charges are initiated, and what options and responsibilities commanders have with regard to those charges.

II. INITIATION AND DISPOSITION OF CHARGES.

A. **Who reports an offense?** Any person. [Reference Rule for Court-Martial (R.C.M.) 301]

1. Law enforcement personnel (*see* TRIAL AND DEFENSE COUNSEL HANDBOOK (JA 310), figures 3-8, 3-9, and 3-13, pp. 3-20 and following, for examples of routine reports, e.g. "blotters").

2. Officers and noncommissioned officers.

3. Victims and witnesses.

B. **Then what?** Immediate commander with Article 15 jurisdiction (usually company commander: captain):

1. Shall conduct a **preliminary inquiry**. [R.C.M. 303]

a. Informal: extent of inquiry depends on complexity of alleged offense.

b. Law enforcement assistance: military police (MP) and Criminal Investigation Division (CID) may be provided.

c. A commander's preliminary inquiry is <u>NOT</u> an Article 32 investigation.

2. Company level commander makes a decision or recommendation how to dispose of the misconduct. R.C.M. 306(b) policy that offenses should be disposed of in a timely manner <u>at the lowest appropriate level</u>.

C. A company **commander's options** for disposition of alleged misconduct include:

1. No action; taking no action is not a bar to other disposition [R.C.M. 306(c)(1)]. Dismiss any charges previously preferred; dismissal is not a bar to further disposition [R.C.M. 306(c), 401(c), 402(1)].

2. Adverse administrative action [R.C.M. 306(c)].

a. Counseling.

b. Reprimand: oral or written.

c. Corrective Training

d. Letter of Reprimand

e. Bar to Re-enlistment

f. Administrative separation.

3. Nonjudicial punishment (commonly referred to as Article 15 or NJP)(Captain's Mast in Navy; Office Hours in Marines). [R.C.M. 306(c)(3); MCM, Part V; AR 27-10, chap. 3]

4. Prefer and forward charges. [R.C.M. 307]

a. Charge Sheet. [MCM, app. 4; AR 27-10, para. 5-16] (*See* JA 310, fig. 3-6, p. 3-13).

(1) Accused's personal data.

(2) Restraint data has consequences for speedy trial and confinement credit.

(3) Charges and Specifications.

(a) **Charge**: identifies article of the UCMJ.

(b) **Specification** ("spec"): states the facts constituting the offense.

b. **Preferral** (sign under oath) [R.C.M. 307].

(1) Any person subject to the UCMJ may prefer charges.

(2) Notice to accused [R.C.M. 308].

c. **Forwarding Charges**. [R.C.M. 306(c)(5), 401(c)(2), 402(2); AR 27-10, para. 5-17].

(1) Charges are forwarded with a transmittal memorandum or endorsement.

(2) Transmittal memo contains commander's personal recommendation as to disposition. Enclosures to transmittal memo:

(a) Summary of evidence;

(b) Prior convictions and Art. 15 punishments (if applicable);

(c) Offered and refused Art. 15 punishment (if applicable);

(d) Character of service.

d. **Referral** (order to trial) [R.C.M. 601; AR 27-10, para 5-19].

e. **Service of charges** on accused [R.C.M. 602; AR 27-10, para. 5-20]. Waiting Period:

(1) GCM - 5 days

(2) All SPCMs - 3 days

D. **Commander's Discretion**. Fundamental principle of military justice is that each commander exercise independent discretion regarding disposition of misconduct. Another fundamental principle is that offenses should be disposed of in a timely manner at the lowest appropriate level. In deciding how to dispose of alleged misconduct, the commander should consider the following non-exclusive R.C.M. 306(b) factors:

1. Character and military service of suspect/accused;
2. Nature and circumstances of offense;
3. Extent of harm, including effect on morale, safety, discipline;
4. Authorized punishment;
5. Availability and admissibility of evidence;
6. Cooperation of accused;
7. Other factors set out in the Discussion to R.C.M. 306(b).

E. **Chain of Command Options.** Each commander in the chain of command has disposition options within the limits of his/her authority. Generally they are:

1. Battalion commander (lieutenant colonel): summary court-martial convening authority (**SCMCA**).
2. Brigade commander (colonel): special court-martial convening authority (**SPCMCA).**
3. Division commander (major general): general court-martial convening authority **(GCMCA).**
4. Superior commanders may withhold or withdraw UCMJ authority from subordinate commanders. In particular, many Army GCMCAs withhold authority to convene BCD-Special courts-martial.

F. **SCMCA**. [UCMJ arts. 20 and 24]

1. **Options.**

   a. **Dismiss** charges. Dismissal does not bar subsequent action under R.C.M. 306(c) [R.C.M. 403(b)(1)].

   b. **Return** to subordinate commander. No recommendation may be made [R.C.M. 401(c)(2)(B) and 403(b)(2)].

   c. **Forward** to superior commander with recommendation [R.C.M. 403(b)(3)]. Record receipt of charges on charge sheet; tolls statute of limitations [R.C.M. 403(a)].

   d. Field grade **Art. 15** punishment.

   e. Direct **Art. 32b** investigation [R.C.M. 403(b)(5)] (*See* JA 310, fig. 3-33, p. 3-86)(usually done by SPCMCA).

   f. **Refer** to summary court-martial [R.C.M. 403(b)(4)].

2. **Summary Court-Martial.** [R.C.M. 1301-06 and MCM, apps. 9, 15; AR 27-10, para. 5-23; DA Pam 27-7].

   Middendorf v. Henry, 425 U.S. 25 (1976) ("a summary court-martial is not a 'criminal prosecution' for purposes of the Sixth Amendment. . . . [N]either the

Sixth nor the Fifth Amendment . . . empowers us to overturn the congressional determination that counsel is not required in summary courts-martial").

a. SCM composition.

(1) One commissioned officer: judge and jury.

(2) No right to defense counsel, but civilian counsel permitted if no unreasonable delay results and if military exigency does not preclude.

(3) Opportunity to consult with military defense counsel, unless military exigency (documented by certificate which is made part of record). Counsel will not represent government.

b. SCM use and limitations.

(1) "promptly adjudicate minor offenses under a simple procedure."

(2) Accused has right to object to trial by SCM.

(3) Summary court-martial can't try officers.

(4) Take a stripe from senior NCOs.

(5) Only noncapital offenses.

c. SCM maximum punishments. [R.C.M. 1301(d)]

(1) SPC (E-4) and below:

(a) Reduction to E-1 (PV1);

(b) 2/3 forfeiture of 1 month pay; and

(c) 60 days restriction, or

45 days hard labor without confinement, or

30 days confinement.

(2) SGT (E-5) and above:

(a) Reduction of one grade;

(b) 2/3 forfeiture of 1 month's pay; and

(c) 60 days restriction.

G. SPCMCA. [UCMJ arts. 19 and 23]

1. **Options.** All options of SCMCA <u>plus</u> refer to special court-martial, to include "BCD Special" (special court-martial empowered to adjudge a bad conduct discharge), unless authority to do so is withheld by GCMCA. [R.C.M. 404]. SPCMCA is typically a colonel, brigade combat team commander [R.C.M. 201(f)(2), 501, 502, 506; AR 27-10, paras. 5-5a, 5-7, and 8-1c].

2. **BCD special court-martial** (BCD-SPCM). [UCMJ art. 19; R.C.M. 201(f)(2); AR 27-10, para. 5-28]

a. BCD composition: same as "straight" special.

b. BCD use and limitations: same as SPCM except BCD is authorized punishment.

c. Maximum Punishment: same as SPCM plus BCD.

d. BCD distinctive features.

(1) Convened by GCMCA or SPCMCA.

(2) Verbatim record IF BCD adjudged or confinement in excess of 6 mos. [R.C.M. 1103(c)(1); AR 27-10, para. 5-28a(3)]

(3) SJA pretrial advice [AR 27-10, para. 5-28b]

3. SPCM composition.

a. Military judge (unless prevented by physical conditions or exigencies).

b. Defense Counsel.

(1) Certified defense counsel.

(2) Individual military counsel (IMC), if reasonably available.

(3) Civilian counsel at own expense.

c. Trial counsel: any commissioned officer (generally a judge advocate).

d. Fact-finder: accused's choice of either:

(1) Judge alone, or

(2) Not less than 3 members (1/3 enlisted upon accused's request).

3. SPCM use and limitations.

a. Intermediate level court.

b. Non-capital offenses (e.g. misdemeanor equivalent).

c. Cannot confine an officer.

4. SPCM maximum punishments. [R.C.M. 201(f)(2)(B)]

a. Reduction to E-1;

b. Forfeiture of 2/3 pay per month for 1 year; and

c. 1 year confinement

H. **GCMCA**. [UCMJ, arts. 18 and 22; R.C.M. 407] GCMCA is typically a division or installation commander, most commonly a major general (2-star). Can also be lower (occasionally COL garrison commander) or higher (*e.g.*, Corps commander, a lieutenant general).

1. **Options:** All options of SPCMCA <u>plus</u> refer to GCM or "BCD special"

3. **General court-martial (GCM).** [UCMJ arts. 18, 22 and 27(b); R.C.M. 201(f)(1), 501 and 502(d)(1)].

a. GCM composition.

(1) Military judge.

(2) Same defense counsel rights as SPCM.

(3) Trial counsel must be certified.

(4) Fact Finder: accused's choice of either:

(a) Judge alone, except in a capital case, or

(b) No fewer than 5 members (1/3 enlisted upon accused's request).

b. GCM prerequisites.

(1) Art. 32 investigation. [R.C.M. 405]

(2) SJA pretrial advice. [UCMJ art. 34; R.C.M. 406]

c. GCM maximum punishments. [R.C.M. 1003]

(1) Death, if referred capital;

(2) Maximum punishments stated in MCM, Part IV, and app. 12; and

(3) Punitive discharge.

(a) Dismissal for any offense (commissioned officers only).

(b) Dishonorable Discharge (enlisted and warrant officers who have not received commission).

(c) Bad-Conduct Discharge (enlisted only).

I. Trial Alternatives.

1. Chapter 14 administrative discharge for misconduct (AR 635-200, chap. 14). Command decides to separate administratively and never prefers charges. Separate class of instruction.

2. Chapter 10 discharge in lieu of court-martial (AR 635-200, chap. 10).

a. Request submitted by accused after preferral of charges which authorize BCD and before action by convening authority.

b. Consult with counsel.

c. Admits guilt to offense or lesser included offense.

d. Forwarded through chain of command.

e. Withdraw only with GCMCA consent unless accused acquitted or does not receive punitive discharge at trial.

f. GCMCA approves or disapproves.

g. Accused may receive "Other than Honorable" discharge certificate (OTH).

h. Chapter 10 appropriate when offenses do not merit confinement or punitive discharge—or significant evidentiary weaknesses or trial problems make trial too risky or costly.

3. Pre-Trial Agreement.

a. Approximately two-thirds of all cases resolved by PTA.

b. Negotiated between accused and convening authority.

c. Providence inquiry by military judge and accused.

d. Adversarial sentencing process. Accused tries to "beat the deal."

III. CONCLUSION.

A. Know how the court-martial system is initiated.

B. Understand each level of command's responsibility to investigate and independently determine how to dispose of allegations of misconduct.

C. Know what options all levels of commanders have at their disposal.

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TAB H

VICTIM/WITNESS ASSISTANCE PROGRAM (VWAP)

Table of Contents

I. REFERENCES. 1

II. DEFINITIONS. 1

III. CRIME VICTIM'S RIGHTS. 2

IV. COMMAND RESPONSIBILITIES. 2

V. REPORTING REQUIREMENTS. 6

VI. EVALUATION OF VICTIM/WITNESS LIAISON PROGRAM 7

VII. OTHER ASSISTANCE AVAILABLE TO VICTIMS. 8

VIII. VICTIM ATTENDANCE AT COURT PROCEEDINGS. 11

IX. CASELAW DISCUSSING VICTIMS' RIGHTS. 11

X. CONCLUSION. 13

LTC ERIC CARPENTER

JANUARY 2011

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VICTIM/WITNESS ASSISTANCE PROGRAM (VWAP)

I. REFERENCES.

A. Justice for All Act of 2004, 18 U.S.C. § 3771 (repeals Section 502 of Victims' Rights and Restitution Act of 1990 (42 U.S.C. §§ 10606-10607)).

B. Victim Rights Clarification Act of 1997, 18 U.S.C. § 3510.

C. Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 1503, 1505, 1510, 1512-1515, 3146, 3579, 3580.

D. Victims of Crime Act of 1984, 42 U.S.C. §§ 10601-10603.

E. 38 U.S.C. §1311-1314 (Dependency and Indemnity Compensation).

F. 10 U.S.C. §1059 (Transitional Compensation).

G. DoD Directive (DoD Dir.) 1030.1, Victim and Witness Assistance (April 13, 2004).

H. DoD Instruction (DoDI) 1030.2, Victim and Witness Assistance Procedures (June 4, 2004).

I. Dep't of Army Reg. 27-10, Military Justice, Chapter 18 (16 November 2005).

J. Dep't of Army Reg. 600-20, Army Command Policy, Ch. 8 (30 November 2009).

K. Dep't of Army Reg. 635-200, Active Duty Enlisted Administrative Separations, (17 December 2010).

L. Dep't of Air Force Instruction (AFI) 51-201, Victim and Witness Assistance, ch. 7 (21 December 2007).

M. OPNAV Instruction 5800.7A, Victim and Witness Assistance Program (4 March 2008).

N. Marine Corps Order P5800.16A, Victim and Witness Assistance Program (VWAP), ch 6 (28 November 2005).

O. US Coast Guard Commandant Instruction M5810.1D, Victim and Witness Protection, ch 3.M. (17 August 2000).

P. OTJAG POC: LTC (Ret) Charles Cosgrove, 1777 North Kent Street, 10th Floor, Rosslyn,, VA 22209-2194; 703-588-6748 (Voice), 703-588-0144 (FAX); charles.cosgrove@hqda.army.mil.

II. DEFINITIONS.

A. Victim: a person who has suffered direct physical, emotional or pecuniary harm as the result of a commission of a crime in violation of the UCMJ (or in violation of the law of another jurisdiction if any portion of the investigation is conducted primarily by the DoD components), including but not limited to:

1. Military members and their family members;

2. When stationed OCONUS, DoD civilian employees and contractors, and their family members;

3. Institutional entity's representative (federal, state and local agencies are not eligible for services available to individual victims);

4. Victim under age 18, incompetent, incapacitated, or deceased (in order of preference): a spouse, legal guardian, parent, child, sibling, other family member, or court designated person; and

5. Includes victims identified as a result of investigations of potential UCMJ violations conducted under the provisions of AR 15-6.

B. Witness: person who has information or evidence about a crime, and provides that knowledge to a DoD component about an offense within the component's investigative jurisdiction. If witness is a minor, includes a family member of legal guardian. BUT not a defense witness, perpetrator or accomplice.

III. CRIME VICTIM'S RIGHTS. AR 27-10, para. 18-10.

A. Fair treatment and respect for dignity and privacy;

B. Reasonable protection from accused;

C. Notification of court proceedings;

D. Presence at all public court proceedings related to the offense, unless court determines victim's testimony would be materially affected by other testimony;

E. Confer with Government attorney;

F. Receive available restitution; and

G. Receive information about conviction, sentencing, imprisonment and release of accused.

IV. COMMAND RESPONSIBILITIES.

A. SJA's are designated as the "local responsible official" and have the following responsibilities:

1. Establish and supervise Victim/Witness Assistance Program (VWAP) within their GCM jurisdiction. Ensure establishment of local policies and procedures to accord crime victims' the rights described in the Bill of Rights above.

2. Establish a Victim and Witness Assistance Council where practical, to ensure interdisciplinary cooperation.

3. Designate, in writing, Victim/Witness Liaison (VWL).

a) Preference for a commissioned or warrant officer or civilian (GS-11 and above).

b) Exceptional circumstances allow SSG and above, or GS-6 and above.

c) VWL's should be outside the military justice section "to the extent permitted by resources."

d) To the extent resources permit, SJA's "should refrain from appointing attorneys as VWL's."

4. Establish Victim-Witness Assistance Council, to extent practicable, at "each significant military installation."

5. Ensure Law Enforcement Agencies (LEA) inform victims and witnesses of VWL's name, location and phone number.

6. TRAINING! Must ensure *annual* training is provided to all agencies involved in program. At a minimum, training will cover victims' rights; available compensation through federal, state, and local agencies, providers' responsibilities under the VWAP program, and requirements and procedures of AR 27-10, Chapter 18.

7. Ensure DoD Victim and Witness Bill of Rights is posted in office of commanders and agencies providing victim and witness assistance.

8. Establish separate waiting areas at courts-martial and other investigative proceedings. "In a deployed environment, victims and Government witnesses should be afforded a separate waiting area to the greatest extent practicable."

9. Ensure victims and witnesses are advised that their interests are protected by administrative and criminal sanctions, i.e. obstruction of justice charges, etc., and that victims and witnesses should promptly report any attempted intimidation, harassment, or other tampering to military authorities.

10. Ensure appropriate law enforcement agencies are immediately notified in case where the life, well-being, or safety of a victim or witness is jeopardized by his or her participation in the criminal investigation or prosecution process.

11. Ensure victim's and witness' requests for investigative reports or other documents are processed under FOIA or Privacy Act.

12. Ensure DD Forms are distributed/completed.

13. Coordinate with criminal investigative agents to ensure all noncontraband property seized as evidence is safeguarded and returned; ensure victims are informed of applicable procedures for requesting return of property.

14. REPORTING REQUIREMENTS!! *See* Section VI, below.

B. DD and DA Forms.

1. DD Form 2701, Initial Information for Victims and Witnesses of Crime.

2. DD Form 2702, Court-Martial Information for Victims and Witnesses of Crime.

3. DD Form 2703, Post-Trial Information for Victims and Witnesses of Crime.

4. DD Form 2704, Victim/Witness Certification and Election Concerning Inmate Status.

5. DD Form 2705, Victim/Witness Notification of Confinee Status.

6. DD Form 2706, Annual Report on Victim and Witness Assistance.

7. DA Form 7568, Army Victim/Witness Liaison Program Evaluation.

C. Responsibilities (VWL, trial counsel, or other government representative).

1. VWL (recommended).

a) As soon as possible, but NLT appointment of Art. 32 Investigating Officer or referral of charges, ensure *victims and witnesses* are provided DD Form 2701 (Initial Information for Victims and Witnesses of Crime).

b) Inform *victim* of the place where the victim may receive emergency medical care and social service support.

c) Inform *victims* of where they can obtain financial, legal, and other support, including right to file Article 139 claim and right to transitional compensation, if applicable.

d) During investigation and prosecution of crime, *will provide* victims the earliest possible notice of significant events in the case, to include:

(1) Status of investigation of crime, with limits.

(2) Apprehension of suspected offender.

(3) Decision to prefer or dismiss charges.

(4) Initial appearance of suspect before pretrial confinement hearing or at Article 32, UCMJ investigation.

(5) Scheduling of each court proceeding victim is required or entitled to attend.

(6) Detention or release from detention of offender or suspected offender.

(7) Acceptance of plea of guilty or other verdict.

(8) Result of trial.

(9) If sentenced to confinement, probable parole date.

(10) General information regarding corrections process.

(11) Opportunity to consult with trial counsel concerning evidence in aggravation.

(12) How to submit victim impact statement to Army Clemency and Parole Board.

(13) The VWL will "make reasonable efforts to notify witnesses and representatives of witnesses, when applicable and at the earliest opportunity" of numbers one through ten above.

e) Advise *victims and witnesses* of protections from intimidation. *See* Military Protective Order, Section V and Appendix, below.

f) Act as intermediary between *victims and witnesses*, when requested, to arrange interviews by defense or government.

g) Advise victims on property return and restitution.

h) Notification of *victims' and witness'* employers and creditors.

i) Witness fees and costs.

j) During trial and investigative proceedings, provide to *victims and witnesses*:

(1) Assistance in obtaining child care.

(2) Transportation/parking.

(3) Lodging.

(4) Separate waiting area outside presence of accused and defense witnesses.

(5) Translators/interpreters

k) Upon sentence to confinement provide *victims (and witnesses "adversely affected by the offender")*:

(1) General information regarding post-trial procedures (DD Form 2703).

(2) Prepare DD Form 2704. Victims and witnesses elect whether they want notification of changes in inmate status. Ensure copy forwarded to confinement facility and ensure offender does not have access to copy of information.

2. Trial counsel (recommended).

a) Consult victims concerning:

(1) Decision not to prefer charges;

(2) Decisions concerning pretrial restraint or release;

(3) Pretrial dismissal of charges; and

(4) Negotiations of pretrial agreements and their potential terms.

Note: Victim does not have veto power over command's decision on these matters; view is considered, not controlling.

b) Establish separate waiting areas at courts-martial and other investigative proceedings.

c) In coordination with SJA and CMCA, consider making restitution a term and condition of pretrial agreements. Also consider whether restitution was made when action is taken.

3. Commander, Confinement Facility.

a) Upon entry into confinement facility commander ensures receipt of DD Form 2704 and determines whether victim and/or witness requested notification of changes in confinement status. If victim and/or witness so indicated, commander will advise of:

(1) Offender's place of confinement and minimum release date.

(2) Earliest possible notice of:

(a) Clemency/parole hearing dates.

(b) Transfer of inmate to another facility.

(c) Escape, recapture, or other form of release from confinement.

(d) Release from supervised parole.

(e) Death of inmate.

b) Forward DD Form 2704 if inmate is transferred.

c) Protect against disclosure to inmate of victim and witness addresses.

d) Reporting requirements as set forth below.

V. REPORTING REQUIREMENTS.

A. For each calendar year (CY), not later than 15 February or each year, SJA of each command having GCM jurisdiction must report:

1. The number of persons who received DD Form 2701 or 2702 from trial counsel, Victim Witness Liaison (VWL) or designee;

2. The number of victims and witnesses who received DD Form 2703 from trial counsel, VWL or designee.

3. SJA will obtain data for their reports from subordinate commands attached or assigned to their GCM jurisdiction for military justice purposes, including RC units.

4. Negative reports are required.

5. Use DD Form 2706.

6. Forward report through MACOM channels to Criminal Law Division, ATTN: DAJA-CL, HQDA, Office of The Judge Advocate General, 1777 North Kent Street, Rosslyn, VA 22209-2194.

B. Other required reports (*Negative reports required*).

1. Military Police channels report the number of:

a) Victims and witnesses who received DD Form 2701 or 2702 from LEA personnel.

b) Victims and witnesses who were informed of their right (via DD Form 2704 or otherwise) to notification of changes in inmate status.

c) Victims and witnesses who were notified using DD Form 2705.

d) Confinees, by service, in Army facilities about whom victim/witness notifications must be made.

2. OTJAG Criminal Law prepares consolidated report for submission to DoD Under Secretary for Personnel and Readiness, Legal Policy Office)

VI. EVALUATION OF VICTIM/WITNESS LIAISON PROGRAM

A. SJAs will ensure that each victim and witness in an incident that is prosecuted at a GCM or SPCM, or investigated pursuant to UCMJ, Art. 32, in those cases not disposed of by GCM or SPCM, receives a victim/witness evaluation form.

1. SJAs will use DA 7568 (Army Victim/Witness Liaison Program Evaluation).

2. Evaluation forms will be reviewed locally by the SJA and copies forwarded quarterly to Criminal Law Division, ATTN: DAJA-CL, ATTN: Victim/Witness Coordinator, Office of The Judge Advocate General, HQDA, 1777 North Kent Street, Rosslyn, VA 22209-2194, by mail or electronically.

B. Anonymous submission requirement for DA 7568 and SJA cover letter.

1. The evaluation form may be provided to victims and witnesses by hand, by mail or otherwise, but must be returned in an anonymous manner. AR 27-10, paragraph 18-28d suggests the installation of a drop box away from the military justice section or the provision of a pre-addressed envelope or "other anonymous means of return" to victims and witnesses.

2. The recipients of the evaluation form must be advised that the form will be returned in an anonymous manner and cannot be accepted in any other manner. The evaluation form will be accompanied by a cover letter under the signature of the SJA. The cover

VII. OTHER ASSISTANCE AVAILABLE TO VICTIMS.

A. Installation assistance. VWL will assist victim in contacting agencies or individuals responsible for providing necessary services and relief.

1. Command Chaplain.

2. Family Advocacy Center/Army Community Service.

3. Emergency Relief Funds.

4. Legal Assistance, if appropriate.

5. American Red Cross.

6. If victims are not eligible for military services, or where military services are not available, "the VWL will provide liaison assistance in seeking any available nonmilitary services within the civilian community."

B. Pretrial Agreements - negotiated restitution.

C. Transportation and shipment of household goods. (See JFTR).

D. State and local assistance.

E. Transitional Compensation. 10 U.S.C. § 1059; DoD Instruction 1342.24, Change 1 (16 January 1997); AR 608-1, *Army Community Service,* (19 September 2007).

1. Dependent-abuse offenses resulting in separation of servicemember from active duty or total forfeiture of all pay and allowances pursuant to court-martial conviction or administrative separation.

a) Applies to cases on or after 30 November 1993.

b) Applies to voluntary and involuntary separation proceedings (example: discharge in lieu of trial by court-martial UP Chapter 10, AR 635-200).

c) Dependent-abuse offenses - conduct by an individual while a member of the armed forces on active duty for a period of more than thirty days that involves abuse of the then-current spouse or dependent child of the member and that is a criminal offense defined by the Uniform Code of Military Justice or other criminal code applicable to the jurisdiction where the act of abuse is committed. Offenses that may qualify as dependent abuse offenses include sexual assault, rape, sodomy, assault, battery, murder, and manslaughter. This is not an exhaustive listing of dependent abuse offenses.

d) Dependent Child. An unmarried child, including an adopted child or stepchild, who was residing with the member at the time of the dependent abuse offense and who is

(1) Under 18 years of age;

(2) Eighteen or older and incapable of self-support because of mental or physical incapacity that existed prior to age 18 and who is dependent on the member for over one-half of the child's support;

(3) 18 or older, but less than 23, and is a college student and who is dependent on the member for over one-half of the child's support.

2. Compensation.

a) Duration of payments dependent upon the unserved portion of the member's obligated active duty service (no less than 12 months, but no more than 36 months).

b) Start-date: date sentence is adjudged if the sentence, as adjudged, includes a dismissal, dishonorable discharge, bad conduct discharge, or forfeiture of all pay and allowances; or

c) However, if there is a pretrial agreement that provides for disapproval or suspension of a dismissal, dishonorable discharge, bad conduct discharge, or forfeiture of all pay and allowances, then start date is the date of the approval of the court-martial sentence if the sentence, as approved, includes an unsuspended dismissal, dishonorable discharge, bad conduct discharge, or forfeiture of all pay and allowances; or,

d) If pursuant to administrative separation, the date of initiation of separation proceedings.

e) Amount of compensation increases with each dependent. See 38 U.S.C. § 1311(a)(1).

f) Dependent loses payments if remarries or cohabitates with abuser, or is an active participant in the abuse.

g) Payment stops if administrative separation is disapproved.

h) Payment stops if dismissal, dishonorable discharge, of bad-conduct discharge is remitted, set aside, or mitigated to a lesser punishment that does not include any such punishment.

i) Application for transitional compensation: individual submits request through military service of member.

j) Requires annual certification of entitlement to funds by spouse and dependent children.

k) Payment is from Operation and Maintenance Funds. Defense Finance and Accounting Service issues the payments, and administrative oversight of the funds (approval of payments and such) is through the Community and Family Support Center (CFSC), a DA level organization.

3. Other benefits –

a) Commissary and exchange privileges for length of time eligible for transitional compensation;

b) Medical and dental care for up to one year for injuries related to dependent abuse offense(s). Applies to dependents of a member separated due to dependent abuse offense (includes discharge as result of conviction as well as administrative separation).

F. Deferral and waiver of forfeitures.

1. Deferral.

a) Accused may request, in writing, deferment of forfeitures. RCM 1101(c)(2).

b) Accused burden to show "the interests of the accused and the community in deferral outweigh the community's interest in imposition of the punishment on its effective date [e.g., forfeitures]." RCM 1101(c)(3).

c) Applies to adjudged forfeitures (Article 57(a)(2), UCMJ; RCM 1101(c)) AND automatic forfeitures (Article 58b(a)(1), UCMJ)). *United States v. Lundy*, 60 M.J. 52 (C.A.A.F. 2004); *United States v. Adney*, 61 M.J. 554 (A. Ct. Crim. App. 2005).

2. Waiver of forfeitures.

a) Accused may request waiver of automatic forfeitures (Article 58b, UCMJ) or the CA may waive *sua sponte*. Request does not have to be made by accused; may be made by dependents or someone (VWL) on behalf of dependents.

b) The accused's request should be in writing.

c) Waiver is allowed for a period not to exceed six months and is for the purpose of providing support to the accused's dependents, as defined in 37 U.S.C. § 401.

d) Factors CA may consider include: "the length of the accused's confinement, the number and age(s) of the accused's family members, whether the accused requested waiver, any debts owed by the accused, the ability of the accused's family members to find employment, and the availability of transitional compensation for abused dependents permitted under 10 U.S.C. 1059." RCM 1101(d)(2).

e) Waiver of forfeitures is authorized as soon as they become effective; need not wait until action.

G. UCMJ, art. 139.

1. Redress of injuries to property.

2. Willful damage or theft.

3. No conviction is required.

VIII. VICTIM ATTENDANCE AT COURT PROCEEDINGS.

A. Military Rule of Evidence 615 (Exclusion of Witnesses) prohibits the military judge from sequestering certain categories of witnesses to prevent them from hearing the testimony of other witnesses, including: "(4) a person authorized by statute to be present at courts-martial, or (5) any victim of an offense from the trial of an accused for that offense because such victim may testify or present any information in relation to the sentence or that offense during the presentencing proceedings." These provisions of the Military Rules of Evidence were effective on 15 May 2002.

B. Subparagraph 4 extends to victims at courts-martial the same rights granted to victims by the Victims' Rights and Restitution Act of 1990, 42 U.S.C. §10606(b)(4). That statute gives crime "victims" "the right to be present at all public proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard the testimony at trial."

C. Subpararaph 5 implements the Victims Rights Clarification Act of 1997, 18 U.S.C. §3510, and basically prohibits the military judge from sequestering a "victim" who will only testify in the presentencing proceeding. This section does not incorporate the balancing test of subparagraph 4, and does not permit the military judge to sequester a victim who will testify only on sentencing even where that victim's testimony may be materially affected by hearing other testimony at trial.

1. The Victim Rights Clarification Act was passed in response to the federal district court judge's ruling in the Oklahoma City bombing trial of Timothy McVeigh that precluded victims from attending the trial proceedings on the grounds that their victim impact testimony on sentencing would be materially affected by observing other parts of the trial on the merits.

D. A "victim" for purposes of Mil. R. Evid. 615 is defined as "a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime, including (A) in the case of a victim that is an institutional entity, an authorized representative of the entity; and (B) in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, one of the following (in order of preference): (i) a spouse; (ii) a legal guardian; (iii) a parent; (iv) a child; (v) a sibling; (vi) another family member; or (vii) another person designated by the court."

E. The rules allowing victims to remain in the courtroom are subject to other rules, such as those regarding classified information, witness deportment, and conduct in the courtroom.

IX. CASELAW DISCUSSING VICTIMS' RIGHTS.

A. *Saum v. Widnall*, 912 F. Supp. 1384 (D. Col 1996). A female Air Force Academy cadet sued the Secretary of the Air Force and others seeking declaratory and injunctive relief based on alleged sexual harassment during training, in violation of her due process and equal protection rights. The alleged harassment included a videotaped simulated "rape and exploitation" scenario as part of SERE (survival, evasion, resistance, and escape) training, during which she received injuries requiring medical attention. As part of her requested relief, plaintiff sought a declaratory judgment that she is a "crime victim" as defined by the Victims' Rights and Restitution Act of 1990 and DoD 1030.2. The Air Force argued that her claim should be dismissed because there is no private right of action under the Victims Rights Act. The court found that argument "without merit," and denied the Air Force's motion to dismiss. Although the court determined that the government "is not required to do anything under the Victims' Rights Act in the absence of an ongoing criminal investigation," if the Air Force was required to have launched such an investigation under the circumstances presented, Cadet Saum may be entitled to relief. Cadet Saum and the Air Force settled the case and it was dismissed with prejudice in 1997. *Saum v. Widnall*, 959 F.Supp. 1310 (D. Col. 1997).

B. *United States v. Rorie*, 58 M.J. 399 (C.A.A.F. 2003). CAAF overturns 53 years of precedent and holds that it will no longer follow a policy of *abatement ab initio* for appellants who die following review by the intermediate service courts but prior to final review by the Court of Appeals for the Armed Forces. The rationale for overturning the abatement policy rested on two grounds: first, even after the death of a military defendant "there remains a substantial punitive interest in preserving otherwise lawful and just military convictions"; and second, the impact of abatement *ab initio* on victims' rights, and, in particular, the issue of restitution as a condition of a pretrial agreements, reduced sentence, clemency, or parole. "Particularly where there has been one level of appeal of right, abatement *ab initio* at this level frustrates a victim's legitimate interest in restitution and compensation."

C. *United States v. Spann*, 51 M.J. 89 (C.A.A.F. 1999). The Victim Rights and Restitution Act of 1990, and the Victim Rights Clarification Act of 1997, amending F.R.E. 615, did not apply to the military prior to the dates those changes would automatically become effective under Mil. R. Evid. 1102 (18 months after the effective date in the federal system). As it happens, the President enacted changes to Mil. R. Evid. 615, effective 15 May 2002 (adding subparts 4 and 5, discussed above), which differed somewhat from the F.R.E. amendment.

D. United States v. Lundy, 60 M.J. 52 (2004). Accused entered into PTA term, whereby the CA agreed to defer any and all reductions and forfeitures until the sentence was approved and suspend all adjudged and waive any and all automatic reductions and forfeitures. For sexually assaulting his children, the Accused (a SSG) was sentenced to a DD, confinement for 23 years, and reduction to E-1, which subjected him to automatic reduction and forfeitures. The CA attempted to suspend the automatic reduction IAW the PTA to provide the Accused's family with waived forfeitures at the E-6, as opposed to the E-1, rate. The parties, however, overlooked AR 600-8-19 which precludes a CA from suspending an automatic reduction unless the CA also suspends any related confinement or discharge which triggered the automatic reduction. ACCA stated no remedial action was required because the Accused's family was adequately compensated with transitional compensation (TC), which ACCA concluded the Accused's family was not entitled to because they were receiving waived forfeitures, albeit at the E-1 rate. The CAAF, in reversing, held if a material term of a PTA is not met by the government three options exist: (1) the government's specific performance of the term; (2) withdrawal by the accused from the PTA, or (3) alternative relief, if the accused consents to such relief. Additionally, the CAAF held an Accused's family could receive TC while receiving either deferred or waived forfeitures if the receipt of TC was based on a discharge and if the receipt of TC was based only on the Accused receiving forfeitures, the family could receive TC if not actively receiving the deferred or waived forfeitures. Case remanded to determine if the Gov't could provide specific performance.

E. *United States v. Bright*, 44 M.J. 749 (C.G. Ct. Crim. App. 1996). Appellant was convicted of larceny of BAH and false official statements. Appellant's wife submitted an adverse letter to the convening authority, purportedly "in the spirit of the DoD Victim and Witness Assistance Program implementing the Victims' Rights and Restitution Act of 1990." Appellant contended on appeal that his estranged wife was not a "victim" in any sense of the word as it is defined in the relevant victim rights statutes. The court held that, while appellant may be correct, the convening authority was permitted to consider the letter upon some other basis, so long as appellant was notified properly by the SJA addendum. Further, the court held that although there may be limits to what the convening authority could consider, by failing to challenge the appropriateness of the letter at the time it was served upon him, the appellant waived the issue.

F. *United States v. Ducharme*, 59 M.J. 816 (N-M. Ct. Crim. App. 2004). Appellant was tried in July, 1999, prior to the effective date of changes to MRE 615 permitting sentencing witnesses to observe trial on the merits (the effective date of those changes is 15 May 2002). The court held that the military judge did not err when he ruled that, under Mil. R. Evid. 806 (control of spectators), one

X. CONCLUSION.

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TAB I

NONJUDICIAL PUNISHMENT – ARTICLE 15, UCMJ

TABLE OF CONTENTS

I. REFERENCES 1

II. INTRODUCTION 1

III. AUTHORITY TO IMPOSE NONJUDICIAL PUNISHMENT 1

IV. WHO CAN RECEIVE NONJUDICIAL PUNISHMENT 2

V. HOW TO DECIDE WHAT OFFENSES ARE APPROPRIATE FOR NJP 2

VI. TYPES OF ARTICLE 15S AND PUNISHMENTS 4

VII. NOTICE REQUIREMENTS (THE "FIRST READING") 6

VIII. SOLDIER'S RIGHTS 6

IX. HEARING 7

X. CLEMENCY 8

XI. FILING 8

XII. APPEALS 9

XIII. PUBLICIZING ARTICLE 15S 11

XIV. SUPPLEMENTAL ACTIONS 11

XV. THE RELATIONSHIP BETWEEN ARTICLE 15S AND COURTS-MARTIAL 11

XVI. ADVOCACY POINTS 12

XVII. CONCLUSION 13

LTC ERIC CARPENTER

JANUARY 2011

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NONJUDICIAL PUNISHMENT – ARTICLE 15, UCMJ

I. REFERENCES

A. UCMJ art. 15.

B. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. V (2005) [hereinafter MCM].

C. U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE chs. 3, 4, 21 (16 November 2005) [hereinafter AR 27-10].

II. INTRODUCTION

A. Purpose. Nonjudicial punishment (NJP) provides commanders with a prompt means of maintaining good order and discipline and promotes positive behavior changes in servicemembers without the stigma of a court-martial. MCM pt. V, para. 1c.

B. Proceedings under Art. 15 are not criminal prosecutions. *United States v. Marshall*, 45 M.J. 268 (C.A.A.F 1996).

III. AUTHORITY TO IMPOSE NONJUDICIAL PUNISHMENT

A. Who may impose?

1. Commanders.

a) "Commanders" are commissioned or warrant officers who exercise primary command authority over an organization; is the person looked to by superior authorities as the individual chiefly responsible for maintaining discipline in the organization. AR 27-10, para. 3-7a.

b) Can include detachment commanders and commanders of provisional units. Whether an officer is a commander is determined by the duties he or she performs, not necessarily by the title of the position occupied. AR 27-10, para. 3-7a.

2. Joint Commanders. *See* AR 27-10, para. 3-7b.

B. Can Article 15 authority be delegated? AR 27-10, para. 3-7c.

1. Article 15 authority may *not* be delegated.

2. Exception: General court-martial convening authorities and commanding generals can delegate Article 15 authority to a deputy or assistant commander or to chief of staff (if general officer or frocked to general officer rank). Delegation must be written.

C. Can Article 15 Authority Be Limited? *Yes*.

1. Permissible limitations. AR 27-10, para. 3-4c.

a) Superior commander may *totally* withhold.

b) Superior commander may *partially* withhold (e.g., over categories of personnel, offenses, or individual cases).

(1) No requirement that limitations be written but probably a good idea (e.g., write a memorandum or publish in post regulation).

2. Impermissible limitations. MCM pt. V, para. 1d(2); AR 27-10, para. 3-4b.

a) Superior commander cannot direct a subordinate commander to impose an Article 15.

b) Superior commander cannot issue regulations, orders, or guides that either directly or indirectly suggest to subordinate commanders that --

(1) Certain categories of offenders or offenses are to be disposed of under Article 15.

(2) Predetermined kinds or amounts of punishment are to be imposed for certain categories of offenders or offenses.

IV. WHO CAN RECEIVE NONJUDICIAL PUNISHMENT

A. Military Personnel of a Commander's Command. AR 27-10, para. 3-8.

1. Assigned.

2. Affiliated, attached, or detailed.

3. The "Beans and Bullets" Rule. AR 27-10, para. 3-8a(3)(b).

B. Personnel of Other Armed Forces (services). AR 27-10, para. 3-8c.

1. An Army commander is not prohibited from imposing NJP on members of his or her command that are from other services. However, if an Army commander imposes NJP on members of another service, he or she may only do so under the circumstances and procedures outlined for imposing NJP prescribed by that member's parent service.

V. HOW TO DECIDE WHAT OFFENSES ARE APPROPRIATE FOR NJP

A. Relationship to administrative corrective measures.

1. NJP should be used when administrative corrective measures (for example, denial of pass privileges, counseling, extra training, administrative reductions in grade, administrative reprimands) are inadequate due to the nature of the minor offense or because of the servicemember's service record. MCM pt. V, para. 1d(1).

2. NJP is generally used to address intentional disregard of or failure to comply with standards of military conduct, while administrative corrective measures generally are used to address misconduct resulting from simple neglect, forgetfulness, laziness, inattention to instructions, sloppy habits, and similar deficiencies. AR 27-10, para. 3-3a.

3. Commanders and supervisors need to ensure that extra training does not become extra duty (punishment) that was given without following NJP procedures. Extra training must relate directly to the deficiency observed and must be oriented to correct that particular deficiency, although extra training can occur after duty hours. AR 27-10, para. 3-3c.

B. NJP may be imposed for *minor* offenses. MCM pt. V, para. 1e; AR 27-10, para. 3-9.

1. Whether an offense is minor depends on several factors:

a) The nature of the offense and the circumstances surrounding its commission;

b) The offender's age, rank, duty assignment, record and experience;

c) The maximum sentence imposable for the offense if tried by a general court-martial.

2. As a rule of thumb, a minor offense is one that does not authorize the imposition of a dishonorable discharge or confinement in excess of one year if tried at a general court-martial. MCM pt. V, para. 1e. However, the maximum punishment

3. Determining what is a minor offense versus a major offense is within the discretion of the imposing commander. MCM pt. V, para. 1e. *See United States v. Gammons*, 51 M.J. 169 (1999); *Turner v. Dep't of Navy*, 325 F.3d 310 (D.C. Cir. 2003).

C. Limitations.

1. Double punishment prohibited.

a) Once Article 15 imposed, cannot impose another Article 15 for same offense or substantially same misconduct. MCM pt. V, para. 1f(1); AR 27-10, para. 3-10.

b) Commanders need to bring all known offenses that are determined to be appropriate for disposition by NJP and that are ready to be considered at that time. This includes all offenses arising from a single incident or course of conduct. MCM pt. V, para. 1f(3); AR 27-10, para. 3-10.

c) What happens if the Soldier commits offense X on day 1, offense Y on day two, and offense Z on day ten, all of which are minor for NJP purposes; the command knows about offense X when it gives an Article 15 for offense Y (putting the Soldier on extra duty and restriction); and later refers charges on offenses X and Z? The defense files a motion to dismiss X under R.C.M. 907(b)(2)(D)(iv), arguing that it should have been brought to an Article 15 at the same time as offense Y, and the accused is therefore facing multiple punishments. Should the military judge grant the motion?

2. Statute of limitations. Except as provided Art. 43(d), UCMJ, NJP may not be used for offenses which were committed more than 2 years before the date of imposition. MCM pt. V, para. 1f(4); AR 27-10, para. 3-12.

3. Civilian courts. NJP may not be used for an offense that has been tried by a federal court. NJP may not be used for an offense that has been tried by a state court unless AR 27-10, ch. 4 has been complied with. MCM pt. V, para. 1f(5).

4. NJP should not be used when it is clear that only a court-martial will meet the needs of justice and discipline. MCM pt. V, para. 1d(1).

D. Preliminary inquiry.

1. Commanders need to conduct a preliminary inquiry under R.C.M. 303.

2. The inquiry can be informal and can be conducted personally or with someone else in the command. The person conducting the inquiry should gather all reasonably available evidence related to guilt or innocence, aggravation, and extenuation and mitigation. R.C.M. 303 discussion.

3. The inquiry should cover whether an offense was committed; whether the Soldier was involved; and the character and military record of the accused. AR 27-10, para. 3-14.

E. Decision to impose NJP.

1. Having conducted an investigation and considering the above, the commander should decide whether to impose NJP by considering:

a) The nature of the offense;

b) The record of the servicemember;

c) The needs for good order and discipline;

d) The effect of NJP on the servicemember and the servicemember's record. MCM pt. V, para. 1d(1).

2. The commander needs to determine that the Soldier *probably* committed the offense and that NJP procedure is appropriate. AR 27-10, para. 3-14.

3. NJP should be conducted at the lowest level of command commensurate with the needs of discipline. AR 27-10, para. 3-5a.

4. If the commander believes that his or her authority is insufficient to impose proper NJP, then he or she should send the case to a superior using DA Form 5109. AR 27-10, para. 3-5.

5. A superior commander may also return a case to a subordinate commander for appropriate disposition. AR 27-10, para. 3-4c.

VI. TYPES OF ARTICLE 15S AND PUNISHMENTS

A. Summarized Article 15. AR 27-10, para. 3-16.

1. Only available for enlisted servicemembers.

2. Punishment cannot exceed 14 days extra duty, 14 days restriction, oral admonition or reprimand, or any combination thereof.

3. Can be imposed by company or field grade officers.

4. Recorded on DA Form 2627-1.

B. Formal Article 15. AR 27-10, para. 3-17.

1. Appropriate if:

a) Soldier is an officer, or

b) Punishment (for any soldier) might exceed 14 days extra duty, 14 days restriction, oral admonition or reprimand, or any combination thereof.

2. Classified as company grade Article 15s, field grade Article 15s, and general officer Article 15s. Technically, "general officer Article 15s" are only imposed only officers (general officers can impose greater punishments on officers that other commanders can). General officers can impose Article 15s on enlisted personnel, too, but the available punishments are the same as those available to field grade officers.

3. Recorded on DA Form 2627.

C. The maximum available punishment is based on rank of imposing commander (company grade, field grade, or for officer offenders, general officer) and the rank of the soldier receiving the punishment. AR 27-10, para. 3-19, tbl. 3-1. Usually, commanding generals withhold authority over officer misconduct using the local AR 27-10. Company grade or field grade NJP over another officer is very rare.

ENLISTED PUNISHMENTS

Summarized	**Company Grade**	**Field Grade**
14 days extra duty	14 days extra duty	45 days extra duty
14 days restriction	14 days restriction	60 days restriction (45, if with extra duty)
	7 days correctional custody (E1-E3)	30 days correctional custody (E1-E3)
	1 grade reduction (E1-E4)	1 or more grade reduction (E1-E4) 1 grade reduction (E5-E6)
	7 days' forfeiture	Forfeiture of ½ of 1 month's pay for 2 months
Oral reprimand/admonition	Oral reprimand/admonition	Oral/written reprimand/admonition

OFFICER PUNISHMENTS

Company Grade	**Field Grade**	**General Officer**
Written reprimand/admonition	Written reprimand/admonition	Written reprimand/admonition
30 days restriction	30 days restriction	60 days restriction, or
		30 days arrest in quarters
		Forfeiture of ½ of 1 month's pay for 2 months

D. Reduction in grade.

1. In general, a commander who can promote to a certain grade can also reduce from that grade.
2. Officers and enlisted soldiers above the grade of E-6 cannot be reduced at an Article 15.

E. Forfeiture of pay.

1. Forfeitures are based on grade to which reduced, whether or not reduction is suspended.
2. Forfeitures may be applied against a soldier's retired pay. AR 27-10, para. 3-19*b*(7)(b).

F. Admonition and reprimand.

1. Officers admonitions and reprimands must be in writing. Enlisted admonitions and reprimands can be oral or in writing. MCM pt. V, para. 5c(1); AR 27-10, para. 3-19b(9)(d).

2. Admonitions and reprimands imposed under NJP should state clearly that they were imposed as punishment under Art. 15. This is to contrast them with admonitions and reprimands given as an administrative matter, which have different procedures. *See* AR 600-37.

3. Written admonitions and reprimands are prepared in memorandum format and attached to the DA Form 2627. AR 27-10, para. 3-19b(9)(d).

G. Combination of punishments. AR 27-10, para. 3-19b(8)

1. Commanders can combine punishments.

2. No two or more punishments involving the deprivation of liberty may be combined to run either consecutively or concurrently, except that restriction and extra duty may be combined but not to run for a period in excess of the maximum duration allowed for extra duty.

3. For officers, arrest in quarters may not be imposed in combination with restriction. MCM pt. V, para. 5d(1).

H. Punishment generally begins on the day imposed. AR 27-10, para. 3-21. Unsuspended punishments of reduction and forfeiture take effect on the day imposed. Commanders can delay other punishments for up to 30 days for legitimate reasons (quarters, TDY, brief field problem). However, once commenced, deprivation of liberty punishments will run continuously unless the Soldier is at fault or is incapacitated (cannot pause deprivation of liberty once it has commenced because of a field problem). AR 27-10, para. 3-19b(8).

VII. NOTICE REQUIREMENTS (THE "FIRST READING")

A. Soldier must be notified of the following (AR 27-10, paras. 3-16*b* and 3-18):

1. Commander's intention to dispose of the matter under Article 15.

2. Offense suspected of.

3. Maximum punishment that the commander could impose under Article 15.

4. Soldier's rights under Article 15.

B. Delegating the notice responsibility. AR 27-10, para. 3-18a.

1. Commander may delegate the notice responsibility to any subordinate who is a SFC or above (if senior to soldier being notified). The commander still needs to personally sign the DA Form 2627 or 2627-1.

2. Good way to involve first sergeant or command sergeant major.

C. For a script that can be used during the first reading, *see* AR 27-10, app. B.

VIII. SOLDIER'S RIGHTS

A. Formal. AR 27-10, para. 3-18.

1. A copy of DA Form 2627 with items 1 and 2 completed so defense counsel may review and properly advise soldier.

2. Reasonable decision period and to consult with counsel (usually 48 hours).

a) Determined by the complexity of the case and the availability of counsel.

b) Soldier can request a delay, the commander can grant for good cause.

3. Right to remain silent.

4. Demand trial by court-martial (unless attached to or embarked on a vessel).

5. Request an open or closed hearing. AR 27-10, para. 3-18(g)(2).

a) Ordinarily, hearings are open. An open hearing usually takes place in the commander's office with the public allowed to attend.

b) The commander should consider all facts and circumstances when deciding whether the hearing will be open or closed.

6. Request a spokesperson.

a) Need not be a lawyer.

b) Soldier may retain a lawyer at own expense.

7. Examine available evidence.

8. Present evidence and call witnesses. AR 27-10, para. 3-18i.

a) The commander determines if the witness is reasonably available, considering that witness and transportation fees are not available

b) Reasonably available witnesses will ordinarily only be those at the installation concerned.

9. Appeal.

B. Summarized

1. Reasonable decision period (normally 24 hours).

2. Demand trial by court-martial.

3. Remain silent.

4. Hearing.

5. Present matters in defense, extenuation, and mitigation.

6. Confront witnesses.

7. Appeal.

IX. HEARING

A. The hearing is non-adversarial. AR 27-10, para. 3-18g(2). Neither the Soldier nor spokesperson (or retained lawyer) may examine or cross-examine witnesses unless allowed by the commander; however, the Soldier or spokesperson or lawyer can indicate to the imposing commander the relevant issues or questions that they would like to be explored or asked.

B. In the commander's presence unless extraordinary circumstances. AR 27-10, para. 3-18(g)(1).

C. Rules of evidence. MCM, pt. V, para. 4c(3); AR 27-10, para. 3-18j.

1. Commander is not bound by the formal rules of evidence, except for the rules pertaining to privileges.

2. May consider any matter the commander believes relevant (including, e.g. unsworn statements and hearsay).

3. But beware that if the Soldier turns down the Art. 15, the Military Rules of Evidence will apply at a court-martial.

D. Proof beyond a reasonable doubt required. AR 27-10, para. 3-18l.

X. CLEMENCY

A. The imposing commander, a successor in command, or the next superior authority may grant clemency. AR 27-10, para. 3-23.

B. Suspension. AR 27-10, para. 3-24.

1. The execution of a punishment of reduction or forfeiture may be suspended for no more than four months. Other punishments may be suspended for no more than six months. For summary Art. 15s, suspensions are for no more than three months.

2. Automatically remitted if no misconduct during the suspension period.

3. Vacation.

a) If the Solder violates a punitive article of the UCMJ (or other stated condition) during the suspension period, the commander may vacate the suspension.

b) If the vacation involves a condition on liberty, reduction in rank, or forfeiture of pay, the commander should hold a hearing as outlined in AR 27-10, para. 3-25. For the vacation of other punishments, the Soldier should be given notice and an opportunity to respond. If the Soldier is absent without leave when the commander proposes vacation, special rules apply.

c) The conduct that led to the vacation can serve as a separate basis for a new NJP action.

d) No appeal is authorized from the vacation of a suspended sentence. AR 27-10, para. 3-29b.

C. Mitigation. The commander can reduce the quantity or quality of the punishment. AR 27-10, para. 3-26.

D. Remission. The commander can cancel any portion of the unexecuted punishment. AR 27-10, para. 3-27.

E. Setting aside and restoration. AR 27-10, para. 3-28

1. Commanders can set aside any part or amount of a punishment, whether executed or unexecuted, and restore whatever rights, privileges or property that was affected are restored.

2. Should only be done when there was “clear injustice,” or an unwaived legal or factual error that clearly and affirmatively injured the substantial rights of the Soldier.

3. Should generally occur within four months from the date that punishment was imposed.

XI. FILING

A. Summarized Article 15. AR 27-10, para. 3-16f.

1. DA Form 2627-1 filed locally.

2. Destroyed two years after imposition or upon transfer from the unit.

B. Formal Article 15. AR 27-10, paras. 3-6, 3-37.

1. Specialist/Corporal (E-4) and below.

a) Original DA Form 2627 filed locally in unit nonjudicial punishment or unit personnel files.

b) Destroyed two years after imposition or upon transfer to another general court-martial convening authority.

2. All other soldiers.

a) Performance fiche or restricted fiche of OMPF.

(1) Performance section is routinely used by career managers and selection boards for the purpose of assignment, promotion, and schooling selection.

(2) Restricted section contains information not normally viewed by career managers or selection boards.

b) A commander's decision where to file is as important as the decision relating to the imposition of NJP itself. AR 27-10, para. 3-6a. Commanders should consider:

(1) Interests of the Soldier's career.

(2) Soldier's age, grade, total service, whether Soldier has prior NJP, recent performance.

(3) Army's interest in advancing only the most qualified personnel for positions of leadership, trust, and responsibility.

(4) Whether the conduct reflects unmitigated moral turpitude or lack of integrity, patterns of misconduct, evidence of serious character deficiency, or substantial breach of military discipline.

c) Imposing commander's filing decision is subject to review by superior authority.

d) Records directed for filing in restricted fiche will be redirected to the performance fiche if the soldier already has an Article 15, received while he was a sergeant (E-5) or above, filed in his restricted fiche.

e) Superior commander cannot withhold subordinate commander's filing determination authority.

XII. APPEALS

A. Soldier only has right to one appeal under Article 15. AR 27-10, para. 3-29.

B. Time limits to appeal.

1. Reasonable time.

2. After five calendar days, appeal presumed untimely and may be rejected.

C. Who acts on an appeal? AR 27-10, para. 3-30.

1. Successor in command or imposing commander can take action on appeal, and if he or she resolves the issue, may not have to forward.

2. The next superior commander generally handles the appeal.

3. Should act on appeal within five calendar days (three calendar days for summarized proceedings). While the punishment generally runs during the appeals period, if the command takes longer than the designated period, and the Soldier requests, the punishments involving deprivation of liberty will be interrupted until the appeal is completed. AR 27-10, para. 3-21b.

D. Procedure for submitting appeal.

1. Submission of additional matters optional.

2. Submitted through imposing commander.

E. Action by appellate authority.

1. May conduct independent inquiry. May take appellate action even if soldier does not appeal.

2. Legal review. AR 27-10, para. 3-34.

a) Must refer certain appeals to the SJA office for a legal review *before* taking appellate action. UCMJ art. 15(e); DA Form 2627, note 9 (on reverse of form).

(1) Reduction in one or more pay grades from E4 or higher, or

(2) More than 7 days arrest in quarters, 7 days correctional custody, 7 days forfeiture of pay, or 14 days of either extra duty or restriction

b) May refer an Article 15 for legal review in any case, regardless of punishment imposed.

c) Review is typically done by the trial counsel.

(1) Must review the appropriateness of the punishment and whether the proceedings were conducted under law and regulations.

(2) Not limited to the written matters in the record; may make additional inquiries.

3. Matters considered. May consider the record of the proceedings, any matters submitted by the servicemember, any matters considered during the legal review, and any other appropriate matters. MCM pt. V, para. 7f. The rules do not require that the servicemember be given notice and an opportunity to respond to any additional matters considered.

4. Options. AR 27-10, paras. 3-23 through 3-33.

a) Approve punishment.

b) Suspend.

c) Mitigate.

d) Remit.

e) Set Aside. This includes setting aside the earlier NJP in order to refer the case to court-martial. *United States v. Cross*, 2 M.J. 1057 (A.C.M.R. 1976).

F. Petition to the Department of the Army Suitability Evaluation Board (DASEB). AR 27-10, para. 3-43; AR 600-37.

1. Sergeants (E-5) and above may petition to have DA Form 2627 transferred from the performance to the restricted fiche.

2. Soldier must present evidence that the Article 15 has served its purpose and transfer would be in the best interest of the Army.

3. Soldiers can petition for removal of the Article 15. AR 600-37, ch. 7.

4. Petition normally not considered until at least one year after imposition of punishment.

XIII. PUBLICIZING ARTICLE 15S

A. Permissible, but must delete social security number of the soldier and relevant privacy information. AR 27-10, para. 3-22.

B. Timing. At next unit formation after punishment is imposed, or, if appealed, after the decision on appeal. Can post on the unit bulletin board.

C. Commander considerations. Avoid inconsistent or arbitrary policy. Before publishing the punishments of sergeants and above, consider:

1. The nature of the offense.

2. The individual's military record and duty position.

3. The deterrent effect.

4. The impact on unit morale or mission.

5. The impact on the victim.

6. The impact on the leadership effectiveness of the individual concerned.

XIV. SUPPLEMENTAL ACTIONS

A. Any action taken by an appropriate authority to suspend, vacate, mitigate, remit, or set aside a punishment under formal Art. 15 proceedings after action has been taken on an appeal or the DA Form 2627 has been distributed to agencies outside the unit (personnel, finance) need to be recorded on a DA Form 2627-2. AR 27-10, para. 3-38.

XV. THE RELATIONSHIP BETWEEN ARTICLE 15S AND COURTS-MARTIAL

A. Double jeopardy.

1. Absent bad faith by the government, Soldiers can be court-martialed for a serious offense that has been the subject of NJP. Art. 15(f), UCMJ; *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989). *See also* R.C.M. 907(b)(2)(D)(iv); AR 27-10, para. 3-10.

2. The defense can move to dismiss specifications for minor offenses if the accused was previously punished under Article 15 for that offense. R.C.M. 907(b)(2)(D)(iv).

B. The defense serves as the gatekeeper for the admission in the presentencing proceeding of evidence of prior Article 15s where the NJP and the court-martial involve the same offense. *Pierce*, 27 M.J. 367.

1. The defense can allow the factfinder to see the Art. 15 as mitigation to show the factfinder that he or she has been previously punished. UCMJ art. 15(f); *United States v. Gammons*, 51 M.J. 169 (1999).

2. The defense can also ask the military judge to give sentencing credit based on the Art. 15 without having the panel become aware of the article 15. The accused is

entitled to "*complete* credit for any and all nonjudicial punishment suffered: day-for-day, dollar-for-dollar, stripe-for-stripe." *Pierce*, 27 M.J. at 369; *Gammons*, 51 M.J. 169. *See* U.S. DEP'T OF ARMY, PAM 27-9, MILITARY JUDGES' BENCHBOOK para. 2-7-21 (1 Jan. 2010) for the Table of Equivalent Punishments that is used to calculate "day-for-day, dollar-for-dollar, stripe-for stripe." This is generally the option chosen.

3. The defense can also ask for the panel members consider the previous Art. 15 for mitigation, and have the military judge instruct on the specific credit that will be applied. U.S. DEP'T OF ARMY, PAM 27-9, MILITARY JUDGES' BENCHBOOK para. 2-7-21 (1 Jan. 2010).

C. Admitting nonrelated (other past misconduct) formal Article 15s during the presentencing proceeding.

1. Admissible at trial by court-martial during presentencing as a record from "personnel records." R.C.M. 1001(b)(2).

2. The record needs to be properly completed and properly maintained. Possible objections to the admissibility of records of nonjudicial punishment include:

a) Record of nonjudicial punishment is incomplete. *E.g., United States v. Rimmer*, 39 M.J. 1083 (A.C.M.R. 1994) (holding that record inadmissible because the form had no indication whether soldier appealed). *See also United States v. Godden*, 44 M.J. 716 (A.F. Ct. Crim. App. 1996) (holding that administrative errors on record did not affect any procedural due process rights of appellant and record admissible).

b) Record not maintained in accordance with regulation. *E.g., United States v. Weatherspoon*, 39 M.J. 762 (A.C.M.R. 1994) (finding that record maintained in Investigative Records Repository was not a personnel record maintained in accordance with regulation because regulation specifically stated that records of courts-martial or nonjudicial punishment would not be maintained under its authority).

c) Record does not indicate that the accused had the opportunity to consult with counsel <u>and</u> the accused waived his/her right to demand trial by court-martial. *U.S. v. Booker*, 5 M.J. 238 (C.M.A. 1978); *U.S. v. Kelley*, 45 M.J. 259 (1996).

d) Record does not have discernible signatures. *United States. v. Dyke*, 16 M.J. 426 (C.M.A. 1983).

e) Appeal incomplete. *United States v. Yarbough*, 33 M.J. 122 (C.M.A. 1991).

f) Irregular procedure. *United States v. Haynes*, 10 M.J. 694 (A.C.M.R. 1981).

3. May be considered in administrative proceedings.

D. Summarized Article 15 (DA Form 2627-1).

1. Not admissible at trial by court-martial. AR 27-10, para. 5-29b.

2. May be considered in administrative proceedings.

XVI. ADVOCACY POINTS

A. NJP is the business of paralegals, trial counsel, and defense counsel. Chiefs of Justice and Staff Judge Advocates rarely get involved other than for general officer Article 15s.

Watch for practices that might damage the system like having commanders offer waiver of counsel forms to Soldiers during the first reading.

B. Trial counsel should review formal Article 15s. For example, look for limited use urinalysis serving as the basis for an Article 15. Remember, if the Soldier turns down the Article 15, you will own the problem. A few minutes up front can save days of trial preparation later.

C. Soldiers turn down Article 15s for lots of reasons. The key for defense counsel is to communicate with the trial counsel right away. Hold on to the file and call the trial counsel to avoid the natural response by the commander to what might seem like a challenge to his or her authority. A few minutes up front can save days of trial preparation later and prevent the parties from becoming entrenched in their positions.

D. One of the major reasons that Soldiers turn down Article 15s is that they do not trust this particular commander to fairly hear their case. Often, the Soldier will be facing issues that arose out of a conflict with the commander that now wants to impose an Article 15, and he or she may understandably feel that the commander will not give them a fair shake. If this is the case, the defense counsel should hold the file and call the trial counsel to see if the next higher commander could handle the Article 15 or if the case could go to a summary court referred by the brigade commander to an officer outside of the Soldier's battalion (if the Soldier is an E5 or above).

E. As a general matter, trial counsel should not charge offenses that were the subject of an earlier NJP – the Soldier gets a huge sentencing credit if you do. Likewise, defense counsel should normally seek *Pierce* credit for previous Art. 15s rather than seeking dismissal under R.C.M. 907(b)(2)(D)(iv).

F. If trial counsel ensure that the record is properly completed and your office performs proper records maintenance, you should be able to admit the record of a previous Art. 15 (not related to current offenses) under R.C.M. 1001(a)(2). Defense counsel should nit-pick prior Art. 15s – pretty much any mistake in the record or in the maintenance of the record will keep it out of evidence.

G. If the SJA is present during the Article 15 hearing given by the commanding general, should the Soldier's trial defense counsel be present, too? It the trial defense counsel is not there, could there be a violation of U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS para. 4.2 (1 June 1992)? Or does the attorney-client relationship end after the Article 15 counseling? *See generally*, *United States v. Kendig*, 36 M.J. 291 (C.M.A. 1993); *United States v. Mack*, 9 M.J. 300 (C.M.A. 1980).

XVII. CONCLUSION

RECORD OF PROCEEDINGS UNDER ARTICLE 15, UCMJ

For use of this form, see AR 27-10; the proponent agency is TJAG.

See Notes on Reverse Before Completing Form

NAME	GRADE	SSN	UNIT	PAY (Basic & Sea/Foreign)
AGER, Robert L.	E4	000-10-0000	D Co, 1/5 Inf, Ft Blank, VA 00000	1,695.60

1. I am considering whether you should be punished under Article 15, UCMJ, for the following misconduct: 1/
In that you did, on or about 0600 hours, 21 Sep 05, without authority, fail to go at the time prescribed to your appointed place of duty, to wit: Formation, D Co, 1/5 Inf, in front of building 15. This is in violation of Article 86, UCMJ.

2. You are not required to make any statements, but if you do, they may be used against you in this proceeding or at a trial by court-martial. You have several rights under this Article 15 proceeding. First I want you to understand I have not yet made a decision whether or not you will be punished. I will not impose any punishment unless I am convinced beyond a reasonable doubt that you committed the offense(s). You may ordinarily have an open hearing before me. You may request a person to speak on your behalf. You may present witnesses or other evidence to show why you shouldn't be punished at all *(matters of defense)* or why punishment should be very light *(matters of extenuation and mitigation)*. I will consider everything you present before deciding whether I will impose punishment or the type and amount of punishment I will impose. 2/ If you do not want me to dispose of this report of misconduct under Article 15, you have the right to demand trial by court-martial instead. 2/ In deciding what you want to do you have the right to consult with legal counsel located at Room 7, Building 10, Fort Blank, VA . You now have 48 hours to decide what you want to do. 4/

DATE / TIME	NAME, GRADE, AND ORGANIZATION OF COMMANDER	SIGNATURE
21 Sep 05 / 0800	JAMES A. SMITH, CPT, D Co, 1/5 Inf	James A. Smith

3. Having been afforded the opportunity to consult with counsel, my decisions are as follow: *(Initial appropriate blocks, date, and sign)*
a. [ ] I demand trial by court-martial.
b. [RLA] I do not demand trial by court-martial and in the Article 15 proceedings:
(1) I request the hearing be [RLA] Open [ ] Closed. *(2)* A person to speak in my behalf [ ] Is [RLA] Is not requested.
(3) Matters in defense, mitigation, and/or extenuation: [ ] Are not presented [RLA] Will be presented in person [ ] Are attached.

DATE	NAME AND GRADE OF SERVICE MEMBER	SIGNATURE
23 Sep 05	ROBERT L. AGER, SPC	Robert L. Ager

4. In a(n) [JAS] Open [ ] Closed hearing 5/ 6/ all matters presented in defense, mitigation, and/or extenuation, having been considered, the following punishment is imposed: 5/ 6/
Reduction to the grade of Private First Class, (E3), suspended, to be automatically remitted if not vacated before 23 Jan 06; and forfeiture of $100.00 pay.

[NOTE: Refer to Para 3-37b(1) prior to completing item 5]

5. ~~Vacated/Mitigated/Remitted/Mitigated/Remitted/Vacated date of the suspension.~~ 2/
6. You are advised of your right to appeal to the _____ within 5 calendar days. An appeal made after that time may be rejected as untimely. Punishment is effective immediately unless otherwise stated above.

DATE	NAME, GRADE, AND ORGANIZATION OF COMMANDER	SIGNATURE
23 Sep 05	JAMES A. SMITH, CPT, D Co, 1/5 Inf	James A. Smith

7. *(Initial appropriate block, date, and sign)*
a. [ ] I do not appeal *b.* [RLA] I appeal and do not submit additional matters 8/ 2/ *c.* [ ] I appeal and submit additional matters 8/ 2/

DATE	NAME AND GRADE OF SERVICE MEMBER	SIGNATURE
23 Sep 05	ROBERT L. AGER, SPC	Robert L. Ager

8. I have considered the appeal and it is my opinion that: The proceedings were conducted in accordance with law and regulation and the punishments imposed were not unjust nor disproportionate to the offense committed.

DATE	NAME AND GRADE OF JUDGE ADVOCATE	SIGNATURE
27 Sep 05	LEWIS H. RANE, MAJ	Lewis H. Rane

9. After consideration of all matters presented in appeal, the appeal is:
[Lgs] Denied [ ] Granted as follows: 10/

DATE	NAME, GRADE, AND ORGANIZATION OF COMMANDER	SIGNATURE
30 SEP 05	LYMAN Z. LIPE, LTC, 1/5 INF	Lyman Z. Lipe

10. I have seen the action taken on my appeal.	DATE	SIGNATURE OF SERVICE MEMBER
	30 Sep 05	Robert L. Ager

11. ALLIED DOCUMENTS AND/OR COMMENTS 11/ 12/ 13/
"Paragraph 3-18(f)(1), AR 27-10 complied with."

statement by SFC Jones, dated 22 Sep 05

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USAPPC V1.00

NOTES

1/ Insert a concise statement of each offense in terms stating a specific violation and the Article of the UCMJ *(Part IV, MCM)*. If additional space is needed, use item 11 or continuation sheets as described in note 11 below.

2/ Inform the member of the maximum punishment which may be imposed under Article 15.

3/ Inform the member that if he or she demands trial, trial could be by SCM, SPCM, or GCM. Additionally, inform the member that he or she may object to trial by SCM and that at SPCM or GCM he or she would be entitled to be represented by qualified military counsel, or by civilian counsel at no expense to the government. If the member is attached to or embarked in a vessel, he or she is not permitted to refuse Article 15 punishment. In such cases, all reference to a demand for trial will be lined out and an appropriate remark will be made in item 11 indicating the official name of the vessel and that the member was attached to or embarked in the vessel at the time punishment was imposed.

4/ Give the member copy 5 of this form.

5/ Offenses determined not to have been committed will be lined out. If the imposing commander decides not to impose any punishment, the member will be notified and all copies of this form destroyed.

6/ Amounts of forfeitures of pay will be rounded off to the next lower whole dollar. If a punishment is suspended, the following statement should be added after it: To be automatically remitted if not vacated before *(date)*. If punishment includes a written admonition or reprimand, it will be attached to this form and listed in item 11.

7/ The imposing commander will initial the appropriate block. The OMPF performance fiche is routinely used by MOS/specialty career managers and DA selection boards. The OMPF restricted fiche is not given to MOS/speciality career managers or DA selection boards without approval of the Cdr, MILPERCEN or selection board proponent.

8/ If the member appeals, this form and all written evidence considered by the imposing commander will be forwarded to the superior authority.

9/ Before acting on an appeal, it must be referred to a judge advocate for advice when the punishment, whether or not suspended, includes reduction of one or more pay grades from the fourth or a higher pay grade, or is in excess of one of the following: 7 days arrest in quarters, 7 days correctional custody, 7 days forfeiture of pay, or 14 days of either extra duties or restriction. *(See Article 15e (1) to (7), UCMJ.)*

10/ The superior authority will initial the appropriate block. If the appeal is granted, the specific relief granted will be stated according to note 12.

11/ In this space indicate the number of pages attached as follows: Allied documents on appeal consist of _____ pages. Allied documents include all written matters considered by the imposing commander submitted by the member on appeal and the commander's rebuttal, if applicable. If additional space is needed for completion of any item *(s)*, use plain bond headed "Continuation Sheet 1", etc.

12/ Applicable portions of the following format may be used to record action taken on appeal. Appropriate language should be entered in item 11 or, if necessary, on a continuation sheet. Supplementary actions *(para 3-38, AR 27-10)* will be recorded on DA Form 2627-2.

Suspension, Mitigation, Remission, or Setting Aside

(DATE)

On *(date)*, The punishment(s) of _____,
imposed on *(date of punishment) (was) (were) (suspended and will be automatically remitted if not vacated before (date)) (mitigated to) (set aside, and all rights, privileges, and property affected restored) (by my order) (by order of) (the officer who imposed the punishment) (the successor in command to the imposing commander) (as superior authority).*

(Typed name, grade, and organization of commander) /s/_____

13/ Racial/ethnic identifiers will be placed in Item 11 *(Chapter 15, AR 27-10)*.

SUMMARIZED RECORD OF PROCEEDINGS UNDER ARTICLE 15, UCMJ

For use of this form, see AR 27-10; the proponent agency is TJAG.

See Notes on Reverse Before Completing Form

This form will be used only in cases involving enlisted personnel and then *ONLY* when no punishment *OTHER THAN* oral admonition or reprimand, restriction for 14 days or less, extra duties for 14 days or less, or a combination thereof has been imposed. [1]

NAME	GRADE	SSN	UNIT
HABE, ALFRED H.	E-3	111-11-1111	A Btry, 9/10th FA, 13th Inf Div, Fort Blank, VA 00000

1. On 23 June 2005, the above service member was advised that I was considering imposition of nonjudicial punishment under the provisions of Article 15, UCMJ, Summarized Proceedings, for the following misconduct: [2]

On or about 0900 hours, 21 June 2005, you were absent without authority from A Btry, 9/10th FA, 13th Inf Div, located at Fort Blank, VA and remained so absent until on or about 0800 hours, 22 June 2005, in violation of Article 86, UCMJ.

2. The member was advised that no statement was required, but that any statement made could be used against him or her in the proceeding or in a court-martial. The member was also informed of the right to demand trial by court-martial [3], the right to present matters in defense, extenuation and/or mitigation, that any matters presented would be considered by me before deciding whether to impose punishment, the type or amount of punishment, if imposed, and that no punishment would be imposed unless I was convinced beyond a reasonable doubt that the service member committed the misconduct. The service member was afforded the opportunity to take 24 hours to make a decision regarding these rights. No demand for trial by court-martial was made. After considering all matters presented, the following punishment was imposed: [4]

Oral reprimand and restriction for 14 days.

3. The member was advised of the right to appeal to the Cdr, 9/10th FA, 13th Inf Div within 5 calendar days, that an appeal made after that time could be rejected as untimely, and that the punishment was effective immediately unless otherwise stated above. The member:

[AAA] Elected immediately not to appeal [ ] Requested time to decide whether to appeal and the decision is indicated in item 4, below. [5] [6]

DATE	NAME, GRADE, AND ORGANIZATION OF IMPOSING COMMANDER	SIGNATURE
23 June 2005	RICHARD J. MOAD, CPT, A BTRY, 9/10TH FA, 13TH INF DIV	Richard J. Moad

4. *(Initial appropriate block, date, and sign)*

a. [AAA] I do not appeal b. [ ] I appeal and do not submit matters for consideration [7] c. [ ] I appeal and submit additional matters [7]

DATE	NAME AND GRADE OF SERVICE MEMBER	SIGNATURE
23 June 2005	ALFRED H. HABE, E-3	Alfred H. Habe

5. After consideration of all matters presented in appeal, the appeal is:

[ ] Denied [ ] Granted as follows: [8]

DATE	NAME, GRADE, AND ORGANIZATION OF COMMANDER	SIGNATURE

6. I have seen the action taken on my appeal.	DATE	SIGNATURE OF SERVICE MEMBER

7. ALLIED DOCUMENTS AND/OR COMMENTS [9] [10] [11]

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NOTES

1. See AR 27-10 for further guidance. Ordinarily entries on this form will be handwritten in ink.

2. Insert a concise statement of each offense in terms stating a specific violation and the Article of the UCMJ. If additional space is needed, use item 7 and/or continuation sheets as described in note 9 below.

3. Inform the member that if he or she demands trial, trial could be by SCM, SPCM, or GCM. Additionally, inform the member that he or she may object to trial by SCM and that at SPCM or GCM he or she would be entitled to be represented by qualified military counsel, or by civilian counsel at no expense to the government. If the member is attached to or embarked in a vessel, he or she is not permitted to refuse Article 15 punishment. In such cases, all reference to a demand for trial will be lined out and an appropriate remark will be made in item 7 indicating the official name of the vessel and that the member was attached to or embarked in the vessel at the time punishment was imposed.

4. Offenses determined not to have been committed will not be listed. If the imposing commander decides not to impose punishment, the member will be notified and no copies of this record will be prepared. If a punishment is suspended, the following statement should be added after it: "To be automatically remitted if not vacated before (date)."

5. If the member immediately elects not to appeal, item 5 will not be completed.

6. The imposing commander will initial the appropriate block.

7. If the individual appeals, this form and all matters set forth in item 7 will be forwarded to the superior authority.

8. The superior authority will initial the appropriate block. Refer to note 10, below.

9. In this space indicate the number of pages as follows: Allied documents on appeal consist of _____ pages. Allied documents include all written matters considered by the imposing commander, submitted by the member on appeal, commander's rebuttal, and copies of supplementary actions taken on the punishment. Supplementary actions will be recorded in accordance with note 10. If additional space is needed for completion of any item(s), use plain bond headed "Continuation Sheet 1," etc.

10. Applicable portions of the following suggested formats may be used to record action taken on an appeal and supplementary actions for summarized Article 15 proceedings. Appropriate language should be entered in item 7 or, if necessary, on continuation sheets.

a. Suspension, Mitigation, Remission, or Setting Aside.

On *(date)* the punishment(s) of _____, imposed on *(date of punishment) (was) (were) (suspended and will be automatically remitted if not vacated before (date)) (mitigated to) (set aside, and all rights, privileges, and property affected restored) (by my order) (by order of) (the officer who imposed the punishment) (the successor in command to the imposing commander) (as superior authority).*

(Typed name, grade, and organization of commander) /s/

b. Vacation of Suspension

The suspension of the punishment(s) of _____ imposed on *(date of punishment) (is) (are)* hereby vacated. The unexecuted portion(s) of the punishment(s) will be duly executed.

(Typed name, grade, and organization of commander) /s/

11. Racial/ethnic identifiers will be placed in item 7 *(Chap 15, AR 27-10)*.

RECORD OF SUPPLEMENTARY ACTION UNDER ARTICLE 15, UCMJ

For use of this form, see AR 27-10; the proponent agency is The Judge Advocate General.

NAME AND GRADE	SSN	UNIT
AGER, Robert L.	000-10-0000	D Co, 1/5 Inf, Fort Blank, VA 00000

TYPE OF SUPPLEMENTARY ACTION *(OTHER THAN BY SUPERIOR AUTHORITY ACTING ON APPEAL)* *(Check appropriate box)*

[ ] **SUSPENSION** *(Complete item 1 below)* [ ] **MITIGATION** *(Complete item 2 below)* [ ] **REMISSION** *(Complete item 3 below)*

[ ] **SETTING ASIDE** *(Complete item 4 below)* [X] **VACATION OF SUSPENSION** *(Complete item 5 below)*

1. SUSPENSION

The punishment(s) of _____

imposed on the above service member on _____ *(date of punishment)* (is) (are) suspended and will automatically be remitted if not vacated before _____ *(date)*.

2. MITIGATION

The punishment(s) of _____

imposed on the above service member on _____ *(date of punishment)* (is) (are) mitigated to _____.

3. REMISSION

The punishment(s) of _____

imposed on the above service member on _____ *(date of punishment)* (is) (are) remitted.

4. SETTING ASIDE

The punishment(s) of _____

imposed on the above service member on _____ *(date of punishment)* (is) (are) set aside on the basis that _____.

All rights, privileges, and property affected are hereby restored.

5. VACATION OF SUSPENSION

a. The suspension of the punishment(s) of reduction to Private First Class (E3)

imposed on the above service member on 23 Sep 05 *(date of punishment)* (is) (~~are~~) hereby vacated. The unexecuted portion(~~s~~) of the punishment(~~s~~) will be duly executed.

b. Vacation is based on the following offense(s): In that you did, on or about 0600 hours, 1 Oct 05, without authority, fail to go at the time prescribed to your appointed place of duty, to wit: Formation, D Co, 1/5 Inf, in front ob Building 15. This is in violation of Article 86, UCMJ.

c. The member *(was)* *(was not)* given an opportunity to rebut *(para 3-25, AR 27-10)*.

d. The member *(was)* *(was not)* present at the vacation proceeding *(para 3-25, AR 27-10)*.

ORIGINAL DA FORM 2627 *(Check appropriate box)*

[ ] ~~[illegible]~~ [ ] ~~[illegible]~~ [ ] ~~[illegible]~~

AUTHENTICATION *(Check appropriate boxes)*

[X] BY MY ORDER [X] THE OFFICER WHO IMPOSED THE PUNISHMENT

[ ] THE SUCCESSOR IN COMMAND TO THE IMPOSING COMMANDER [ ] AS SUPERIOR AUTHORITY

DATE	NAME, GRADE, AND ORGANIZATION OF COMMANDER	SIGNATURE
2 Oct 05	JAMES A. SMITH, CPT, Co D, 1/5 Inf	James A Smith

DA FORM 2627-2, FEB 83 EDITION OF NOV 82 WILL BE USED UNTIL EXHAUSTED. USAPPC V1.00 ORIGINAL

TAB J

DISCOVERY AND PRODUCTION

TABLE OF CONTENTS

I. REFERENCES 1

II. INTRODUCTION 1

III. GENERAL 2

IV. GOVERNMENT DISCOVERY RESPONSIBILITIES AND REQUESTS 3

V. DEFENSE DISCOVERY RESPONSIBILITIES AND REQUESTS 16

VI. REGULATION OF DISCOVERY 19

VII. PRODUCTION 24

VIII. PRODUCTION OF EXPERT WITNESSES AND ASSISTANTS 33

IX. CONCLUSION AND PRACTICE TIPS 37

X. APPENDIX 40

LTC ERIC CARPENTER

JANUARY 2011

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DISCOVERY AND PRODUCTION

I. REFERENCES

A. UCMJ art. 46 (2008).

B. MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 701, 702, 703, 914 [hereinafter MCM, RCM].

C. MCM, MIL. R. EVID. 301, 304, 311, 321, 404(b), 412, 413, 414, 807 [hereinafter, MRE].

D. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 June 1992) [hereinafter, AR 27-26].

E. RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL, UNITED STATES ARMY TRIAL JUDICIARY (15 Sept. 2009) [hereinafter, RULES OF PRACTICE].

F. JOSHUA DRESSLER AND ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE, VOL. 2: ADJUDICATION (4th ed. 2006) [hereinafter, UNDERSTANDING CRIMINAL PROCEDURE].

G. James W. McElhaney, *Hunt for the Winning Story*, A.B.A. J., July 2006, at 22

H. James W. McElhaney, *Discovery is the Trial*, A.B.A. J., Aug. 2007, at 26

II. INTRODUCTION

A. How to use this outline.

1. This outline is set up so that you can go to your respective section (government or defense) and see what you must disclose (even without the other party asking for anything); what you must disclose if the other party asks; and what discovery you can seek from the other party. Look to the other party's section on mandatory disclosures to see what that party owes you even if you do not ask for anything.

2. This outline contains those discovery requirements that are found in the RULES OF PRACTICE that relate to the exchange of information between the parties. The RULES OF PRACTICE contain other requirements for the exchange of information between the parties and the military judge, to include the exchange of information related to motions. Chapter 5, AR 27-10 also contains requirements for information exchanges with the military judge.

3. This outline does not cover Article 32 investigations; however, the Article 32 investigation should be an integrated part of your discovery plan.

B. Discovery basics.

1. The rules for discovery establish how each party will help the *other* party to develop the *other* party's case. Fundamentally, these rules govern how the parties will exchange information.

a) Discovery is a broad term. It means attaining that which was previously unknown. BLACK'S LAW DICTIONARY 322 (6th ed. 1991). It includes "the pre-trial devices that can be used by one party to obtain facts and information about the case from the other party in order to assist the party's preparation for trial." *Id*.

b) Generally, one party requests *discovery*, to which the other party provides *disclosure* of the material. Disclosure means to bring into view or to make known. *Id*. at 320. The terms "disclosure" and "allowing to

inspect" are often used interchangeably. The difference is really just a question of which party has to press the button on the copy machine.

c) Discovery includes *disclosure* of something tangible or *notice* of something intangible, like a party's intent to do something.

2. The discovery rules in the military are very liberal and are designed to encourage an efficient system. Requiring parties to exchange information early in the process reduces pretrial motions practice; reduces surprise and gamesmanship; reduces delay at trial when delay is especially costly because the court is assembled; leads to better-informed decisions about the merits of the case; and encourages early decisions concerning withdrawal of charges, motions, pleas, and composition of court-martial. RCM 701 analysis, app. 21, at A21-33.

a) Showing your cards encourages realistic settlements. James W. McElhaney, *Discovery is the Trial*, A.B.A. J., Aug. 2007, at 26.

C. Production basics.

1. Production and discovery are different concepts. Discovery deals with case development. Information learned during the discovery process may or may not ultimately be introduced at trial.

2. Production is where one party (typically, the defense) requests that the other party (typically, the government) be responsible for ensuring a witness or item of evidence makes it to the courthouse on the date scheduled for a motions hearing or trial. The party seeking production intends to call this witness or introduce this evidence at the hearing or trial. If the accused is denied production, or does not want to request that the government produce a witness or some evidence, the accused can always arrange for the production of that witness or evidence at his own expense (having family members drive in on sentencing but not seek reimbursement from the governnment, for example).

3. In the federal system, the judiciary is responsible for processing witness and evidence requests. In the military, the command which convened the court-martial is responsible for those duties. The production rules found in RCM 703 explain what the defense must include in its requests; that the trial counsel can grant the requests; and if the trial counsel denies the request, that the military judge will rule on the production of the witness or evidence. RCM 703 analysis, app. 21, at A21-36.

III. GENERAL

A. UCMJ art. 46 (2008) is the root source for much of the military's discovery and production rules: "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence."

1. For discovery, this statute is embodied in RCM 701(e), Access to Witnesses and Evidence: "Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence."

a) Generally speaking, the government cannot require that a government representative be present during defense interviews of government witnesses, although in certain circumstances a third party observer may be permissible. *United States v. Irwin*, 30 M.J. 87 (C.M.A. 1990). If a third party observer is required, that requirement would need to apply to both

defense and government interviews. *Id*. at 93. *See also United States v. Killebrew*, 9 M.J. 154 (C.M.A. 1980).

b) If the government analyzes the evidence, then the defense can analyze it too. *United States v. Walker*, 66 M.J. 721 (N-M. Ct. Crim. App. 2008) (in a capital trial, the military judge erred when he refused to allow the defense experts to conduct independent testing of physical evidence admitted a trial).

2. For production, this statute is embodied in RCM 703(a): "The prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process."

B. Ethical considerations. AR 27-26, para. 3.4.

1. It is unethical to unlawfully obstruct another party's access to evidence, to make a frivolous discovery request, or fail to make a reasonably diligent effort to comply with a proper discovery request from an opposing party. Rule 3.4(a) and (d).

2. "Subject to evidentiary privileges, the right of an opposing party, including the Government, to obtain evidence through discovery or subpoena is an important procedural right." (Comment to rule).

3. The ABA Standards for Criminal Justice, which apply to Army lawyers to the extent that they do not conflict with AR 27-26, contains additional ethical considerations. For example, the Standards contain guidance on how to deal with a witness that asks a party whether or not she should communicate with the other party (see Standard 3-3.1 and accompanying commentary) and whether a trial counsel should read a witness her rights for the purpose of influencing whether that witness should testify (Standard 3-3.2).

C. Continuing Duty to Disclose. If, before or during the court-martial, a party discovers additional evidence or material previously requested or required to be produced, which is subject to discovery or inspection under this rule, that party shall promptly notify the other party or the military judge of the existence of the additional evidence or material. RCM 701(d). *See United States v. Eshalomi*, 23 M.J. 12 (C.M.A. 1986); *United States v. Jackson*, 59 M.J. 330 (C.A.A.F. 2004).

D. Information not subject to disclosure. RCM 701(f). Disclosure is not required if the information is protected under the Military Rules of Evidence or if the information is attorney work product (notes, memoranda, or similar working papers prepared by counsel or counsel's assistants or representatives).

1. *United States v. Vanderwier*, 25 M.J. 263, 269 (C.M.A. 1987) ("Even though liberal, discovery in the military does not 'justify unwarranted inquiries into the files and the mental impressions of an attorney.'")

2. *United States v. King*, 32 M.J. 709 (A.C.M.R. 1991), *rev'd on other grounds*, 35 M.J. 337 (C.M.A. 1992). A defense expert is subject to a pretrial interview by TC, but a defense "representative" under MRE 502 is not. It was improper for TC to communicate with defense representative concerning interview with appellant.

3. *United States v. Vanderbilt*, 58 M.J. 725 (N-M. Ct. Crim. App. 2003) (holding that a civilian witness' agreement to testify pursuant to a pretrial agreement with the U.S. Attorney's Office does not waive that witness' attorney-client privilege regarding statement made to his attorney during the course of pretrial negotiations).

IV. GOVERNMENT DISCOVERY RESPONSIBILITIES AND REQUESTS

A. Mandatory disclosure or notice requirements for trial counsel.

1. Evidence that reasonably tends to negate guilt, reduces the degree of guilt, or reduces punishment (disclose as soon as practicable).

a) Sources.

(1) RCM 701(a)(6). The trial counsel shall disclose evidence which reasonably tends to:

(a) Negate guilt;

(b) Reduce the degree of guilt; or

(c) Reduce the punishment.

(2) *Brady v. Maryland*, 373 U.S. 83 (1963). In a death penalty case, the government did not disclose a statement where the codefendant admitted to being the actual killer. The Court stated that the government must disclose evidence that is favorable to the accused and material to either guilt or punishment.

(3) AR 27-26, para. 3.8(d). Trial counsel will disclose all evidence that tends to:

(a) Negate guilt;

(b) Mitigate the offense; or

(c) Mitigate the sentence.

(d) *See United States v. Kinzer*, 39 M.J. 559, 562 (A.C.M.R. 1994); *United States v. Adens*, 56 M.J. 724 (Army Ct. Crim. App. 2002).

b) Favorable.

(1) Impeachment information. *Banks v. Dretke*, 124 S. Ct. 1256 (2004); *Strickler v. Greene*, 527 U.S. 263, 281 (1999); *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Bagley*, 473 U.S. 667 (1985)*; Giglio v. United States*, 405 U.S. 150 (1972).

(2) This impeachment information may include:

(a) Any promise of immunity or leniency offered to a witness in exchange for testimony. *See, e.g., Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959).

(b) Specific instances of conduct of a witness for the purpose of attacking the witness's credibility or character for truthfulness. *See, e.g., United States v. Watson*, 31 M.J. 49 (C.M.A. 1990) (finding evidence that witness had monetary interest in outcome of case could have been favorable); *United States v. Mahoney*, 58 M.J. 346 (C.A.A.F. 2003) (holding that trial counsel's failure to disclose a letter impeaching government's expert witness was reversible error).

(c) Evidence in the form of opinion or reputation as to a witness's character for truthfulness.

(d) Prior inconsistent statements. *See, e.g., United States v. Romano*, 46 M.J. 269 (C.A.A.F. 1997); *Graves v. Cockrell*, 351 F. 3d 156 (5th Cir. 2003). *See also* MRE 613(a)

(e) Information to suggest that a witness is biased. *See, e.g., Bagley*, 473 U.S. at 667; *Banks*, 124 S. Ct. 1256 (2004) (finding that the State's failure to disclose that key state witness in capital sentencing proceeding was a paid government informant and played an important role in setting up Banks' arrest was error).

(f) *United States v. Romano*, 46 M.J. 269 (C.A.A.F. 1997). The trial counsel had a duty to disclose statements by witnesses at the Art. 32 investigation of co-accuseds, where the prior statements were inconsistent with the government's main witness' testimony at trial.

c) Scope of the government's duty.

(1) The prosecutor does *not* have to have actual knowledge of the evidence to commit a *Brady* violation. *See Kyles v. Whitley***,** 514 U.S. 419 (1995); *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Mahoney*, 58 M.J. 346 (C.A.A.F. 2003); *Bailey v. Rae*, 339 F.3d 1107 (9th Cir. 2003).

(2) The government may be required to look beyond its files for exculpatory evidence. *United States v. Williams*, 50 M.J. 436 (C.A.A.F. 1999). The scope of the government's duty to search with beyond the prosecutor's own files generally is limited to:

(a) The files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses. *Id*. at 441.

(i) *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989) (the "prosecutor will be deemed to have knowledge of and access to anything in the possession, custody, or control of any federal agency participating in the same investigation of the defendant.")

(ii) *United States v. Simmons*, 38 M.J. 376 (C.M.A. 1993) (holding that trial counsel must exercise due diligence in discovering the results of exams and tests which are in possession of CID).

(iii) *United States v. Sebring*, 44 M.J. 805 (N-M. Ct. Crim. App. 1996) (holding that trial counsel had a duty to discover quality control investigation into problems at Navy drug lab that tested the accused's urine sample).

(iv) *Kyles v. Whitley*, 514 U.S. at 437 ("the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police").

(b) Investigative files in a related case maintained by an entity closely aligned with the prosecution. *United States v. Williams*, 50 M.J. at 441.

(i) *United States v. Hankins*, 872 F. Supp. 170, 173 (D.N.J. 1995) ("when the government is pursuing both a civil and criminal prosecution against a defendant stemming from the same underlying activity, the government must search both the civil and criminal files in search of exculpatory material.")

(c) Investigative files of tangential or unrelated investigations if specifically requested by the defense. *Williams*, 50 M.J. at 441; *United States v. Veksler*, 62 F.3d 544 (3d Cir. 1995) (the request provides constructive notice to the prosecution about the existence of the files). (These requests should also be analyzed under RCM 701(a)(2).)

(i) *United States v. Green*, 37 M.J. 88, 89 (C.M.A. 1993). The defense requested "[a]ny record of prior conviction, and/or nonjudicial punishment of" any government witness. The trial counsel responded without comment. The CID agent had an Art. 15 for fraternization, false claim, and larceny. Error was harmless beyond a reasonable doubt because the CID agent was only used to authenticate physical evidence.

(3) The *Brady* rule is designed to ensure the defendant learns of exculpatory evidence that is known only to the government. If the defendant knows or should know the essential facts permitting him to take advantage of the exculpatory evidence (like the witness' identity), then the government does not have a duty to disclose the information. *United States v. Grossman*, 843 F.2d 78, 85 (2d Cir. 1988) (no *Brady* violation when the defense knew the witness' name; that he might have testified before a grand jury; and that the testimony might have been favorable).

d) Understanding and applying RCM 701(a)(6) and *Brady* at trial.

(1) Applying RCM 701(a)(6) and *Brady* at trial is not that difficult. Typically, these issues arise when the government makes a late disclosure or the defense discovers this evidence on its own late in the process. Everyone knows about the evidence (they are, after all, litigating about it). The real problem is that the defense needs more time to prepare for trial based on this newly discovered evidence. The military judge just needs to fashion a just action in response under RCM 701(g), which will probably be to grant a continuance.

(a) Whether disclosure is sufficiently complete or timely to satisfy *Brady* can only be evaluated in terms of "the sufficiency, under the circumstances, of the defense's opportunity to use the evidence when disclosure is

made." *Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001). "The opportunity for use under *Brady* is the opportunity for a responsible lawyer to use the information with some degree of calculation and forethought." *Id*. at 103.

(2) The key point is that, in the military, under RCM 701(a)(6) (and for Army attorneys, under AR 27-26, para. 3.8(d)), the trial counsel *must always disclose favorable matter*, whether or not that matter may later be found to be material or not.

(3) The RCM 701(a)(6) language uses the phrase "reasonably tends" rather than the *Brady* term "material." Under Brady, if the government fails to disclose favorable information, that non-disclosure violates due process only if the matter was material. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *Cone v. Bell*, 129 S.Ct. 1769 (2009). If a local jurisdiction has not implemented rules like RCM 701(a)(6) or AR 27-26, para. 3.8(d), then the prosecutor might consider whether favorable evidence is material before disclosing. That is not the case in our practice.

(4) The phrase "reasonably tends" can be readily applied at during trial proceedings, where the parties are arguing *prospectively*. The term "material" is essentially a test for prejudice that is applied *retrospectively*, on appeal, where the defense has only now learned of the evidence. The issue on appeal is whether the first trial should be set aside based on this discovery violation. As such, much of the case law related to the term "material" may not translate well to litigation at trial. At trial, use "reasonably tends."

(5) The case law that has developed around the term "favorable" does have application at trial litigation, but again, if the issue is being litigated at trial, then the defense knows about the evidence and the real issue is whether the defense has enough time to prepare based on that new knowledge. And, if the defense has made a discovery request under RCM 701(a)(2), the defense does not have to make a showing that the evidence is "favorable." Under that rule, the information only needs to be "material."

e) Understanding and applying RCM 701(a)(6) and *Brady* on appeal.

(1) Applying RCM 701(a)(6) and *Brady* on appeal is more complex. The issue now is whether the matter was favorable; whether the government failed to properly disclose; and whether the defendant suffered prejudice as a result (the "material" inquiry). *See generally*, *Strickler v. Greene*, 527 U.S. 263 (1999).

(2) Favorable. Discussed above.

(3) Scope of government's duty to disclose. Discussed above.

(4) If there is no specific request by the defense, use *material*.

(a) A failure to disclose is material if there is a reasonably probability that there would have been a different result at trial had the evidence been disclosed. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). The Supreme Court in *Banks*

v. Dretke, 540 U.S. 668 (2004), reiterated that the touchstone of materiality is the *Kyles* case.

(b) "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434.

(c) In cases of knowing use of perjured testimony by the prosecutor, the failure to disclose favorable evidence is material unless the failure to disclose is harmless beyond a reasonable doubt. *United States v. Bagley*, 473 U.S. 667 (1985).

(5) If there is a specific defense request under RCM 701, then use harmless beyond a reasonable doubt.

(a) Where the defense makes a specific discovery request under RCM 701 and the government fails to disclose that evidence, the standard of review is *harmless beyond a reasonable doubt*. *United States v. Roberts*, 59 M.J. 323 (C.A.A.F. 2004). This heightened standard is often incorrectly confused with *Brady* material analysis (reasonable probability of different result). *See United States v. Figueroa* 55 M.J. 525 (A.F. Ct. Crim. App. 2001).

(b) The source of the "harmless beyond a reasonable doubt" standard is Article 46 and RCM 701, not *Brady*. United States v. Eshalomi, 23 M.J. 12 (C.M.A. 1986); United States v. Hart, 29 M.J. 407 (C.M.A. 1990); *Roberts*, 59 M.J. 323.

f) Comparison to RCM 701(a)(2). (For more discussion of RCM 701(a)(2), see section B.1 below).

(1) If the defense makes a specific discovery request under RCM 701(a)(2) (discussed below), the government must provide the information if, among other things, it is *material to the preparation of the defense*. Unlike RCM 701(a)(6) and *Brady*, there is no requirement that the information be *favorable*. It can be unfavorable and still be material to the preparation of the defense.

(2) Unlike RCM 701(a)(6) and *Brady*, the government only has to disclose RCM 701(a)(2) information if requested by the defense.

(3) Where the defense makes a specific discovery request under RCM 701 and the government fails to disclose that evidence, or where there is prosecutorial misconduct, the standard of review is *harmless beyond a reasonable doubt*. *United States v. Roberts*, 59 M.J. 323 (C.A.A.F. 2004). This heightened standard is often

incorrectly confused with *Brady* material analysis (reasonable probability of different result). *See United States v. Figueroa* 55 M.J. 525 (A.F. Ct. Crim. App. 2001).

(4) The scope of the government's duty to locate the evidence is different under RCM 701(a)(2) than under RCM 701(a)(6) and *Brady*. Under RCM 701(a)(2), the trial counsel must search that which is within the "possession, custody, or control of military authorities," which includes non law-enforcement authorities. Under RCM 701(a)(6) and *Brady*, the trial counsel must search her files, files of other law enforcement agencies that have been involved in the investigation, files of related cases maintained by an entity closely aligned with the prosecution.

g) Miscellaneous.

(1) The duty to disclose favorable evidence exists even without a request by the accused. *United States v. Agurs*, 427 U.S. 97, 107 (1976).

(2) Bad faith on the part of the government not required. *Brady v. Maryland*, 373 U.S. 83 (1963).

(3) The Constitution does not require the pre-guilty plea disclosure of impeachment information. The Court noted that disclosure of impeachment information relates to the fairness of a *trial*, as opposed to the voluntariness of a plea. Impeachment information, the Court declared, is particularly difficult to characterize "as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant." *United States v. Ruiz*, 536 U.S. 622 (2002).

2. Charges (as soon as practicable). RCM 308(a).

a) Within 24 hours to both accused and defense counsel. RULES OF PRACTICE, at 1.

3. Allied papers (as soon as practicable after service of charges). 701(a)(1):

a) Any papers that accompanied the charges when referred;

b) The convening orders.

c) Also, ERB/ORB. RULES OF PRACTICE, at 1.

4. Sworn or signed statements (as soon as practicable after service of charges). RCM 701(a)(1):

a) Any sworn or signed statement relating to an offense charged which is in the possession of the trial counsel.

5. Report of Article 32 investigation (promptly). RCM 405(j)(3).

6. Merits witnesses (before the beginning of the trial on the merits). RCM 701(a)(3).

a) The trial counsel shall notify the defense of the names and addresses of the witnesses the trial counsel intends to call:

(1) In the prosecution case-in-chief; and

(2) To rebut a defense of alibi, innocent ingestion, or lack of mental responsibility, when the trial counsel has received timely notice of such a defense.

b) The RULES OF PRACTICE, at 21, requires notice ten days prior to trial.

7. Prior convictions of the accused (before arraignment). RCM 701(a)(4).

a) The trial counsel shall notify the defense of any records of prior civilian or court-martial convictions of the accused of which the trial counsel is aware and which the trial counsel may offer on the merits for any purpose, including impeachment.

8. "Section III" disclosures under the Military Rules of Evidence.

a) Grants of immunity or leniency (prior to arraignment or within a reasonable time before the witness testifies). MRE 301. The grant must be reduced to writing. *See also Giglio v. United States*, 405 U.S. 150 (1972).

b) Accused's statements (prior to arraignment). MRE 304(d)(1). The prosecution shall disclose all statements of the accused, oral or written, that are relevant to the case *irrespective of intent to use at trial*. "All statements:"

(1) Includes remarks made during informal conversations. *United States v. Callara*, 21 M.J. 259, 262 (C.M.A. 1986).

(2) Is not limited to those made to military superiors or law enforcement. *United States v. Trimper*, 28 M.J. 460, 468 (C.M.A. 1989).

(3) Provide timely notice of an intent to offer a statement that was not disclosed prior to arraignment. MRE 304(d)(2).

c) Evidence seized from the accused or property owned by the accused (prior to arraignment). MRE 311(d)(1). The prosecution shall disclose all evidence seized from the accused or property owned by the accused, that it *intends to offer* into evidence against the accused at trial.

(1) Provide timely notice of an intent to offer this evidence that was not disclosed prior to arraignment. MRE 311(d)(2)(B).

d) Identifications (prior to arraignment). MRE 321(c)(1). The prosecution shall disclose all evidence of prior identifications of the accused that it *intends to offer* into evidence against the accused at trial.

(1) Provide timely notice of an intent to offer lineup evidence that was not disclosed prior to arraignment. MRE 321(c)(2)(B).

e) The RULES OF PRACTICE, at 3, requires disclosure not later than two duty days after the trial date is set if arraignment is the day of trial.

9. Similar sex assault or molestation crimes (5 days prior to trial). MRE 413 and 414.

a) If the government intends to offer evidence of similar crimes (sexual assault or child molestation), the trial counsel must notify the defense of its intent and disclose the evidence.

10. Testing may consume only available samples of evidence. *United States v. Garries*, 22 M.J. 288, 293 (C.M.A. 1986). Inform the accused when testing may consume the only available samples and permit the defense an opportunity to have a representative present.

11. Residual hearsay (sufficiently in advance of trial to provide fair opportunity to respond). MRE 807.

    a) The proponent of residual hearsay must give the opponent notice of the intent to offer out-of-court statements as residual hearsay. *See United States v. Holt*, 58 M.J. 227 (C.A.A.F. 2003) (holding that Air Force Court of Criminal Appeals abused its discretion when it affirmed the introduction of residual hearsay statement when there was no indication in the record as to whether the required notice was given and by misapplying the foundational requirement of necessity).

12. Aggravating circumstances in capital cases (before arraignment). RCM 1004(b)(1)(B).

13. Judicial notice of a foreign law (reasonable time). MRE 201A(b).

14. Original writing in possession of other party. MRE 1004(3).

15. Evidence of a conviction more than 10 years old (sufficient advance notice as to provide a fair opportunity to contest the use). MRE 609(b).

16. Notice of intent to employ an expert at government expense (in advance of employment). RCM 703(d).

B. Disclosures and notices made upon defense request.

1. Documents and tangible objects (after service of charges). RCM 701(a)(2)(A).

    a) Books, papers, documents, photographs, tangible objects, buildings, or places, AND

    b) In the possession, custody, or control of military authorities, AND

    c) Either *intended for use* by the trial counsel as evidence in the case-in-chief OR *material* to the preparation of the defense;

        (1) Unlike RCM 701(a)(6) and Brady, this matter does not have to be favorable – just material to the preparation of the defense. Unfavorable matter can be material to the preparation of the defense. *See United States v. Adens*, 56 M.J. 724 (Army Ct. Crim. App. 2002).

            (a) The definition of "material" in Black's Law Dictionary includes matter that is of "such a nature that knowledge of the item would affect a person's decision-making process." BLACK'S LAW DICTIONARY 1066 (9th ed. 2009).

            (b) The decisions might how to plead (*see generally United States v. Adens*, 56 M.J. 724 (Army Ct. Crim. App. 2002); *United States v. Trigueros*, 69 M.J. 604, 611 (A. Ct. Crim. App. 2010)) or to pursue lines of investigation, defenses, or trial strategies (*United States v. Eshalomi*, 22

M.J. 12, 27 (C.M.A. 1986); *United States v. Webb*, 66 M.J. 89 (C.A.A.F. 2008)).

(c) Evidence might be material if the defense could use it to persuade the convening authority not to refer the case. *United States v. Eshalomi*, 22 M.J. 12, 28 (C.M.A. 1986)).

(d) There is no requirement that "material" matters be known to be admissible at trial or that the government intend to introduce it. See *United States v. Luke*, __ M.J. __ (C.A.A.F. 2011).

(2) Where the defense makes a *specific* discovery request and the government fails to disclose that evidence, or where there is prosecutorial misconduct, the standard of review is harmless beyond a reasonable doubt. *United States v. Roberts*, 59 M.J. 323 (C.A.A.F. 2004).

(a) Some of the military judge's decisions are reviewed under the abuse of discretion standard. A military judge abuses her discretion when her factual findings are clearly erroneous or she applies the wrong law. Next, the appellate courts review the decision that the matter is "material to the preparation of the defense" under a *de nevo* standard. If the appellate court finds that the material should have been disclosed, then the appellate courts apply "harmless beyond a reasonable doubt" to test for prejudice. *Roberts*, 59 M.J. at 326.

(3) Courts often incorrectly confuse this analysis with *Brady* analysis. *See United States v. Figueroa* 55 M.J. 525 (A.F. Ct. Crim. App. 2001). The obligations under RCM 701(a)(2) are in addition to the obligations found under *Brady*.

(4) Trial counsel's duty to search. The government must make good faith efforts to comply with the requests. *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999). "The government cannot intentionally remain ignorant and them claim it exercised due diligence." *United States v. Trigueros*, 69 M.J. 604, 611 (A. Ct. Crim. App. 2010).

(5) Trial counsel's rebuttal evidence on the merits.

(a) Government must disclose evidence that is "material to preparation of defense" under R.C.M. 701(a)(2) regardless of "whether the government intends to offer the evidence in its case-in-chief, in rebuttal, or not at all." *United States v. Adens*, 56 M.J. 724 (Army Ct. Crim. App. 2002).

(b) In *Adens*, the government knew the defense theory of the case and knew of evidence that was *unfavorable* to that defense; did not present that evidence during a direct

examination but instead waited for the defense to cross-examine a government witness based on the defense theory; then the government introduced the evidence in re-direct examination of that witness. While stating that RCM 701(a)(2) includes rebuttal evidence, the court noted that technically this evidence was introduced in the government case-in-chief. Because this failure to disclose was pursuant to a specific request, court reviewed under the harmless beyond a reasonable doubt standard, found material prejudice existed, and reversed.

(c) "[A] trial counsel who holds back material evidence for possible use in rebuttal to ambush the defense runs a risk . . . In the exercise of that control, a military judge is entitled to exclude prosecution evidence in rebuttal, if the judge concludes that it should have been offered in the prosecution case-in-chief . . ." *United States v. Murphy*, 33 M.J. 323 (C.M.A. 1991).

2. Reports (after service of charges). RCM 701(a)(2)(B).

a) Results or reports of physical or mental examinations, and of scientific tests or experiments, AND

b) In the possession, custody, or control of military authorities, AND

c) Either *intended for use* by the trial counsel as evidence in the case-in-chief OR *material* to the preparation of the defense;

d) *United States v. Jackson*, 59 M.J. 330 (C.A.A.F. 2004). Defense counsel specifically requested "any reports, memos for record or other documentation relating to Quality Control and/or other documentation relating to Quality Control and/or inspections pertaining to quality control at the Brooks Lab for the three quarters prior to [the accused]'s sample being tested, and the available quarters since [the accused]'s sample was tested." The lab failed to identify a blind quality control sample by reporting a negative sample as a positive less than four months after the accused's sample was tested and less than three months after the defense's request. The trial counsel failed to discover and disclose the report to the defense. That failure violated the accused's rights under RCM 701(a)(2)(B). The CAAF found prejudice because had the information been disclosed, the defense could have used the information to demonstrate the existence of quality control problems.

3. Sentencing information (upon request). RCM 701(a)(5).

a) Written material that will be presented by the prosecution during the presentencing proceedings.

(1) Trial counsel are not required to written matters intended to be offered in *rebuttal* of an accused's presentencing case where the matter *could not have been offered* during government's presentencing case. *United States v. Clark*, 37 M.J. 1098 (N.M.C.M.R. 1993).

b) Names and addresses of witnesses the trial counsel intends to call during the presentencing proceedings.

(1) The RULES OF PRACTICE, at 21, requires notice ten days prior to trial and do not require a defense request for this information.

4. Notice of uncharged misconduct (reasonable notice in advance of trial). MRE 404(b).

a) Upon defense request, the government must provide pretrial notice of the general nature of evidence of other crimes, wrongs, or acts which it intends to introduce at trial.

5. Statements by a witness that has testified (after testimony). RCM 914.

a) A witness, not the accused, testifies. Upon a motion by the party who did not call the witness, the judge shall order disclosure of any "statement" by the witness that relates to the subject of his testimony.

b) RCM 914 is a counterpart to the Jencks Act, 18 U.S.C. § 3500. Much of what the government would have to disclose to the defense under RCM 914 will also fall under other discovery rules like RCM 701(a)(1, 2, 6) and *Brady*.

(1) Under RCM 701(a)(1), for example, the government must disclose all sworn or signed statements relating to a charged offense.

c) A statement is a "written statement by the witness that is signed, adopted or approved by the witness."

(1) Includes a substantially verbatim account of an oral statement made by the witness that is recorded contemporaneously with the oral statement. *See United States v. Holmes*, 25 M.J. 674 (A.F.C.M.R. 1987).

(2) CID Agent investigator notes. If the agent testifies or if a witness who has reviewed and approved the agent's notes testifies, the notes must be produced under this rule. *See Goldberg v. United States*, 425 U.S. 94 (1976) and *United States v. Smaldone*, 484 F. 2d 311 (10th Cir. 1973). If the agent does not testify, then the defense will have to look to another rule to seek discovery.

(3) Article 32 testimony.

(a) *United States v. Lewis*, 38 M.J. 501 (A.C.M.R. 1993). CID agent testifies at trial. Defense motion to strike because tape recordings of his Article 32 testimony erased by legal clerk. The trial judge correctly denied the motion when the accused failed to show that the government acted in bad faith causing the destruction or loss of the Article 32 tapes and the agent's testimony was internally consistent and corroborated by other witnesses.

(b) *United States v. Marsh*, 21 M.J. 445 (C.M.A. 1986). The Jencks Act applies to courts-martial and to statements made by witnesses at an Article 32 Investigation. Negligent loss of Article 32 tapes, without any intent to suppress, does not require the court to strike the testimony of the witness.

(4) Administrative board hearings. *United States v. Staley*, 36 M.J. 896 (A.F.C.M.R. 1993). Military judge found that statements made by witnesses before an administrative discharge board were within the general mandate of RCM 914. Destruction of the tape recording of the testimony was in good faith; thus, exclusion of the witnesses' testimony was not required.

(5) Confidential informant's notes.

(a) *United States v. Guthrie*, 25 M.J. 808 (A.C.M.R. 1988). No Jencks Act violation when a handwritten statement was destroyed after a typed version was created and adopted by the witness.

(b) *United States v. Douglas*, 32 M.J. 694 (A.F.C.M.R. 1991). An informant did not keep his notes about an investigation. Lesson to be learned: "Whenever military law enforcement agents request that an informant prepare written notes regarding an on-going investigation, those notes should be obtained from the informant and included in the investigative case file." *Id*. at 698 n.2.

d) Remedy for non-disclosure. "The military judge shall order that the testimony of the witness be disregarded by the trier of fact and that the trial proceed, or, if it is the trial counsel who elects not to comply, shall declare a mistrial if required in the interest of justice." RCM 914(e).

6. Writings used to refresh memory (while testifying, or before testifying if the judge determines it is necessary in the interest of justice). MRE 612.

a) Remedy for non-disclosure. "The military judge shall make any order justice requires, except that when the prosecution elects not to comply, the order shall be one striking the testimony . . . or a mistrial."

7. Inconsistent prior statements (on request). MRE 613(a).

C. Government requests.

1. Names and addresses of sentencing witnesses. RCM 701(b)(1)(B)(i). Due upon request.

2. Written sentencing materials. RCM 701(b)(1)(B)(ii). Due upon request.

3. Reciprocal discovery. If the defense requests discovery under RCM 701(a)(2), upon compliance with such request by the government, the defense, on request of the trial counsel, shall permit the trial counsel to inspect:

a) Papers, documents, photographs, objects within the possession, custody and control of the defense and which the defense *intends to introduce as evidence* in the defense case-in-chief. RCM 701(b)(3). Due upon government request and government compliance with defense request.

b) Reports of physical or mental examinations and scientific tests or experiments within the possession, custody and control of the defense and which the defense *intends to introduce as evidence* in the defense case-in-chief or which were prepared by a defense witness who will be called at trial. RCM 701(b)(4). Due upon government request and government compliance with defense request.

4. Statements by a witness that testifies (after testifying, upon motion). RCM 914.

a) A witness, not the accused, testifies. Upon a motion by the party who did not call the witness, the judge shall order disclosure of any "statement" by the witness that relates to the subject of his testimony.

b) RCM 914 is a counterpart to the Jencks Act, 18 U.S.C. § 3500.

c) For a complete discussion of RCM 914 and the Jencks Act, see paragraph IV.b.5 above.

5. Writings used to refresh memory (while testifying, or before testifying if the judge determines it is necessary in the interest of justice). MRE 612.

a) Keep track of what your witness looks at in preparation for testifying.

6. Inconsistent prior statements (on request). MRE 613(a).

7. Full contents of the sanity board (upon motion). MRE 302(c).

a) If the defense offers expert testimony concerning the mental condition of the accused, the military judge shall order the release of the full contents (except for statements made by the accused).

b) If the defense also offers the statements made by the accused at the sanity board, the military judge may also order the disclosure of those statements.

D. Practice tip. Note that if the trial counsel does not ask for certain information, the defense is under no obligation to provide it – so ask for it.

V. DEFENSE DISCOVERY RESPONSIBILITIES AND REQUESTS

A. Mandatory disclosure or notice requirements for defense counsel.

1. Merits witnesses (before beginning of trial on the merits). RCM 701(b)(1)(A).

a) The defense shall notify the trial counsel of the names and addresses of all witnesses, other than the accused, whom the defense intends to call during the defense case-in-chief.

b) The RULES OF PRACTICE, at 21, requires notice ten days prior to trial.

2. Merits witnesses' sworn or signed statements (before beginning of trial on the merits). RCM 701(b)(1)(A).

a) The defense shall provide all sworn or signed statements known by the defense to have been made by such witnesses in connection with the case.

b) The RULES OF PRACTICE, at 21, requires notice ten days prior to trial.

3. Notice of certain defenses (before the beginning of trial on the merits). RCM 701(b)(2). The defense shall give notice before the beginning of trial on the merits of its intent to offer the defense of:

a) Alibi, to include the place or places at which the defense claims the accused to have been at the time of the alleged offense.

b) Innocent ingestion, to include the place or places where, and the circumstances under which the defense claims the accused innocently ingested the substances in question.

(1) *United States v. Lewis*, 51 M.J. 376 (C.A.A.F. 1999). The trial judge erroneously prevented the accused from presenting an innocent ingestion defense because the defense could not give

notice of places where the innocent ingestion occurred and witnesses to be relied upon. The judge prevented the accused from raising this defense herself by her testimony alone. CAAF reversed holding that RCM 701(b)(2) does not require corroborative witnesses or direct evidence as a condition for raising innocent ingestion.

c) Lack of mental responsibility.

d) Notice shall include places, circumstances, and witnesses to be relied upon for these defenses.

e) The RULES OF PRACTICE, at 4, requires notice at least ten days before trial.

4. Notice of intent to introduce expert testimony as to the accused's mental condition (before beginning of trial on the merits). RCM 701(b)(2).

a) Note the relationship to MRE 302(c). If the defense does then offer this testimony, the defense may have to disclose the full contents of the sanity board report.

5. Evidence of the victim's sexual behavior or predisposition (5 days prior to entry of plea). MRE 412.

6. Residual hearsay (sufficiently in advance of trial to provide a fair opportunity to respond). MRE 807.

a) *See United States v. Holt*, 58 M.J. 227 (C.A.A.F. 2003) (holding that Air Force Court of Criminal Appeals abused its discretion when it affirmed the introduction of residual hearsay statement when there was no indication in the record as to whether the required notice was given and by misapplying the foundational requirement of necessity).

7. Notice of intent to disclose classified or government information. MRE 505(h)(1), 506(h).

8. Judicial notice of a foreign law (reasonable time). MRE 201A(b).

9. Testimony of accused for limited purpose regarding a confession, MRE 304(f); seizures, MRE 311(f); or lineups, MRE 321(c)(2)(B).

10. Original writing in possession of other party. MRE 1004(3).

11. Evidence of a conviction more than 10 years old (sufficient advance notice as to provide a fair opportunity to contest the use). MRE 609(b).

12. Notice of plea and forum. Unless the judge sets a different deadline, defense counsel will notify the trial counsel and judge, in writing, at least ten duty days before the date of trial (whichever is earlier), of the forum and pleas. RULES FOR PRACTICE, at 3.

B. Disclosures or notices made upon government request (not based on reciprocity).

1. Sentencing witnesses (no time given). RCM 701(b)(1)(B)(i). Provide the trial counsel with the names and addresses of any witness whom the defense intends to call at the presentencing proceeding.

2. Written presenting material (no time given). RCM 701(b)(1)(B)(ii). Permit the trial counsel to inspect any written material that will be presented by the defense at the presentencing proceeding.

3. Statements by a witness that testifies (after testifying, upon motion). RCM 914.

   a) A witness, not the accused, testifies. Upon a motion by the party who did not call the witness, the judge shall order disclosure of any "statement" by the witness that relates to the subject of his testimony.

   b) RCM 914 is a counterpart to the Jencks Act, 18 U.S.C. § 3500. Some of what the defense would have disclose is also covered by RCM 701(b)(1)(A): merits witnesses' sworn or signed statements.

   c) For a complete discussion of RCM 914 and the Jencks Act, see paragraph IV.b.5 above.

4. Writings used to refresh recollection (while testifying, or before testifying if the judge determines it is necessary in the interest of justice). MRE 612.

   a) Keep track of what your witness looks at in preparation for testifying.

5. Prior inconsistent statements by a witness (on request). MRE 613(a).

6. Full contents of the sanity board report (upon the granting by the military judge of a motion to compel disclosure). MRE 302(c).

   a) If the defense offers expert testimony concerning the mental condition of the accused, the military judge shall order the release of the full contents (except for statements made by the accused).

   b) If the defense also offers the statements made by the accused at the sanity board, the military judge may also order the disclosure of those statements.

C. Disclosures made upon government requests (based on reciprocity). If the defense requests discovery under RCM 701(a)(2), upon compliance with such request by the government, the defense, on request of the trial counsel, shall permit the trial counsel to inspect:

1. Papers, documents, photographs, objects within the possession, custody and control of the defense and which the defense *intends to introduce as evidence* in the defense case-in-chief. RCM 701(b)(3).

   a) Defense not required to disclose surrebuttal evidence. *United States v. Stewart*, 29 M.J. 621 (C.G.C.M.R. 1989).

2. Reports of physical or mental examinations and scientific tests or experiments within the possession, custody and control of the defense and which the defense intends to introduce as evidence in the defense case-in-chief or which were prepared by a defense witness who will be called at trial. RCM 701(b)(4).

D. Defense requests.

1. Documents and tangible objects. RCM 701(a)(2)(A).

   a) Where the defense makes a specific discovery request and the government fails to disclose that evidence, or where there is prosecutorial misconduct, the standard of review is harmless beyond a reasonable doubt.

   b) "Where an appellant demonstrates that the Government failed to disclose discoverable evidence in response to a specific request or as a result of prosecutorial misconduct, the appellant will be entitled to relief unless the Government can show that nondisclosure was harmless beyond a reasonable doubt." *United States v. Roberts*, 59 M.J. 323 (C.A.A.F. 2004).

c) For more, see the RCM 701(a)(2) discussion in section IV above.

2. Reports. RCM 701(a)(2)(B)

3. Sentencing materials and witnesses. RCM 701(a)(5):

4. Notice of uncharged misconduct (reasonable notice in advance of trial). MRE 404(b).

5. Statements by a witness that has testified (after testimony). RCM 914.

a) A witness, not the accused, testifies. Upon a motion by the party who did not call the witness, the judge shall order disclosure of any "statement" by the witness that relates to the subject of his testimony.

b) RCM 914 is a counterpart to the Jencks Act, 18 U.S.C. § 3500.

c) For more, see the RCM 914 in section IV above.

6. Writings used to refresh memory (while testifying, or before testifying if the judge determines it is necessary in the interest of justice). MRE 612.

E. Practice tips.

1. Note that if the defense counsel does not ask for certain information, the government is under no obligation to provide it unless another rule or due process separately requires disclosure – so ask for it.

2. If defense counsel can identify what they are looking for and make a specific discovery request and the government does not disclose that evidence, then the accused will benefit from a higher standard of review on appeal.

3. Defense counsel should generally make an RCM 701(a)(2) request. Note that after making that request, if the government makes a reciprocal request, the defense only has to disclose that evidence that it *intends to introduce* in its case-in-chief. Defense counsel do not usually introduce damaging evidence during its case-in-chief. They only introduce positive information – and this positive information may further negotiations. If the circumstances of your case weight against making an RCM 701(a)(2) request, remember to request the other items in this section.

VI. REGULATION OF DISCOVERY

A. General. The basic rules for discovery, to include the basic remedies available for noncompliance, come from RCM 701(g). However, many discovery rules contain their own remedies for noncompliance. *See* RCMs 308(c), 405(j)(4), 914(e), 1004(b)(1)(A); MREs 301(c)(2), 302(d), 304(d)(2)(B), 311(d)(2)(B), 321(c)(2)(B), 505, 506, 507, 612.

B. Pretrial orders.

1. The military judge may issue pretrial orders that regulate when the parties will provide notices and make disclosures to the other party.

a) "The military judge may, consistent with this rule, specify the time, place, and manner of making discovery and may prescribe such terms and conditions as are just." RCM 701(g)(1)

b) The judiciary "may make rules of court not inconsistent with these rules for the conduct of court-martial proceedings." RCM 108.

C. Protective and modifying orders.

1. A party may seek relief from a discovery obligation by providing the military judge with a sufficient showing that relief is warranted. RCM 701(g)(2). *See generally* RCM 906(b)(7) (motion for appropriate relief – discovery).

2. The military judge may order that discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. RCM 701(g)(2).

3. *In camera* review.

a) Rules.

(1) Upon motion, the military judge may permit a party to make such showing, in whole or in part, in writing to be inspected only by the judge. RCM 701(g)(2).

(2) If the military judge withholds some or all of the reviewed material, the entire text of the material must be sealed and attached to the record of trial as an appellate exhibit RCM 701(g)(2).

(a) Failure of military judge to seal and attach military records of government's key witness, after denying defense request for their disclosure for impeachment purposes, made proper appellate review impossible. *United States v. Abrams*, 50 M.J. 361 (C.A.A.F. 1999).

b) The framework for deciding (1) whether to conduct an *in camera* review in first place, and (2) whether to then grant the request to prevent disclosure of certain information is not entirely clear. The cases on this issue tend to move between RCM 701 and 703 without much precision even though there are significant differences between the two rules (see subparagraph d below). A suggested framework for *in camera* reviews of discovery requests under RCM 701(a)(2) (*see generally United States v. Abrams*, 50 M.J. 361 (C.A.A.F. 1999); *United States v. Trigueros*, 69 M.J. 604 (A. Ct. Crim. App. Mar. 29, 2010)) is:

(1) Does the party allege with a sufficient showing that some of what is being requested is not subject to disclosure under RCM 701(f) (privileged) or is otherwise confidential? If yes, then the court should grant *in camera* review.

(2) Is the matter protected from disclosure under the Military Rules of Evidence (privileges)? If yes, then do not disclose but attach to the record.

(a) MRE 506. *United States v. Rivers*, 49 M.J. 434 (C.A.A.F. 1998).

(3) Is the matter otherwise confidential? Potentially confidential matters include:

(a) Medical records, mental health records, therapist notes. *United States v. Cano*, 61 M.J. 74 (C.A.A.F. 2005); *United States v. Abrams*, 50 M.J. 361 (C.A.A.F. 1999); *United States v. Briggs*, 48 M.J. 143 (C.A.A.F. 1998);

United States v. Kelly, 52 M.J. 773 (Army Ct. Crim. App. 1999); *United States v. Trigueros*, 69 M.J. 604 (Army Ct. Crim. App. Mar. 29, 2010).

(b) Personnel records. *United States v. Kelly*, 52 M.J. 773 (Army Ct. Crim. App. 1999).

(c) Inspector General's Report of Inquiry. *United States v. Sanchez*, 50 M.J. 506 (A.F. Ct. Crim. App. 1999).

(4) If no, end the *in camera* review. If yes, is the matter material to the preparation of the defense?

(a) Military judges can allow the defense counsel to perform a review for materiality under a protective order to enable them to make informed arguments about discoverability. *United States v. Abrams*, 50 M.J. 361, 364 (C.A.A.F. 1999).

(b) When trial judges consider whether the information is material to the preparation of the defense they should remember that they may not be in the best position to judge what is relevant and what is not: "An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances." *Alderman v. United States*, 394 U.S. 165, 182 (1969).

(5) If yes, disclose with a protective order. If no, do not disclose but attach to the record.

c) The military judge should perform the in camera review rather than having a trial counsel state that sought after records do not contain exculpatory material. *United States v. Briggs*, 48 M.J. 143 (C.A.A.F. 1998); *United States v. Kelly*, 52 M.J. 773 (Army Ct. Crim. App. 1999).

d) Comparison with RCM 703(f) *in camera* analysis (see RCM 703(f) discussion in section VII below).

(1) Timing. Under RCM 701(g), a party has a disclosure obligation. The party tells the military judge that it believes the matter is not subject to disclosure and asks for an *in camera* review. The military judge grants *in camera* review before deciding on the importance of the information (whether the matter is material to the preparation of the defense). Under RCM 703(f), the government has already issued a subpoena for the evidence (the "relevant and necessary" decision has already been made) and now the custodian of the evidence requests relief from the subpoena. The *in camera* review comes *after* the decision on the importance of the information. The military judge is now dealing with how to enforce that subpoena.

(2) Person seeking relief. Under RCM 701(g), the person seeking relief is a party to the trial. Under RCM 703(f), the person seeking relief is the custodian of the evidence (not one of the parties).

(3) Remedy. Under RCM 701(g), once the military judge has ruled, the party that was denied discovery has no relief until appeal. Under RCM 703(f)(4), the party denied production of the evidence then seeks relief under RCM 703(f)(2) (unavailable evidence). Remember, at this point, the evidence has already been determined to be relevant and necessary. Now, the threshold for relief is raised to "such central importance to an issue that is essential to a fair trial and no adequate substitute."

D. Remedies for Nondisclosure. RCM 701(g)(3). At any time during the court-martial, if a party has failed to comply with RCM 701, the military judge can take one or more of the following actions:

1. Order discovery. RCM 701(g)(3)(A).

2. Grant a continuance (common remedy). RCM 701(g)(3)(B);

a) *United States v. Trimper*, 28 M.J. 460 (C.M.A. 1989). Defense counsel moved to preclude use of a urinalysis report that was disclosed by the government just before trial. The military judge denied the request for exclusion, but granted a continuance, which was an appropriate remedy.

b) *United States v. Murphy*, 33 M.J. 323 (C.M.A. 1991). The Government did not disclose its sole witness (an eyewitness accomplice) that they learned of the night before trial, but used the witness on rebuttal. Exclusion of testimony was not necessary. Violation of disclosure was adequately remedied by military judge's actions in granting accused a continuance for several hours to allow the defense to interview the witness, read her statement, interview the investigator that interviewed the witness, and conduct background checks of the witness.

3. Prohibit introduction of the evidence, calling a witness, or raising a defense not disclosed. RCM 701(g)(3)(C).

a) The discussion to RCM 701(g)(3) includes factors to consider in determining whether to grant this remedy:

(1) The extent of disadvantage that resulted from a failure to disclose;

(2) The reason for the failure to disclose;

(3) The extent to which later events mitigated the disadvantage caused by the failure to disclose;

(4) Any other relevant factors.

b) Excluding defense evidence.

(1) RCM 701(g)(3) discussion.

(a) Only use this sanction upon finding that the defense counsel's failure to comply was willful and motivated by a desire to obtain tactical advantage or to conceal a plan present fabricated testimony.

(b) Only use if alternative sanctions could not have minimized the prejudice to the Government.

(c) Before imposing the sanction, the military judge must weigh the defendant's right to compulsory process against the countervailing public interests, including:

(i) The integrity of the adversarial process;

(ii) The interest in the fair and efficient administration of justice;

(iii) The potential prejudice to the truth-determining function of the trial process.

(2) The Sixth Amendment right to present witnesses is not absolute. The sword of compulsory process cannot be used irresponsibly. Excluding testimony is allowable; however, alternative sanctions will be adequate and appropriate in most cases. *Taylor v. Illinois*, 484 U.S. 400, 414 (1988).

(3) *United States v. Nobles*, 422 U.S. 225 (1975). Defense expert testimony excluded because expert refused to permit discovery of a "highly relevant" report. "The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." *Id*. at 241.

(4) *Michigan v. Lucas*, 500 U.S. 145 (1991). The Court held that the state court of appeals erred in holding that the exclusion of evidence for the violation of a notice requirement under a state rape-shield law always violates the Sixth Amendment. The preclusion may be appropriate where willful misconduct is designed to gain a tactical advantage over the prosecution.

(5) *United States v. Pomarleau*, 57 M.J. 352 (C.A.A.F. 2002). The military judge erred by excluding defense evidence as a discovery sanction without conducting a fact-finding hearing or otherwise ascertaining the cause for untimely disclosure by the defense, and by not making findings of fact on the record as to whether less restrictive measures could have remedied any prejudice to the government.

(6) *United States v. Preuss*, 34 M.J. 688 (N.M.C.M.R. 1991). Applying the RCM 703(g)(3) discussion factors, the court found that the military judge abused his discretion by excluding the defense's alibi witness because the defense counsel failed to give notice of its intent to offer the alibi defense before the beginning of the trial.

4. Such other order as is just under the circumstances.

a) Mistrial. RCM 915.

b) Order a deposition.

(1) Depositions are primarily used to preserve testimony for later use at trial; however, depositions can be used for discovery when the

government has improperly impeded defense access to a witness. RCM 702(c)(3)(A) discussion; RCM 702(a) analysis, app. 21, at A21-35.

(2) Where the government substantially impaired the defense counsel's ability to interview a witness, the defense could have sought a deposition. *United States v. Killebrew*, 9 M.J. 154 (C.M.A. 1980).

(3) Where the government substantially impaired the defense's ability to interview witnesses, "timely use of the deposition process would provide the defense with meaningful discovery of these witnesses' testimony . . ." *United States v. Cumberledge*, 6 M.J. 203, 206 n.13 (C.M.A. 1979).

c) Count the delay caused by the noncompliance against the government when calculating speedy trial. *United States v. Tebsherany*, 32 M.J. 351, 354 (C.M.A. 1991) "[T]ime requested by counsel to examine material not disclosed until the pretrial investigation might, under facts showing bad faith, be charged to the United States in accounting for pretrial delay."

d) *United States v. Adens*, 56 M.J. 724 (Army Ct. Crim. App. 2002). The government failed to disclose unfavorable but material evidence to the defense. A government witness then testified early on in the trial regarding this undisclosed evidence. The remedies fashioned by military judge for the government's failure to disclose the evidence included making the assistant trial counsel lead counsel for the remainder of the case, with the "quiet assistance" of the lead counsel, and exclusion of the undisclosed evidence and some related evidence. The military judge failed, however, to instruct the members to disregard the testimony from the government witness, given five days earlier, about the evidence. The court held that while the decision not to instruct the members was "understandable under the circumstances," the failure to instruct negated the validity of the other remedies.

E. Post-Trial: A military judge has the authority under Article 39(a), UCMJ to convene a post-trial session (but before authentication of the record) to consider a discovery violation and to take whatever remedial action is appropriate to include ordering a new trial. *United States v. Webb*, 66 M.J. 89 (C.A.A.F. 2008).

VII. PRODUCTION

A. General.

1. RCM 703 provides that "[t]he prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process." This rule is based on Article 46, UCMJ and implements the accused's Sixth Amendment right to compulsory process.

a) Merits witnesses. Each party is entitled to production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary. RCM 703(b)(1).

(1) Necessary means the evidence is not cumulative and would contribute to a party's presentation of the case in some positive way on a matter in issue. RCM 703(b)(1) discussion. A matter is not in issue when it is stipulated as a fact.

b) Sentencing witnesses. Each party is entitled to the production of any witness whose testimony on sentencing is required under RCM 1001(e). RCM 703(b)(2).

(1) There is much greater latitude during the presentencing proceeding to receive information from means other than the testimony of witnesses in the courtroom. RCM 1001(e)(1).

c) Evidence. Each party is entitled to production of evidence that is relevant and necessary. RCM(f)(1).

(1) Necessary means the evidence is not cumulative and would contribute to a party's presentation of the case in some positive way on a matter in issue. RCM 703(f)(1) discussion. A matter is not in issue when it is stipulated as a fact.

2. How the process works.

a) The parties identify the witness or evidence that they want produced.

b) The defense submits its requests to the trial counsel.

c) If the trial counsel contends that some defense witnesses or evidence do not satisfy the production standards, the trial counsel tells the defense. The defense may file a motion for production with the military judge.

d) The military judge rules on production.

e) The trial counsel then arranges for the presence of those required witnesses and that evidence, to include prosecution witnesses and evidence. The trial counsel arranges for orders or subpoenas of witnesses, depending on the witnesses' status, and arranges for requests or subpoenas for evidence, depending on who controls the evidence.

B. Production standards for the prosecution.

1. Witnesses.

a) The trial counsel shall obtain the presence of witnesses for the prosecution whose testimony the trial counsel considers relevant and necessary. RCM 703(c)(1).

2. Evidence

a) The trial counsel shall obtain evidence that the trial counsel considers relevant and necessary. RCM 703(f)(3), relating back to RCM 703(c)(1).

C. Production standards for the defense.

1. Witnesses. RCM 703(c)(2). The defense shall submit to the trial counsel a written list of the witnesses that the defense wants the government to produce.

a) Merits and interlocutory questions. Requests shall include:

(1) A synopsis of the expected testimony sufficient to show its relevance and necessity.

(2) The contact information found in RCM 703(c)(2)(B)(i). *See, e.g.*, *United States v. Barreto*, 57 M.J. 127 (C.A.A.F. 2002).

b) Sentencing. Requests shall include:

(1) A synopsis of the expected testimony and why personal appearance is necessary under the standards set forth in RCM 1001(e). Personal appearance is required only if all of the below are satisfied:

(a) The testimony is necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence.

(b) The weight or credibility of the testimony is of substantial significance to the determination of an appropriate sentence.

(c) The other party refuses to enter into a stipulation of fact.

(d) Other forms of evidence (depositions, interrogatories, former testimony, testimony by remote means) would not be sufficient in the determination of an appropriate sentence.

(e) The significance of the personal appearance to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, favors production.

(i) See RCM 1001(e)(2)(E) for a list of factors related to this balancing test.

(2) The contact information found in RCM 703(c)(2)(B)(ii).

2. Evidence. RCM 703(f)(3).

a) Defense requests for evidence shall:

(1) List the items of evidence to be produced, and

(2) Must include a description of each item sufficient to show its relevance and necessity.

(3) Must include a statement of where it can be obtained; and, if known, the name, address, and telephone number of the custodian of the evidence.

b) Generally, the government has no responsibility to create records to satisfy demands for them. *United States v. Birbeck*, 35 M.J. 519, 522 (A.F.C.M.R. 1992) (military judge did not err in denying defense request for the government to create laboratory reports on two negative urinalysis). The court used "discovery" language rather than "production" language. If the government will not produce a report, the defense can seek the employment of an expert witness, who can then test the evidence and produced a report. *See, e.g., United States v. Walker*, 66 M.J. 721 (N-M. Ct. Crim. App. 2008).

D. Regulation of production.

1. If the trial counsel contends that the defense requests for production are not required by the rules, then the defense may file a motion for production. RCM 703(c)(2)(D); RCM 906(b)(7).

2. Whether a witness shall be produced to testify during the presentencing proceeding is a matter within the discretion of the military judge, subject to the production rules. RCM 1001(e)(1).

3. If the military judge grants a motion for production, the trial counsel shall produce the witness or evidence or the proceedings shall be abated. RCM 703(c)(2)(D), 703(f)(3).

4. The standard of review for the denial of a request for production is abuse of discretion. *United States v. Powell*, 49 M.J. 220, 225 (C.A.A.F. 1998); *United States v. Mosley*, 42 M.J. 300, 303 (C.A.A.F. 1995). If the military judge abused her discretion, then the test for prejudice is harmless beyond a reasonable doubt. *Powell*, 49 M.J. at 225.

5. Remote testimony. RCM 703(b)(1).

   a) With the consent of both the accused and the Government, the military judge may authorize any witness to testify via remote means.

   b) Over a party's objection, the military judge may authorize any witness to testify on *interlocutory questions* (not on issues of ultimate guilt) via remote means or similar technology if:

      (1) The practical difficulties of producing the witness outweigh the significance of the witness' personal appearance.

      (2) Factors include: costs of producing the witness; the timing of the request for production; potential delay caused by production; willingness of the witness to testify in person; the likelihood of significant interference with military operations; and for child witnesses, the traumatic effect of providing in-court testimony.

6. Unavailable witnesses and evidence.

   c) A party is not entitled to the presence of a witness who is unavailable under MRE 804(a) or evidence that is destroyed, lost, or otherwise not subject to compulsory process. RCM 703(b)(3) and (f)(2).

   d) However, if the testimony or the evidence is of such central importance to an issue that is essential to a fair trial, and there is no adequate substitute, the military judge shall:

      (1) Grant a continuance or other relief in order to attempt to secure the witness or evidence; or

      (2) Shall abate the proceedings.

   e) A party cannot seek a remedy under this rule if they are the reason that the evidence is unavailable. RCM 703(f)(2). Otherwise, there is no "bad faith" requirement, unlike the constitutional jurisprudence regarding preservation and destruction of evidence (discussed below). The defense can seek a remedy under this rule even if the government was not at fault when destroying the evidence, or was simply negligent in losing the evidence.

   f) Lost or destroyed evidence instruction.

      (1) "If you find that the State has . . . allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer

that the true fact is against the State's interest." *Arizona v. Youngblood*, 488 U.S. 51, 59-60 (1988) (Stevens, J., concurring).

(2) "An adverse inference instruction is an appropriate curative measure for improper destruction of evidence." *United States v. Ellis*, 57 M.J. 375 (C.A.A.F. 2002).

g) Cases.

(1) *United States v. Terry*, 66 M.J. 514 (A.F. Ct. Crim. App. 2008). After the first trial, the government lost or destroyed almost all of the physical evidence in a rape case. The second trial judge dismissed the related charges. The appellate court found that there were adequate substitutes and the evidence did not go to an issue of central importance.

(2) *United States v. Barreto*, 57 M.J. 127 (C.A.A.F. 2002). Appellant caused a car accident, killing a passenger and injuring himself. The government was unable to locate two unknown witnesses to the fatal traffic accident whom the defense requested, despite efforts that included running ads in German and U.S. newspapers. The defense moved to compel their production, or, in the alternative, abate the proceedings until the witnesses could be produced. The court found that these witnesses were unavailable and that other eyewitnesses with unobstructed views of the accident who testified at trial were an adequate substitute for the potential testimony of the unknown witnesses.

(3) *United States v. Eiland*, 39 M.J. 566 (N.M.C.M.R. 1993). Military judge abated the proceedings when the government failed to produce two critical witnesses requested by the defense in a rape case. One witness was the doctor who examined the alleged victim and the other witness was another employee of the hospital who observed her demeanor. Defense refused to stipulate. No abuse of discretion in abating trial when testimony is "of such central importance to an issue that it is essential to a fair trial." *Id.* at 568.

(4) *United States v. Ellis*, 57 M.J. 375 (C.A.A.F. 2002). Appellant convicted of involuntary manslaughter and assault upon a child. After an autopsy was performed on the victim, the brain and its meninges were stored pursuant to laboratory regulations. Several months later, the specimen container was accidentally discarded when the laboratory was moved to a new location. The defense expert was never able to examine the specimens. At trial, the military judge never gave an adverse inference instruction relating to the lost specimen, and did not stop the trial counsel from commenting on the defense's inability to examine it. The court did not reach the RCM 703(f)(2) analysis, finding any error was harmless.

E. Duty to preserve evidence.

1. Due process test. Unless the government acts in bad faith, failure to preserve potentially useful evidence does not constitute a denial of due process

a) *Arizona v. Youngblood*, 488 U.S. 51 (1988). The Government did not preserve clothes or perform certain tests on physical evidence taken from a child victim who had been sexually assaulted. The Government did not make use of any of the materials in its case-in-chief. The stated "that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process." *Id*. at 58.

(1) *See also Illinois v. Fisher*, 540 U.S. 544 (2004) (bad faith is the issue, even when the government destroys evidence for which the defense has submitted a discovery request).

(2) *Youngblood* clarified *California v. Trombetta*, 467 U.S. 479, 488-89 (1984), which stated that absent bad faith, any constitutional duty to preserve evidence is limited to evidence that might be expected to play a significant role in the suspect's defense; that is, the evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Some military cases from the period 1984-1988 refer to *Trombetta* as the controlling source.

(3) Seventeen years after his conviction, DNA testing on some remaining evidence cleared Youngblood. UNDERSTANDING CRIMINAL PROCEDURE § 7.04.

b) Military cases.

(1) *United States v. Garries*, 22 M.J. 288, 293 (C.M.A. 1986). Blood stained fabric was consumed during testing. The court applied the *Trombetta* test which applied at the time and found no constitutional violation. However, the court stated, "Under Article 46, the defense is entitled to equal access to all evidence, whether or not it is apparently exculpatory. . . . Thus, the better practice is to inform the accused when testing may consume the only available samples and permit the defense an opportunity to have a representative present."

(2) *United States v. Mobley*, 31 M.J. 273 (C.M.A. 1990). Crime scene processors took evidence (including swatches) from a car and then released the car to the owners before the defense had an opportunity to examine the car. At trial, the defense made a due process objection. The court found no bad faith, and the evidence collected from the car was still available for testing.

(3) *United States v. Gill*, 37 M.J. 501 (A.F.C.M.R. 1993). The accused is not entitled to relief on due process grounds for the government's failure to preserve evidence.

(4) *United States v. Terry*, 66 M.J. 514 (A.F. Ct. Crim. App. 2008). After the first trial, the government lost or destroyed almost all of the physical evidence in a rape case. The court conducted due process analysis, finding no bad faith. (The court also conducted separate, R.C.M. 703(f)(2) analysis).

2. Contrast with RCM 703(f)(2).

a) The rules for unavailable evidence in RCM 703(f)(2) are consistent with but broader than the due process jurisprudence related to the preservation of evidence. Many states declined to follow *Youngblood* and either enacted rules for production or made rulings under state constitutions that provided the same protections that are found under RCM 703(f)(2): no requirement for bad faith, and a "critically important to a fair trial" test. *See generally* UNDERSTANDING CRIMINAL PROCEDURE § 7.04.

b) At trial, counsel and military judges should generally apply the RCM 703(f)(2) analysis. *See generally United States v. Kern*, 22 M.J. 49 (C.M.A. 1986). If the government did act in bad faith, then shift analysis to the due process jurisprudence.

c) RCM 703(f)(2) is also a prospective rule – the parties at trial know that the evidence is unavailable. The question on appeal is whether the military judge correctly applied the rule. If the accused did not know at trial that that some evidence had been destroyed, and so could not litigate under RCM 703(f)(2), then the question on appeal would be whether due process was violated and so that analysis would be used. Appellate courts can conduct separate analysis under both tests. *See United States v. Terry*, 66 M.J. 514 (A.F. Ct. Crim. App. 2008).

3. Service regulations may provide further rights and remedies.

a) *United States v. Manuel*, 43 M.J. 282 (C.A.A.F. 1995). Destruction of accused's positive urine sample one month after testing violated Air Force regulation and DoD directive. Lower court's suppression of positive results not an abuse of discretion where court concluded that standards for preserving samples conferred a substantial right on the accused.

b) *United States v. Madigan*, 63 M.J. 118 (C.A.A.F. 2006). An Air Force Institute of Pathology regulation required that positive urine samples be kept for two years. The lab inadvertently destroyed the accused's sample before the two years were up. The defense did not request access to the sample during this period. Later, the defense discovered the sample was destroyed. The court found that applicable regulations concerning retention of drug testing samples conferred a right on servicemembers to discover evidence, and suppression is an appropriate remedy for lost or destroyed evidence in those cases. If the defense does not make a request to preserve the evidence before the period ends, they have essentially become the reason that the evidence is unavailable and so cannot seek a remedy under RCM 703(f)(2).

c) Department of Defense policy requires retention for one year. Dep't of Defense, Instr. 1010.16, Technical Procedures for the Military Personnel Drug Abuse Testing Program para. E1.9.2 (Dec. 9, 1994)

F. Procedures.

1. Witnesses.

a) Military Personnel: Request that the witness' commander issue any necessary orders. RCM 703(e)(1).

b) Civilian Witnesses: Subpoena. RCM 703(e)(2).

(1) Use for trial or depositions but not for pretrial interviews or Article 32 investigations. RCM 703(e)(2)(B) discussion.

(2) Issued by the trial counsel. RCM 703(e)(2)(C).

(3) Use DD Form 453. See the content requirements of RCM 703(e)(2)(B) and follow the requirements of RCM 703(e)(2).

2. Evidence.

a) Evidence is under the control of the government. Trial counsel notifies the custodian of the evidence of the time, place, and date evidence is required and requesting custodian to send or deliver the evidence. RCM 703(f)(4)(A).

b) Evidence not under control of the government. Subpoena. RCM 703(f)(4)(B).

G. Enforcement.

1. Witnesses. Article 47, RCM 703(e)(2)(G).

a) If the witness neglects or refuses to appear, a military judge (or the convening authority if there is no military judge), may issue a warrant of attachment. RCM 703(e)(2)(G)(i).

(1) A warrant of attachment is issued only upon probable cause to believe that the witness was duly served with the subpoena, that fees and mileage were tendered, that the witness was material, that the witness refused or willfully neglected to appear, and that no valid excuse exists. RCM 703(e)(2)(G)(ii).

(2) Only non-deadly force may be used to bring the witness to before the court-martial. RCM 703(e)(2)(G)(iv).

b) Refusal to appear or testify is a separate offense under Article 47.

c) Cases.

(1) *United States v. Scaff*, 29 M.J. 60 (C.M.A. 1989). The military judge ordered a post-trial Article 39(a) to hear allegedly newly discovered evidence to be offered by defense witness. Trial counsel issued a subpoena to the defense witness, but the convening authority refused to pay expenses on the basis of bad advice from his SJA. The Court of Military Appeals determined that since the record of trial wasn't authenticated, the judge could order the government to show cause why the findings and sentence should not be set aside or the judge could order accused released from confinement pending the motion for new trial.

2. Evidence. RCM 703(f)(4)(C).

a) If the person who has the evidence believes that compliance with the subpoena or order of production is unreasonable or oppressive, the person may seek relief from the military judge.

b) The military judge can withdraw or modify the subpoena or order of production.

(1) *United States v. Rodriguez*, 57 M.J. 765 (N-M. Ct. Crim. App. 2002). Law enforcement agents invited NBC for a "ride along" where an NBC videographer may have taped the scene of the traffic stop and search of appellant's vehicle. The accused filed a motion to suppress based on violations of his Fourth Amendment

rights and believed that the video may contain evidence in support of his motion. NBC provided a videotape of the broadcast material of the traffic stop but stated that it relied on its First Amendment privilege regarding the production of the video "outtakes" and reporter's notes. The trial defense counsel requested the military judge to order production of any remaining videotape. The military judge denied the defense request to compel production. The appellate court stated that, essentially, the accused ask for production; NBC asked for relief; and the trial counsel supported that with a motion to quash the subpoena. The court found that the accused never met his burden for production: relevance and necessity. Even if it was, and assuming the evidence was unavailable under RCM 703(f)(2) because it was not subject to compulsory process, the evidence was not of central importance to an issue that was essential to a fair trial. The military judge should have at least reviewed the material *in camera*, though.

c) *In camera*. The military judge may direct an *in camera* review in order to determine whether relief should be granted.

(1) Note how this *in camera* review differs from the *in camera* review found in RCM 701(g). This review comes after a subpoena has been issued, which means someone has decided that the matter is relevant and necessary. Now, the custodian of the evidence does not want to give the matter to the court. The military judge now does an *in camera* review. If the military judge agrees, the matter now has become "unavailable," and the parties shift to the unavailable evidence analysis found in RCM 703(f)(2). See the discussion in section VI above.

d) Types of potentially oppressive or unreasonable subpoenas.

(1) First Amendment claims.

(a) *United States v. Rodriguez*, 57 M.J. 765 (N-M. Ct. Crim. App. 2002) (discussed above).

(b) *United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008). The accused gave an interview to CBS. CBS broadcast a portion of the interview and the government issued a subpoena for the remainder. The military judge did not conduct an *in camera* review and ordered the subpoena quashed. The court remanded for an *in camera* review and suggested that if the outtakes were not cumulative, then production and a subpoena would be appropriate.

(2) Medical treatment and disciplinary records of minors**.** *United States v. Reece*, 25 M.J. 93 (C.M.A. 1987). The military judge should have conducted an *in camera* inspection of the victims' treatment and disciplinary records. The defense counsel "made as specific a showing of relevance as possible, given that he was denied all access to the documents." Witness credibility would be central in this case because there were no eyewitnesses. The court held that the military judge abused his discretion in failing to

order production of the requested records for an *in camera* review.

(3) *United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006) Defense counsel requested production of a rape victim's medical records during discovery. Trial counsel subpoenaed the requested records; however the custodian, a private social worker who had counseled the victim, refused to produce the records. Defense counsel filed a motion asking the military judge to order production of the records, which he agreed to do after a hearing where he considered M.R.E. 513 and decided an *in camera* review would be appropriate. When the social worker still declined to produce the records, the military judge issued a warrant of attachment IAW R.C.M. 703(e)(2)(G). The warrant of attachment authorized the United States Marshal Service to seize the records and deliver them to the judge. The U.S. Marshal Service failed to seize the records, instead merely asking the social worker to produce the records, and gave up when she declined to do so. Faced with the government's failure to enforce the warrant of attachment, and deciding that the case could not proceed without *in camera* consideration of the records, the military judge abated the proceedings with regard to the rape charge. The appellate courts upheld the military judge.

VIII. PRODUCTION OF EXPERT WITNESSES AND ASSISTANTS

A. Expert Assistance.

1. General.

a) An expert assistant is someone detailed to the defense team to assist the accused and defense counsel during the investigative stage of the trial process, although expert assistance can be requested for any stage. In this sense, expert assistance issues are more like *discovery* issues than production issues.

b) Expert assistants most commonly assist defense counsel in the evaluation of scientific or technical evidence that the government intends to offer at trial. Expert assistants can also be helpful in the areas of mitigation, member selection, evaluation of physical evidence, or in providing a psychological evaluation of the accused.

c) Even if the defense is successful in obtaining an expert assistant, that does not necessarily mean that that the defense will be entitled to have that assistant testify as an expert *witness*. Ordinarily the two will merge but such merger is not automatic. The distinction matters, particularly with respect to privileges.

(1) If the defense successfully obtains expert assistance, then the expert becomes a part of the defense team. Therefore, communications between the expert and the defense counsel or the expert and the accused are privileged under M.R.E. 502. *United States v. Turner*, 28 M.J. 487 (C.M.A. 1989). The government may not interview a defense expert assistant without the approval of the defense counsel.

(2) However, once the defense lists the expert as a witness, the government is free to contact and interview the witness. *United States v. Langston*, 32 M.J. 894 (A.F.C.M.R 1991).

d) The limited right to expert assistance is guaranteed by the Due Process Clause, federal case law, and military case law, provided certain circumstances exist.

(1) *Ake v. Oklahoma*, 470 U.S. 68 (1985). In a capital case, the accused asked for a court-appointed psychiatrist to assist with the defense. The trial court denied the request. The Supreme Court held when an indigent accused makes a showing that expert assistance is needed on a substantial issue in the case both during case-in-chief and at sentencing, Due Process requires that the government provide that assistance.

(2) *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986). The court held that as a matter of military due process, servicemembers are entitled to investigative or other expert assistance when necessary for an adequate defense, without regard to indigence.

e) Unlike the production of expert witnesses, the appointment of expert assistants does not have a source in the R.C.M.s.

2. Requests.

a) The defense is entitled to expert assistance if the services are necessary. *Garries*, 22 M.J. 288; *United States v. Robinson*, 39 M.J. 88 (C.M.A. 1994).

b) In order to determine necessity, courts apply a two pronged test: "[T]he accused has the burden of establishing that a *reasonable probability* exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial." *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2006) (emphasis added).

(1) The defense must show more than just a mere possibility that the expert would be of assistance. *United States v. Lloyd*, 69 M.J. 95 (2010) (the defense's desire to "explore all possibilities" did not reach the "reasonable probability" threshold).

c) Toward that first prong, courts use the three-pronged test adopted in *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1991).

(1) Why is the expert assistance needed?

(a) The issue must be central to the defense theory of the case. *United States v. Lloyd*, 69 M.J. 95 (2010). In *Lloyd*, the C.A.A.F. used the word "necessary" instead of "needed."

(2) What would expert assistance accomplish for the accused?

(3) Why is the defense unable to gather and present the evidence that the expert assistant would be able to develop?

(a) Defense counsel are expected to educate themselves to attain competence in defending the issues in a particular case. *United States v. Kelley*, 39 M.J. 235, 238 (C.M.A. 1994).

(b) The rapid growth in forensic science techniques at trial may make cases more complex than general practitioners can handle on their own. *United States v. McAllister*, 55 M.J. 270, 275 (2001); *United States v. Warner*, 62 M.J. 114, 118 (C.A.A.F. 2005).

(c) In *United States v. Lee*, 64 M.J. 213 (2006), CAAF commented on *Warner* and Article 46, saying that the playing field is uneven when the government benefits from scientific evidence and expert testimony and the defense is denied a necessary expert to prepare for and respond to the government's expert.

(d) Absent a showing that his case was unusual, when the government offered CID laboratory experts in a child sexual assault case, the military judge did not abuse his discretion when denying the request. *United States v. Ndanyi*, 45 M.J. 315 (C.A.A.F. 1996).

(e) However, the military judge cannot deny a defense request for an expert assistant by telling the defense to use the government's own expert to prepare for trial. *United States v. Lee*, 64 M.J. 213 (2006).

(f) Where the defense counsel had already tried 15-20 urinalysis cases; had previously worked with an expert assistant on two urinalysis cases; had telephonic access to an expert consultant during trial; knew of the appropriate sources in the field; and did not raise irregularities in the handling of the urine specimen, the military judge did not err in not requiring the physical presence of the expert assistant during trial. *United States v. Kelley*, 39 M.J. 235, 238 (C.M.A. 1994).

(4) Adequate substitute.

(a) The government cannot secure for itself the top expert in the field and then provide the defense with a generalist: "Article 46 is a clear statement of congressional intent against government exploitation of its opportunity to obtain an expert vastly superior to the defense's." *United States v. Warner*, 62 M.J. 114 (C.A.A.F. 2005). To do so violates the letter and spirit of Article 46.

(b) However, giving the defense a generalist but then having the government call a specialist in rebuttal is not *per se* unfair. *United States v. Anderson*, 68 M.J. 378 (C.A.A.F. 2010). The disparity must cause some prejudice to the accused.

d) Defense counsel may have to provide evidence that the favorable evidence they are seeking actually exists. *United States v. Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005).

e) For cases involving requests for expert assistance in false confessions and interrogation techniques, *see United States v. Bresnahan*, 62 M.J. 137 (C.A.A.F 2005); *United States v. Freeman*, 65 M.J. 451 (C.A.A.F. 2008)

(defense counsel may be capable of developing the expertise in this area without expert assistance).

B. Expert Witnesses.

1. General.

a) Under M.R.E. 702, an expert witness is someone who possesses particular knowledge, skill, experience, training or education and can offer scientific, technical, or other specialized knowledge testimony that will assist the trier of fact to understand the evidence or to determine a fact in issue. An expert witness is allowed to testify in the form of an opinion.

b) As with an expert assistant, an accused has the right to obtain an expert witness and produce her for trial at his own expense. If an accused intends to do so, all the notice and disclosure requirements outlined in R.C.M. 701(b) concerning witnesses must be observed.

2. Process.

a) The production and employment of expert witnesses is governed by R.C.M. 703(d).

(1) If the defense *or the government* is seeking to have an expert witness produced and to have the convening authority cover the expense of the witnesses, counsel must:

(a) Submit a request to the convening authority to authorize employment and fix compensation before employment;

(i) Nothing in the Manual for Courts-Martial permits the government to ratify previous employment of a defense expert.

(b) Provide notice to the other party.

(2) The request must include a complete statement of reasons why the expert is *necessary*, and an estimate of costs.

(a) This list of reasons should include a synopsis of testimony as required by R.C.M. 703(c)(2). *United States v. Ndanyi*, 45 M.J. 315 (C.A.A.F. 1996).

(3) If the convening authority denies the request, the defense can raise the issue with the military judge.

(a) The military judge will determine whether the testimony of the expert is *relevant* and *necessary*. *United States v. Ndanyi*, 45 M.J. 315, 319 (C.A.A.F. 1996).

(b) If so, whether the government has provided an *adequate substitute*.

(4) The defense may be entitled to an ex parte hearing to justify their request for a defense expert. This is not an absolute right and is only for unusual situations. *United States v. Garries*, 22 MJ 288, 291 (C.M.A. 1986); *United States v. Kaspers*, 47 MJ 176 (C.A.A.F. 1997).

(5) If the military judge finds that a defense expert is needed, she may order the government to provide the expert. If the

government fails to comply, the military judge may abate the proceedings. R.C.M. 703(d).

b) Relevant and necessary. Courts may use the *Houser* factors, *United States v. Houser*, 36 M.J. 392 (C.M.A. 1993), when determining whether the expert's testimony would be necessary and relevant. *United States v. Rivers*, 49 M.J. 434 (C.A.A.F. 1998).

c) Adequate substitute.

(1) The defense is not entitled to its named expert. If the government decides an expert is needed, or if the military judge orders the government to produce and expert, the government may provide a reasonable substitute. *United States v. Burnette*, 29 M.J. 473 (C.M.A 1990).

(2) Except in unusual circumstances, the military judge does not have authority to appoint a specific expert. *United States v. Thorpe*, 38 M.J. 8 (C.M.A. 1993).

(3) If the defense requests an expert and the government provides an expert that has a divergent view from the one held by the defense requested expert, then the substitute might not be adquate. *United States v. Robinson*, 43 M.J. 501 (A.F.C.C.A. 1995).

(4) The defense is not entitled to an eminent expert in a particular field. The defense is only entitled to receive a qualified expert. *United States v. Gray*, 37 M.J. 730 (A.C.M.R. 1993).

IX. CONCLUSION AND PRACTICE TIPS

A. The gaps between discovery and production can lead to Catch-22 scenarios. Say the defense counsel believes his client suffered an adverse reaction from a new medication. The defense counsel wants to review reports made to the Food and Drug Administration to see if others have had similar reactions. Can the defense counsel get these reports under RCM 701 or 703? Probably not.

1. RCM 701(a)(6) and *Brady* do not provide a mechanism. Even if there were exculpatory material in the reports, the trial counsel is not obligated to disclose them – the reports are not in the files of a law enforcement agency that is somehow related to the case.

2. RCM 701(a)(2) does not provide a mechanism. The reports are not in the possession, custody, or control of *military* authorities.

3. The defense counsel has to rely on the production rules in RCM 703. While the files are subject to production without subpoena (they are under the control of the Government), the defense counsel may not be able to make a good argument about why the matter is relevant and necessary – because the defense counsel has not seen them yet.

4. The defense counsel's only remedy may be to ask the Article 32 officer to produce the reports at the Article 32 hearing (RCM 405(g)(1)(B)) or ask for the reports under the Freedom of Information Act and then wait patiently for them to arrive, asking the military judge for continuances until they do.

B. Knowing the difference between the various discovery rules and between the discovery rules and similar production rules is important. Be precise in your analysis. When conducting research, note whether the appellate court is using RCM 701 or 703 as the

basis for its reasoning (and whether the appellate court incorrectly applied one or the other). For example:

1. Scope of government duty to locate. Under RCM 701(a)(2), the trial counsel must search what is in the possession, custody, or control of *military* authorities, which includes non law-enforcement authorities. Under RCM 701(a)(6) and *Brady*, the trial counsel generally must search law enforcement files. Under RCM 703, the government may have to issue a subpoena to *anyone*, military or government or not.

2. The kind of information. Under RCM 701(a)(2), the threshold is low: the matter only needs to be *material to the preparation of the defense*. Under RCM 701(a)(6) and *Brady*, the matter needs to be *favorable and material*. Under RCM 703, the matter needs to be *relevant and necessary*. These are all different standards.

3. When. Under RCM 701(a)(2), the government only has to provide the information when asked. Under RCM 701(a)(6) and *Brady*, the government must disclose the matter without being asked. Under RCM 703, the government must product the witness or evidence if the government determines that it is relevant and necessary, or the military judge tells the government to produce it.

4. *In camera*. Under RCM 701(g), the military judge grants *in camera* review before deciding on the importance of the information (whether the matter is material to the preparation of the defense); the person seeking relief is a party to the trial; and the party that is denied discovery has no relief until appeal. Under RCM 703(f), the *in camera* review comes *after* the decision on the importance of the information (relevant and necessary); the person seeking relief is the custodian of the evidence; and the party denied production of the evidence then seeks relief under RCM 703(f)(2) (unavailable evidence).

5. Standard on review. For specific requests under RCM 701(a)(2), the standard for prejudice is harmless beyond a reasonable doubt. Under RCM 701(a)(6) and *Brady*, the standard for prejudice is material (reasonable probability of different result) unless government bad faith, when it is harmless beyond a reasonable doubt. Under RCM 703, the standard for prejudice is harmless beyond a reasonable doubt.

C. Discovery and trial advocacy.

1. After trial advocates have framed their problem by identifying the elements at issue in the case and have constructed basic arguments that support their positions on those elements, the advocates need to develop the evidence that supports those arguments.

2. Before you can find something, you need know what you are looking for. Develop a plan for finding what you need. Brainstorm. *See* ALBERT J. MOORE, ET AL., TRIAL ADVOCACY: INFERENCES, ARGUMENTS, AND TECHNIQUES (1996).

   a) If my claim is true, what evidence indicates a motive or reason for why my claim is accurate? What should we expect to have happened before and after? What actually did happen before and after? If my claim is true, what else is likely to have occurred?

   b) How do people typically act? How do institutions typically behave? How do mechanical devices operate? How do people typically think? How do people typically react in emotional situations?

c) What is the custom and practice? Were less restrictive alternatives available? What positive or negative consequences resulted or could have resulted from the conduct?

d) What was the person's physical ability to observe? Is there a reason they would or would not have seen the event? Is there a reason why they would or would not remember the event? Are there internal inconsistencies (if they did this, they would not have done that)? Are there external inconsistencies (they said they did this, but someone else says that did not happen)? Did the person have the authority to do what they said they did? Are there reasons the person would be neutral or biased?

3. Discovery is just a part of that plan. "[T]he role of discovery is not just to get your case into or out of court. It's to find the facts – the human elements – that tell the winning story." James W. McElhaney, *Hunt for the Winning Story*, A.B.A. J., July 2006, at 22.

4. The starting point for developing evidence is to apply a liberal amount of elbow grease. If you want it, go get it. If there is an obstacle between you and the evidence that you cannot get around, but the other party can get around the obstacle, then seek discovery.

5. While not discussed in this outline, the Article 32 is an integral part of both party's discovery plans.

X. APPENDIX

Discovery in the Military Justice System

Preferral, Article 32 Investigation, Referral (Until Arraignment)

***This document is intended to give a general framework to help counsel understand how discovery works in court-martial practice. It is only a starting point and is not a substitute for the rules and cases actually governing discovery.*

I. Preferral

After the accused is informed of the charges against him or her, the trial counsel should provide a copy of the charge sheet and associated documents (sworn statements etc.) to the defense counsel. If the accused does not have a defense counsel assigned, this is the time to get one detailed (work with your Chief of Justice). This will foster good working relations with the Trial Defense Service, streamline the process, and make it work better for all concerned.

Authority	Burden On	Trigger/Deadline	What is Required
R.C.M. 308	Government	As soon as practicable after preferral	Identification of accuser

II. Article 32 Investigation

There is no formal requirement for disclosure under RCM 701 before the Article 32 hearing. However, RCM 405 does require that witnesses and evidence against the accused be produced. From a practical standpoint, the defense counsel should be provided with a packet that includes all charge sheets, sworn statements, evidence custody documents, and copies of pictures. This will streamline the process. You should always use a tracking document when you turn something over to the defense so that there is a paper trail.

Authority	Burden On	Trigger/Deadline	What is Required
R.C.M. 405(j)(3)	Government	Promptly after report is completed	Article 32 Investigating Officer's Report

III. Referral

Note that many of these rules have different triggers. In practice, all evidence should be disclosed before arraignment, according to the dates set by the Military Judge. The Military Judge regulates discovery once a case is referred to trial**.**

Authority	Burden On	Trigger/Deadline	What is Required
R.C.M. 701(a)(1)	Government	As soon as practicable after service of charges	Papers accompanying the charges; convening orders; & statements
R.C.M. 701(a)(6)/*Brady*	Government	As soon as practicable	Evidence that reasonably tends to be favorable to the defense
Trombetta*, *Youngblood*, and *Garries	Government	Before evidence used up in testing	Inform accused that testing may consume all available samples of

			evidence (even if that evidence is apparently not exculpatory)
R.C.M. 701(a)(2)	Government	Defense Request	Documents, tangible objects and reports etc.
R.C.M. 701(a)(3)(B)	Government	Defense notice under RCM 701(b)((1) or (2); Before start of trial	Witnesses to rebut certain defenses
R.C.M. 701(a)(5)	Government	Defense Request	Information to be used at sentencing
M.R.E. 404(b)	Government	Defense Request	Uncharged misconduct
M.R.E. 505	Government and Defense	Defense request or government claim of privilege	Classified Information
M.R.E. 506	Government	Defense Request	Privileged information other than classified information
M.R.E. 507	Government (claim of privilege); Defense (motion to disclose)		Identity of informant
M.R.E. 609	Proponent	Sufficient advance notice	Notice of intent to impeach w/ > 10 year old conviction

Authority	**Burden On**	**Trigger/Deadline**	**What is Required**
R.C.M. 706(c)(3)(B)	Government	Completion of sanity board	Mental examination of accused – distribution of the report
R.C.M. 701(b)(1)(B)	Defense	Government request	Pre-sentencing witnesses and evidence
R.C.M. 701(b)(3)	Defense	Reciprocal Discovery (once government has responded to earlier defense discovery request, *and* has affirmatively requested this information pursuant to this rule)	Documents and tangible objects
R.C.M. 701(b)(4)	Defense	Reciprocal Discovery (once government has responded to earlier defense discovery request, *and* has affirmatively requested this information pursuant to this rule)	Reports of results of mental examinations, tests, and scientific experiments

Discovery in the Military Justice System

<u>Arraignment</u>

Authority	**Burden On**	**Trigger/Deadline**	**What is Required**

R.C.M. 701(a)(4)	Government	Before arraignment	Prior convictions of accused to be offered on the merits for any reason, including impeachment
M.R.E. 301	Government	Before arraignment or within reasonable time before witness testifies	Immunity
M.R.E. 304(d)	Government	Before arraignment	Statements of accused relevant to case, *regardless* of whether government intends to use them
M.R.E. 311(d)	Government	Before arraignment	Property seized from accused
M.R.E. 321(c)	Government	Before arraignment	Identifications of accused
R.C.M. 1004(b)(1)	Government	Before arraignment	Capital cases – notice of aggravating factors under RCM 1004(c)
M.R.E. 311(f)	Defense	Accused to testify in motion to suppress evidence seized from accused	Notice that accused will testify for limited purposes of the motion
M.R.E. 321(e)	Defense	Accused to testify in motion to suppress out of court identification	Notice that accused will testify for limited purposes of the motion

Discovery in the Military Justice System

Trial

Authority	Burden On	Trigger/Deadline	What is Required
R.C.M. 701(a)(3)(A)	Government	Before start of trial	Witnesses in case-in-chief
M.R.E. 412(c)	Proponent (normally defense)	Minimum of 5 days before entry of pleas	Rape shield
M.R.E. 413/414	Government	Minimum of 5 days before scheduled date of trial	Evidence of similar crimes (child molestation and sexual assault cases)
R.C.M. 914 (Jencks Act)	Proponent of witness	After witness testifies on direct, on motion of opposing party	Production of statements concerning which witness testified (could be CID Agent Activity Summaries; Article 32 tapes; witness interview notes; Administrative board proceedings; confidential informant's notes, etc.

R.C.M. 701(b)(1)(A)	Defense	Before trial on the merits	Names of witnesses and statements
R.C.M. 701(b)(2)	Defense	Before trial on the merits	Notice of certain defenses (alibi; lack of mental responsibility; innocent ingestion, etc.)

Post-Trial

Remember that the duty to disclose is a continuing duty. Even if something covered by these rules is discovered after trial, it must be disclosed.

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TAB K

SEARCH AND SEIZURE

TAB K

Table of Contents

I. INTRODUCTION. 1

II. LITIGATING FOURTH AMENDMENT VIOLATIONS. 2

III. APPLICATION OF FOURTH AMENDMENT. 3

IV. AUTHORIZATION AND PROBABLE CAUSE. 10

V. EXCEPTIONS TO AUTHORIZATION REQUIREMENT. 17

VI. EXCEPTIONS TO PROBABLE CAUSE REQUIREMENT. 19

VII. EXCLUSIONARY RULE AND EXCEPTIONS. 29

APPENDIX A: SECTION III DISCLOSURE 35

APPENDIX B: GUIDE TO ARTICULATING PROBABLE CAUSE 36

LtCol Derek Brostek, USMC

January 2011

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I. INTRODUCTION.

A. The Fourth Amendment protects against unreasonable searches and seizures and requires warrants to be supported by probable cause. Although there is debate as to whether it applies to military members, military courts act as if it does. The Fourth Amendment, its requirements, and exceptions, are codified in military rules of evidence 311-317.

B. Text: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

C. The Fourth Amendment in the Military.

1. The Fourth Amendment applies to soldiers. *United States v. Stuckey*, 10 M.J. 347, 349 (C.M.A. 1981). *But see* Lederer and Borch, *Does the Fourth Amendment Apply to the Armed Forces?* 144 Mil. L. Rev. 110 (1994) (this article points out that the Supreme Court has never expressly applied the Fourth Amendment to the military).

2. The balancing of competing interests is different in military society. A soldier's reasonable expectation of privacy must be balanced against:

a) National security;

b) Military necessity (commander's inherent authority to ensure the safety, security, fitness for duty, good order and discipline of his command);

c) Effective law enforcement

3. The Military Rules of Evidence (Mil. R. Evid.) codify constitutional law.

a) Military Rules of Evidence that codify Fourth Amendment principles:

(1) Mil. R. Evid. 311, Evidence Obtained From Unlawful Searches and Seizures.

(2) Mil. R. Evid. 312, Body Views and Intrusions.

(3) Mil. R. Evid. 313, Inspections and Inventories in the Armed Forces.

(4) Mil. R. Evid. 314, Searches Not Requiring Probable Cause.

(5) Mil. R. Evid. 315, Probable Cause Searches.

(6) Mil. R. Evid. 316, Seizures.

(7) Mil. R. Evid. 317, Interception of Wire and Oral Communications.

b) Which law applies -- recent constitutional decisions or the Military Rules of Evidence?

(1) General rule: the law more advantageous to the accused will apply. Mil. R. Evid. 103(a) Drafters' Analysis. MCM, App. 22.

(2) Minority view: "These 'constitutional rules' of the Military Rules of Evidence were intended to keep pace with, and apply to the military, the burgeoning body of interpretive constitutional law . . . not to cast in legal or evidentiary concrete the Constitution as it was known in 1980." *United States v. Postle*, 20 M.J. 632, 643 (N.M.C.M.R. 1985).

(3) Some Military Rules of Evidence provide exceptions that permit application of recent constitutional decisions to the military. *See* Mil. R. Evid. 314(k) (searches of a type valid under the Constitution are valid in military practice, even if not covered by the Military Rules of Evidence).

II. LITIGATING FOURTH AMENDMENT VIOLATIONS.

A. A person must claim that his own expectation of privacy was violated to assert a Fourth Amendment claim. The prosecution is required to disclose evidence seized from an accused prior to arraignment. The prosecution generally has the evidentiary burden (by a preponderance of evidence) that the search/seizure was proper.

B. Standing or "Adequate Interest."

1. General rule. To raise a violation of the Fourth Amendment, the accused's own constitutional rights must have been violated; he cannot vicariously claim Fourth Amendment violations of the rights of others.

a) *Rakas v. Illinois*, 439 U.S. 128, 134 (1978). Police seized sawed-off shotgun and ammunition in illegal search of car. Only owner was allowed to challenge admissibility of evidence seized. Defendant passenger lacked standing to make same challenge.

b) *United States v. Padilla*, 508 U.S. 77 (1993). Accused lacked standing to challenge search of auto containing drugs driven by a conspirator in furtherance of the conspiracy, despite accused's supervisory control over auto.

c) *But see Brendlin v. California*, 551 U.S. 249 (U.S. 2007). When police make a traffic stop, a passenger in the car, like the driver, is seized for Fourth Amendment purposes and may challenge the stop's constitutionality.

2. Lack of standing is often analyzed as lack of a reasonable expectation of privacy. *See United States v. Padilla*, 508 U.S. 77 (1993) and *United States v. Salazar*, 44 M.J. 464 (C.A.A.F. 1996).

C. Motions, Burdens of Proof, and Standards of Review.

1. Disclosure by prosecution. Prior to arraignment, the prosecution must disclose to the defense all evidence seized from the person or property of the accused that it intends to offer at trial. Mil. R. Evid. 311(d)(1). See Appendix A for sample disclosure.

2. Motion by the defense. The defense must raise any motion to suppress evidence based on an improper search or seizure prior to entering a plea. Absent such a motion, the defense may not raise the issue later, unless permitted to do so by the military judge for good cause. Mil. R. Evid. 311(d)(2).

3. Burden of proof. When a motion has been made by the defense, the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure or that some other exception applies. Mil. R. Evid. 311(e)(1).

a) Exception: Consent. Government must show by clear and convincing evidence that the consent to search was voluntary. Mil. R. Evid. 314(e)(5).

b) Exception: "Subterfuge" Rule. If the rule is triggered, the prosecution must show by clear and convincing evidence that the primary purpose of the government's intrusion was administrative and not a criminal search for evidence. Mil. R. Evid. 313(b).

c) Exception: Eyewitness Identification. If military judge determines identification is result of lineup conducted w/o presence of counsel, or appropriate waiver, subsequent identification is unlawful unless Gov't can establish by clear and convincing evidence that eyewitness identification is not tainted. Mil. R. Evid. 321(d)(1).

4. Effect of guilty plea.

a) A plea of guilty waives all issues under the Fourth Amendment, whether or not raised prior to the plea. Mil. R. Evid. 311(i).

b) Exception: conditional guilty plea approved by military judge with prior consent from the convening authority. R.C.M. 910(a)(2).

5. Appellate Standard of Review. For Fourth Amendment issues, the standard of review for a military judge's evidentiary ruling is an abuse of discretion standard. *United States v. Owens*, 51 M.J. 204, 209 (C.A.A.F. 1999). Within this context, the abuse of discretion standard becomes a mixed question of fact and law. A military judge's "[f]indings of fact will not be overturned unless they are clearly erroneous or unsupported by the record." *Id*. A military judge's conclusions of law are reviewed under the *de novo* standard. The appellate courts will reverse for an abuse of discretion only if "the military judge's findings of fact are clearly erroneous or if his [or her] decision is influenced by an erroneous view of the law." *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995).

III. APPLICATION OF FOURTH AMENDMENT.

A. For the Fourth Amendment to apply there must be a search/seizure by a U.S. government official/agent. Furthermore, the person claiming protection must have a "reasonable expectation of privacy" in the thing/area searched or item seized. Determining what is a "reasonable expectation of privacy" is done on a case-by-case basis utilizing the test set forth in Katz v. United States, which states that a person claiming an expectation of privacy must show that 1) he actually believed he had such an expectation, and 2) society views the expectation as objectively reasonable.

B. Nongovernment Searches. The Fourth Amendment does not apply unless there is a *governmental* invasion of privacy. *Rakas v. Illinois*, 439 U.S. 128, 140-49 (1978).

1. Private searches are not covered by the Fourth Amendment.

a) Searches by persons unrelated to the government are not covered by the Fourth Amendment.

(1) *United States v. Jacobsen*, 466 U.S. 109 (1984). No government search occurred where Federal Express employees opened damaged package.

(2) *United States v. Hodges*, 27 M.J. 754 (A.F.C.M.R. 1988). United Parcel Service employee opened package addressed to accused as part of random inspection. Held: this was not a government search.

b) Searches by government officials not acting in official capacity are not covered by the Fourth Amendment.

(1) *United States v. Portt*, 21 M.J. 333 (C.M.A. 1986). Search by military policeman acting in non-law enforcement role is not covered by the Fourth Amendment.

(2) *United States v. Daniels*, 60 M.J. 69 (C.A.A.F. 2004). Whether a private actor serves as an agent of the gov't hinges not on the motivation of the individual, but on the degree of the government's participation/involvement.

c) Searches by informants are covered by the Fourth Amendment. *But see United States v. Aponte*, 11 M.J. 917 (A.C.M.R. 1981). Soldier "checked" accused's canvas bag and found drugs after commander asked soldier to keep his "eyes open." Held: this was not a government search because soldier was not acting as agent of the commander.

d) Searches by AAFES detectives are covered by Fourth Amendment. *United States v. Baker*, 30 M.J. 262 (C.M.A. 1990). Fourth Amendment extends to searches by AAFES store detectives; *Baker* overruled earlier case law that likened AAFES personnel to private security guards.

2. Foreign searches are not covered by Fourth Amendment.

a) Searches by U.S. agents abroad. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). Fourth Amendment does not apply to search by U.S. agents of foreigner's property located in a foreign country.

b) Searches by foreign officials.

(1) The Fourth Amendment is inapplicable to searches by foreign officials unless U.S. agents "participated in" the search. Mil. R. Evid. 311(c) and 315(h)(3).

(a) "Participation" by U.S. agents does not include:

(i) Mere presence.

(ii) Acting as interpreter.

(b) *United States v. Morrison*, 12 M.J. 272 (C.M.A. 1982). Fourth Amendment did not apply to German search of off-post apartment, even though military police provided German police with information that led to search.

(c) *United States v. Porter*, 36 M.J. 812 (A.C.M.R. 1993). Military police officer participated in Panamanian search by driving accused to Army hospital, requesting blood alcohol test, signing required forms and assisting in administering test.

(2) A search by foreign officials is unlawful if the accused was subjected to "gross and brutal maltreatment." Mil. R. Evid. 311(c)(3).

C. No Reasonable Expectation of Privacy. The Fourth Amendment only applies if there is a reasonable expectation of privacy. *See Katz v. United States*, 389 U.S. 347 (1967) (holding that the Fourth Amendment protects people, not places).

1. For the expectation of privacy to be reasonable:

a) The person must have an actual subjective expectation of privacy; and,

b) Society must recognize the expectation as objectively reasonable.

2. Public view or open view. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967).

a) Abandoned property. Mil. R. Evid. 316(d)(1).

(1) Garbage. *California v. Greenwood*, 486 U.S. 35 (1988). There was no expectation of privacy in sealed trash bags left for collection at curbside.

(2) Clearing quarters. *United States v. Ayala*, 26 M.J. 190 (C.M.A. 1988). There was no reasonable expectation of privacy in blood stains found in quarters accused was clearing when accused removed majority of belongings, lived elsewhere, surrendered keys to cleaning team, and took no action to protect remnants left behind.

(3) Voluntarily abandoned property. *United States v. Flores*, 64 M.J. 451 (C.A.A.F. 2007). An accused has no privacy interest in voluntarily abandoning his property prior to a search, and subsequently lacks standing to complain of the search or seizure of such property.

(4) Lost computer. *United States v. Michael*, 66 M.J. 78 (C.A.A.F. 2008). A government interest in safeguarding property outweighs reduced expectation of privacy in laptop computer left in restroom by a student at an entry-level school.

b) Aerial observation.

(1) *California v. Ciraolo*, 476 U.S. 207 (1986). Observation of a fenced-in marijuana plot from an airplane was not a search.

(2) *Florida v. Riley*, 488 U.S. 445 (1989). Observation of a fenced-in marijuana greenhouse from a hovering helicopter was not a search.

c) Peering into Automobiles. *United States v. Owens*, 51 M.J. 204 (C.A.A.F. 1999). Peering into an open door or through a window of an automobile is not a search. *See also United States v. Richter*, 51 M.J. 213 (C.A.A.F. 1999). If the car is stopped by a law enforcement official and then peered into, the investigative stop must be lawful.

d) The "passerby."

(1) *United States v. Wisniewski*, 21 M.J. 370 (C.M.A. 1986). Peeking through a 1/8 inch by 3/8 inch crack in the venetian blinds from a walkway was not a search.

(2) *United States v. Kaliski*, 37 M.J. 105 (C.M.A. 1993). Security police's view through eight to ten inch gap in curtains in back patio door was unlawful search because patio was not open to public.

e) Private dwellings. *Minnesota v. Carter*, 525 U.S. 83 (1998). Cocaine distributors were utilizing another person's apartment to bag cocaine. The distributors were in the apartment for two and a half hours and had no other purpose there than to bag the cocaine. Supreme Court held that even though the drug distributors were in private residence at consent of owner, they had no expectation of privacy in the apartment, and police discovery of their activity was not a Fourth Amendment search.

3. Plain view. Mil. R. Evid. 316(d)(4)(c).

a) General rule. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *United States v. Fogg*, 52 M.J. 144 (C.A.A.F. 1999). Property may be seized when:

(1) The property is in plain view;

(2) The person observing the property is lawfully present; and,

(3) The person observing the property has probable cause to seize it.

b) "Inadvertence" is not required for plain view seizure. *Horton v. California*, 496 U.S. 128 (1990).

c) The contraband character of the property must be readily apparent. *Arizona v. Hicks*, 480 U.S. 321 (1987). Policeman lawfully in accused's home moved stereo turntable to check serial number to identify whether it was stolen; seizure was unlawful because the serial number was not in plain view and the lifting of the turntable was illegal search.

d) Plain feel. Police may seize contraband detected through the sense of touch during a stop and frisk if its contraband nature is readily apparent. *Minnesota v. Dickerson*, 508 U.S. 366 (1993). Police officer felt lump of cocaine in accused's pocket during pat down search and seized it. Seizure was held unconstitutional because the contraband nature of the lump was not "readily apparent." *See also United States v. Bond*, 529 U.S. 334 (2000) (finding border agent's squeeze of bus passenger's bag unreasonable absent individualized suspicion).

4. Government computers/diskettes. *United States v. Tanksley*, 54 M.J. 169 (C.A.A.F. 2000). No (or at least reduced) reasonable expectation of privacy in office and computer routinely designated for official government use. Seizure was lawful based on plain view.

5. E-mail/Internet. The Department of Justice has promulgated a manual on computers and criminal investigations. The February 2007 Search and Seizure Manual can be found at www.cybercrime.gov/ccmanual/index.html.

a) *United States v. Maxwell*, 45 M.J. 406 (C.A.A.F. 1996). Accused had reasonable expectation of privacy in electronic mail transmissions sent, received and stored on the AOL computer server. Like a letter or phone conversation, a person sending e-mail enjoys a reasonable expectation of privacy that police will not intercept the transmission without probable cause and a warrant.

b) *United States v. Monroe*, 52 M.J. 326 (C.A.A.F. 2000). Accused did not have a reasonable expectation of privacy in e-mail mailbox on government server which was the e-mail host for all "personal" mailboxes and where users were notified that system was subject to monitoring.

c) *United States v. Ohnesorge*, 60 M.J. 946 (N-M. Ct. Crim. App. 2005). There is no reasonable expectation of privacy in subscriber information provided to a commercial internet service provider. *United States v. Allen*, 53 M.J. 402 (C.A.A.F. 2000). No warrant/authorization required for stored transactional records (distinguished from private communications). Inevitable discovery exception also applied to information sought by government investigators.

d) *United States v. Long*, 64 M.J. 57 (C.A.A.F. 2006). Reasonable expectation of privacy found in e-mail communications regarding drug use on a government computer, over a government network, when investigation was conducted and ordered by law enforcement instead of originating with computer network administrator. (This is a narrow holding as USMC log-on banner described access to "monitor" the computer system –not to engage in law enforcement intrusions by examining the contents of particular e-mails in a manner unrelated to maintenance of the e-mail system).

e) *United States v. Larson*, 66 M.J. 212 (C.A.A.F. 2008). Accused had no Fourth Amendment expectation of privacy in his government computer (distinguishing *Long* based on facts of case). He failed to rebut presumption that he had no reasonable expectation of privacy in the government computer provided to him for official use. *See* Mil. R. Evid. 314(d).

6. Bank records.

a) *United States v. Wooten*, 34 M.J. 141 (C.M.A. 1992). No reasonable expectation of privacy exists in bank records. Even though records were obtained in violation of financial privacy statute, exclusion of evidence was inappropriate, because statute did not create Fourth Amendment protection.

b) *United States v. Dowty*, 48 M.J. 102 (C.A.A.F. 1998). Servicemember may avail himself of the Right to Financial Privacy Act (RFPA), to include seeking federal district court judge to quash subpoena for bank records. However, Article 43, UCMJ, statute of limitations is tolled during such litigation.

7. Enhanced senses. Use of "low-tech" devices to enhance senses during otherwise lawful search is permissible.

a) Dogs.

(1) *United States v. Place*, 462 U.S. 696 (1983). There is no expectation of privacy to odors emanating from luggage in a public place. "Low-tech" dog sniff is not a search (no Fourth Amendment violation).

(2) *United States v. Alexander*, 34 M.J. 121 (C.M.A. 1992). Dog sniff in common area does not trigger Fourth Amendment.

(3) *United States v. Middleton*, 10 M.J. 123 (C.M.A. 1981). Use of drug dogs at health and welfare inspection is permissible. Dog is merely an extension of human sense of smell.

(4) *See* AR 190-12 (4 Jun. 2007), Military Working Dog Program. Drug detector dogs are not to be used to inspect people. <u>See</u> AR 190-12 at para 4-9.c.

b) Flashlights. *Texas v. Brown*, 460 U.S. 730 (1983). Shining flashlight to illuminate interior of auto is not a search.

c) Binoculars. *United States v. Lee*, 274 U.S. 559 (1927). Use of field glasses or binoculars is not a search.

d) Cameras. *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986). Aerial photography with "commercially available" camera was not a search, but use of satellite photos or parabolic microphones or other "high-tech devices" would be a search.

e) Thermal Imaging Devices. *Kyllo v. United States*, 533 U.S. 27 (2001). Supreme Court ruled that police use of thermal imaging device without a warrant was unreasonable. The thermal imaging device detected higher than normal heat radiating from house. Heat source was lamps used for growing marijuana in private dwelling. The Court found use of thermal imaging device during surveillance was a "search" and, absent a warrant, presumptively unreasonable.

8. Interception of wire and oral communications. Communications are protected by the Fourth Amendment. *Katz v. United States*, 389 U.S. 347 (1967).

a) One party may consent to monitoring a phone conversation.

(1) *United States v. Caceras*, 440 U.S. 741 (1979). A person has no reasonable expectation that a person with whom she is conversing will not later reveal that conversation to police.

(2) *United States v. Parrillo*, 34 M.J. 112 (C.M.A. 1992). There is no reasonable expectation of privacy as to contents of telephone conversation after it has reached other end of telephone line.

(3) *United States v. Guzman*, 52 M.J. 218 (C.A.A.F. 2000). There are still regulatory requirements for (one-party) consensual wiretapping but exclusion of evidence is not proper remedy except in cases where violation of regulation implicates constitutional or statutory rights.

b) The "bugged" informant. *United States v. Samora*, 6 M.J. 360 (C.M.A. 1979). There is no reasonable expectation of privacy where a "wired" informant recorded conversations during drug transaction.

c) Special rules exist for the use of wiretaps, electronic and video surveillance, and pen registers/trap & trace devices. Rules for video surveillance apply if "communications" are recorded.

(1) Federal statutes provide greater protections than the Fourth Amendment. See 18 U.S.C. §§ 2510-22, 2701-11, and 3121-27 (2000). The statutory scheme is referred to as the Electronic Communications Privacy Act (ECPA).

(a) The ECPA prohibits the unauthorized interception of wire and oral communications. 18 U.S.C. § 2511 (2000).

(b) The ECPA contains its own exclusionary rule in the event of violation. 18 U.S.C. § 2515 (2000).

(c) The ECPA applies to private searches, even though such searches are not covered by the Fourth Amendment. *People v. Otto*, 831 P.2d 1178 (Cal. 1992).

(2) Approval process requires coordination with HQ, USACIDC and final approval from DA Office of General Counsel. *See* Mil. R. Evid. 317; AR 190-53, Interception of Wire and Oral Communications for Law Enforcement Purposes (3 Nov. 1986).

(3) An overheard telephone conversation is not an "interception" under the statute. *United States v. Parillo*, 34 M.J. 112 (C.M.A. 1992).

(4) See Clark, Electronic Surveillance and Related Investigative Techniques, 128 MIL. L. REV. 155 (1990).

d) The USA PATRIOT ACT has enlarged the government's ability to access electronic communications and stored information. For details on the Act, see www.cybercrime.gov/cclaws.html.

9. Government property.

a) General rule. Mil. R. Evid. 316(d)(3) and Mil. R. Evid. 314(d).

(1) Normally a person does not have a reasonable expectation of privacy in government property that is not issued for personal use. *United States v. Weshenfelder*, 43 C.M.R. 256 (1971).

(2) A reasonable expectation of privacy normally exists in personal-use items such as footlockers and wall lockers.

b) Government desks.

(1) *O'Connor v. Ortega*, 480 U.S. 709 (1987) (plurality opinion). Search of desk by employer, for "work-related" purpose, does not require probable cause or warrant; however, search of desk by employer may require search authorization if purpose of search in criminal in nature. *See City of Ontario v. Quon*, 560 U.S. __ (2010) (June 17, 2010) (assuming reasonable expectation of privacy in government pager, but finding search reasonable under the *Ortega* "non-investigatory, work-related purpose" test).

(2) *United States v. Muniz*, 23 M.J. 201 (C.M.A. 1987). No expectation of privacy existed in locked government credenza when commander performed search for an administrative purpose.

(3) *United States v. Craig*, 32 M.J. 614 (A.C.M.R. 1991). No expectation of privacy existed in government desk at installation museum where search was conducted by sergeant major.

c) Barracks rooms.

(1) There generally is a reasonable expectation of privacy in items in a barracks room. *See* Mil. R. Evid. 314(d).

(2) *United States v. Conklin*, 63 M.J. 333 (C.A.A.F. 2006). While recognizing the limited expectation of privacy in a barracks room, CAAF acknowledges that a servicemember sharing a two-person dormitory room on a military base has a reasonable expectation of privacy in the files kept on a personally owned computer.

(3) *But see United States v. McCarthy*, 38 M.J. 398 (C.M.A. 1993). Warrantless intrusion and apprehension in barracks upheld. Court rules there is no reasonable expectation of privacy in barracks.

(4) *But see United States v. Curry*, 46 M.J. 733 (N-M. Ct. Crim. App. 1997) *aff'd* 48 M.J. 115 (C.A.A.F. 1998) (per curiam). No need to read *McCarthy* so broadly: according to Navy Court, there is, instead, a *reduced* expectation of privacy in a barracks room.

(5) *United States v. Battles*, 25 M.J. 58 (C.M.A. 1987). Drugs discovered during 0300 hours "inspection" in ship's berthing area and box near a common maintenance locker were admissible because there was no reasonable expectation of privacy in these areas.

(6) *United States v. Moore*, 23 M.J. 295, 299 (C.M.A. 1987) (Cox, J., concurring). "I am unable intellectually to harmonize the implicit assumption . . . that service members have legally enforceable expectations of privacy . . . in barracks rooms."

D. Open fields. The Fourth Amendment does not apply to open fields. Mil. R. Evid. 314(j).

1. *Hester v. United States*, 265 U.S. 57 (1924). Open fields are not "persons, houses, papers, and effects" and thus are not protected by the Fourth Amendment.

2. *United States v. Dunn*, 480 U.S. 294 (1987). Police intrusion into open barn on 198-acre ranch was not covered by the Fourth Amendment; barn was not within "curtilage." *Dunn* articulates a 4-part test to define "curtilage."

a) The proximity of the area to be curtilage to the home;

b) Whether the area is included within an enclosure surrounding the home;

c) The nature of the uses to which the area is put; AND

d) The steps taken by the resident to protect the area from observation by people passing by.

IV. AUTHORIZATION AND PROBABLE CAUSE.

A. A search is valid if based upon probable cause and a proper search warrant. Probable cause is evaluated by looking at the "totality of the circumstances" to determine whether evidence is located at a particular place. In the military, the equivalent to a search warrant is called a search authorization, and may be issued by an appropriate neutral and detached commander, military judge, or military magistrate. Even if a search is based upon probable cause and is conducted pursuant to a proper search warrant/ authorization, it must be conducted in a reasonable manner.

B. General Rule. A search is proper if conducted pursuant to a search warrant or authorization based on probable cause. Mil. R. Evid. 315.

1. A search *warrant* is issued by a civilian judge; it must be in writing, under oath, and based on probable cause.

2. A search *authorization* is granted by a military commander; it may be oral or written, need not be under oath, but must be based on probable cause.

C. Probable Cause.

1. Probable cause is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. Mil. R. Evid. 315(f). It is a "fluid concept---turning on the assessment of probabilities in particular factual contexts---not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 232 (1982).

2. Probable cause is evaluated under the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213 (1982). The Court rejected a lower court's attempt to "overlay a categorical scheme" on the *Gates* TOC analysis, see *United States v. Banks*, 540 U.S. 31 (2003). See also, *United States v. Leedy*, 65 M.J. 208 (C.A.A.F. 2007) where CAAF emphasizes TOC as the key in any probable cause analysis.

a) Probable cause will clearly be established if informant is reliable (*i.e.* believable) and has a factual basis for his or her information under the two-pronged test of *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969).

b) Probable cause may also be established even if the *Aguilar-Spinelli* test is not satisfied. *Illinois v. Gates*, 462 U.S. 213 (1982). *But see United States v. Washington*, 39 M.J. 1014 (A.C.M.R. 1994). No probable cause existed to search accused's barracks room because commander who authorized search lacked information concerning informant's basis of knowledge and reliability. The Gates TOC test was re-articulated in *United States v. Bethea*, 61 M.J. 184 (C.A.A.F. 2005) in which the CAAF held that there was sufficient probable cause to authorize a seizure of a hair sample to establish wrongful use of cocaine based on a prior positive urinalysis despite fact that hair sample would not necessarily indicate a prior one-time use of cocaine. Hair sample revealed that the accused had used cocaine multiple occasions.

c) *United States v. Evans*, 35 M.J. 306 (C.M.A. 1992). Evidence that accused manufactured crack cocaine in his house gave probable cause to search accused's vehicle. *Devenpeck v. Alford*, 543 U.S. 146 (2004), the probable cause upon which investigation and arrest are based need not be the same or even closely related to the probable cause for the ultimate criminal conviction, so long as both are legitimate.

d) *United States v. Figueroa*, 35 M.J. 54 (C.M.A. 1992). Probable cause existed to search accused's quarters where commander was informed that contraband handguns had been delivered to the accused and the most logical place for him to store them was his quarters.

e) *Maryland v. Pringle*, 540 U.S. 366 (2003). A police officer suspected that one, or all three, of a group in a vehicle possessed drugs and arrested them. The Court found it reasonable for the officer to infer a common enterprise, and ruled the arrest constitutional as to Pringle, even though the officer had no individualized PC regarding Pringle.

f) *United States v. Macomber*, 67 M.J. 214 (C.A.A.F. 2009). Probable cause existed to search airman's barracks room for child pornography under the totality of circumstances, even though there was no evidence the airman ever actually possessed child pornography, and the evidence that he registered with a child pornography website was fourteen months old.

g) *United States v. Rogers*, 67 M.J. 162 (C.A.A.F. 2009). Probable cause existed to test appellant's hair for cocaine, even though his urinalysis was negative.

h) *United States v. Clayton*, 68 M.J. 419 (C.A.A.F. 2010). Probable causes existed to search for child porn on computer in appellant's quarters, based largely on appellant's membership in a Google user group known to contain child pornography.

3. Staleness. Probable cause will exist only if information establishes that evidence is currently located in area to be searched. PC may evaporate with passage of time.

a) *United States v. Henley*, 53 M.J. 488 (C.A.A.F. 2000). Magistrate's unknowing use of information over five years old was not dispositive. In addition, good faith exception applied to agents executing warrant.

b) *United States v. Queen*, 26 M.J. 136 (C.M.A. 1988). Probable cause existed despite delay of two to six weeks between informant's observation of evidence of crime (firearm) in accused's car and commander's search authorization; accused was living on ship and had not turned in firearm to ship's armory.

c) *United States v. Agosto*, 43 M.J. 745 (A.F. Ct. Crim. App. 1995). Probable cause existed for search of accused's dormitory room even though 3 1/2 months elapsed between offense and search. Items sought (photos) were not consumable and were of a nature to be kept indefinitely.

4. *See* Appendix B for a guide to articulating probable cause.

D. Persons Who Can Authorize a Search. Mil. R. Evid. 315(d).

1. Any commander of the person or place to be searched ("king-of-the-turf" standard).

a) The unit commander can authorize searches of:

(1) Barracks under his control;

(2) Vehicles within the unit area; and

(3) Off-post quarters of soldiers in the unit if the unit is overseas.

b) The installation commander can authorize searches of:

(1) All of the above;

(2) Installation areas such as:

(a) On-post quarters;

(b) Post Exchange (PX); and,

(c) On-post recreation centers.

c) Delegation prohibited. Power to authorize searches is a function of command and may not be delegated to an executive officer. *United States v. Kalscheur*, 11 M.J. 378 (C.M.A. 1981)

d) Devolution authorized. *United States v. Law*, 17 M.J. 229 (C.M.A. 1983). An "acting commander" may authorize a search when commander is absent. *See also United States v. Hall*, 50 M.J. 247 (C.A.A.F. 1999). Commander may resume command at his discretion; no need not have written revocation of appointment of acting commander.

e) More than one commander may have control over the area to be searched. *United States v. Mix*, 35 M.J. 283 (C.M.A. 1992). Three commanders whose battalions used common dining facility each had sufficient control over the parking lot surrounding facility to authorize search there.

2. A military magistrate or military judge may authorize searches of all areas where a commander may authorize searches. *See* chapter 9, AR 27-10, Military Justice (16 Nov 2005), for information on the military magistrate program.

3. In the United States a state civilian judge may issue search warrants for off-post areas.

4. In the United States a federal civilian magistrate or judge may issue search warrants for:

a) Off-post areas for evidence related to federal crimes; and,

b) On-post areas.

5. Overseas a civilian judge may authorize a search of off-post areas.

E. Neutral and Detached Requirement. The official issuing a search authorization must be neutral and detached. *See* Mil. R. Evid. 315(d). *See also United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979) (discusses four separate cases where commanders' neutrality was attacked).

1. A commander is not neutral and detached when he or she:

a) Initiates or orchestrates the investigation (has personal involvement with informants, dogs, and controlled buys); or,

b) Conducts the search.

2. A commander may be neutral and detached even though he or she:

a) Is present at the search;

b) Has personal knowledge of the suspect's reputation;

c) Makes public comments about crime in his or her command; or,

d) Is aware of an on-going investigation.

3. Alternatives: Avoid any potential "neutral and detached" problems by seeking search authorization from:

a) A military magistrate; or,

b) The next higher commander.

F. Reasonableness. Even if based upon a warrant or authorization and probable cause, *a search must be conducted in a reasonable manner*.

1. *Wilson v. Arkansas*, 514 U.S. 927 (1995). The common law requirement that police officers "knock and announce" their presence is part of the reasonableness clause of the Fourth Amendment.

2. *United States v. Banks*, 540 U.S. 31 (2003). In a case involving easily disposable illegal drugs, police were justified in breaking through an apartment door after waiting 15-20 seconds following knocking and announcing their presence. This time was sufficient for the situation to ripen into an exigency.

3. *Richards v. Wisconsin*, 520 U.S. 385 (1997). Every no-knock warrant request by police must be evaluated on a case-by-case basis. Test for no-knock warrant is whether there is reasonable suspicion that evidence will be destroyed or there is danger to police by knocking. *United States v. Ramirez*, 523 U.S. 65 (1998). Whether or not property is damaged during warrant execution, the same test applies -- reasonable suspicion.

4. *Hudson v. Michigan*, 547 U.S. 586 (2006). Violation of the Fourth Amendment "knock and announce" rule, without more, will not result in suppression of evidence at trial.

5. Depending on the circumstances, law enforcement officials may "seize" and handcuff occupants of a residence while they execute a search warrant of that residence. *Muehler v. Mena*, 544 U.S. 93, 125 S.Ct. 1465 (2005).

6. *L.A. County v. Rettele*, 127 S.Ct. 1989 (2007). When officers execute a valid warrant and act in a reasonable manner to protect themselves from harm, however, the Fourth Amendment is not violated.

7. *United States v. Osorio*, 66 M.J. 632 (A.F. Ct. Crim. App. 2008). Forensic examination of a computer based on a search warrant must not exceed the scope of the warrant. Examiners must carefully analyze the terms of the warrant and adjust their examination methodology accordingly. Inevitable discovery did not apply to facts of this case.

G. Reasonableness and Media "Ride-Alongs." Violation of Fourth Amendment rights of homeowners for police to bring members of media or other third parties into homes during execution of warrants. *Wilson v. Layne*, 526 U.S. 603 (1999).

H. Seizure of Property.

1. Probable cause to seize. Probable cause to seize property or evidence exists when there is a reasonable belief that the property or evidence is an unlawful weapon, contraband, evidence of crime, or might be used to resist apprehension or to escape. Mil. R. Evid. 316(b). *United States v. Mons*, 14 M.J. 575 (N.M.C.M.R. 1982). Probable cause existed to seize bloody clothing cut from accused's body during emergency room treatment.

2. Effects of unlawful seizure. If there is no probable cause the seizure is illegal and the evidence seized is suppressed under Mil. R. Evid. 311.

I. External Impoundment. Reasonable to secure a room ("freeze the scene") pending an authorized search to prevent the removal or destruction of evidence. *United States v. Hall*, 50 M.J. 247 (C.A.A.F. 1999). But freezing the scene does not mean that investigators have unrestricted authorization to search crime scene without a proper warrant/authorization. *See Flippo v. West Virginia*, 528 U.S. 11 (1999) (holding that no general crime scene exception exists).

J. Seizure (Apprehension) of Persons.

1. Probable cause to apprehend. Probable cause to apprehend exists when there are reasonable grounds to believe that an offense has been or is being committed and the person to be apprehended committed or is committing it. RCM 302(c). *See also* Mil. R. Evid. 316(c).

2. Effects of unlawful apprehension. If there is no probable cause the apprehension is illegal and evidence obtained as a result of the apprehension is suppressed under Mil. R. Evid. 311. *See United States v. Dunaway*, 442 U.S. 200 (1979) (holding that fruits of illegal apprehension are inadmissible).

3. Situations amounting to apprehension.

a) There is a seizure or apprehension of a person when a reasonable person, in view of all the circumstances, would not believe he or she was free to leave.

b) In "cramped" settings (*e.g*. on a bus, in a room), there is an apprehension when a reasonable person, in view of all the circumstances, would not feel "free to decline to answer questions." *Florida v. Bostick*, 501 U.S. 429 (1991). *But see United States v. Drayton*, 536 U.S. 194 (2002) (finding that there was no requirement to inform bus passengers that they could refuse to cooperate with police).

c) Armed Texas police rousting a 17-year old murder suspect from his bed at 0300, transporting him handcuffed, barefoot and in his underwear to the police station was an apprehension, despite suspect's answer of "Okay", in response to police saying "We have to talk." *Kaupp v. Texas*, 536 U.S. 626 (2003).

d) Asking for identification is not an apprehension. *United States v. Mendenhall*, 446 U.S. 544 (1980).

(1) Asking for identification and consent to search on a bus is not apprehension. *Florida v. Bostick*, 501 U.S. 429 (1991). *See also United States v. Drayton*, 536 U.S. 194 (2002) (finding no requirement to inform bus passengers they could refuse to cooperate with police); *Muehler v. Mena*, 544 U.S. 93 (2005) (asking person who had been handcuffed about immigration status did not constitute seizure).

(2) State may prosecute for failure to answer if the 'stop and ID' statute is properly drawn. Thus, there was no Fourth Amendment violation in *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177 (2004).

e) A police chase is not an apprehension.

(1) *Michigan v. Chestnut*, 486 U.S. 567 (1988). Following a running accused in patrol car was not a seizure where police did not turn on lights or otherwise tell accused to stop. Consequently, drugs accused dropped were not illegally seized.

(2) *California v. Hodari D*., 499 U.S. 621 (1991). Police officer needs neither probable cause nor reasonable suspicion to chase a person who flees after seeing him. A suspect who fails to obey an order to stop is not seized within meaning of the Fourth Amendment.

f) Traffic Stops.

(1) Brendlin v. California, 551 U.S. 249 (U.S. 2007). When police make a traffic stop, a passenger in the car, like the driver, is seized for Fourth Amendment purposes and so may challenge the stop's constitutionality.

g) An order to report to military police.

(1) An order to report for non-custodial questioning is not apprehension.

(2) An order to report for fingerprints is not apprehension. *United States v. Fagan*, 28 M.J. 64 (C.M.A. 1989). Accused, who was ordered to report to military police for fingerprinting was not apprehended. Fingerprinting is a much less serious intrusion than interrogation, and may comply with the Fourth Amendment even if there is less than probable cause.

(3) Transporting an accused to the military police station under guard is apprehension. *United States v. Schneider*, 14 M.J. 189 (C.M.A. 1982). When accused is ordered to go to military police station under guard, probable cause must exist or subsequent voluntary confession is inadmissible.

4. Apprehension at home or in quarters: a military magistrate, military judge, or the commander who controls that dwelling (usually the installation commander) must authorize apprehension in private dwelling. R.C.M. 302(e); *Payton v. New York*, 445 U.S. 573 (1980).

a) A private dwelling includes:

(1) BOQ/BEQ rooms;

(2) Guest quarters;

(3) On-post quarters; or,

(4) Off-post apartment or house.

b) A private dwelling does not include:

(1) Tents.

(2) Barracks rooms; *see United States v. McCarthy*, 38 M.J. 398 (C.M.A. 1993). Warrantless apprehension in barracks room was proper.

(3) Vehicles.

c) Exigent circumstances may justify entering dwelling without warrant or authorization. *See* Mil. R. Evid. 315(g). *United States v. Ayala*, 26 M.J. 190 (C.M.A. 1988). Accused was properly apprehended, without authorization, in transient billets. Exigent circumstances justified apprehension. *See also Kirk v. Louisiana*, 536 U.S. 635 (2002) (absent exigent circumstances, police may not enter a private dwelling without a warrant supported by probable cause to search the premises or apprehend an individual); *United States v. Khamsouk*, 57 M.J. 282 (C.A.A.F. 2002) (finding that the DD Form 553 is not the equivalent of an arrest warrant issued by a civilian magistrate judge).

d) Consent may justify entering dwelling without proper warrant or authorization. *See* Mil. R. Evid. 316(d)(2). *United States v. Sager*, 30 M.J. 777 (A.C.M.R. 1990), *aff'd on other grounds*, 36 M.J. 137 (C.M.A. 1992). Accused, awakened by military police at on-post quarters, in his underwear, and escorted to police station was not illegally apprehended, despite lack of proper authorization, where his wife "consented" to police entry.

e) Probable cause may cure lack of proper authorization. *New York v. Harris*, 495 U.S. 14 (1990). Where police had probable cause but did not get a warrant before arresting accused at home, statement accused made at home was suppressed as violation of *Payton v. New York*, but statement made at police station was held to be admissible. The statement at the police station was not the "fruit" of the illegal arrest at home.

f) Exigent circumstances may also allow warrantless seizure of dwelling and/or occupants while waiting for search warrant to be issued. *Illinois v. McArthur*, 531 U.S. 326 (2001).

V. EXCEPTIONS TO AUTHORIZATION REQUIREMENT.

A. Not all searches require warrants or search authorizations, if there is probable cause that evidence is at a certain location. If there is probable cause that evidence will be destroyed, a law enforcement official may dispense with the warrant/authorization requirement. Searches of automobiles generally do not require warrants/authorizations.

B. Exigent Circumstances.

1. General rule. A search warrant or authorization is not required when there is probable cause but insufficient time to obtain the authorization because the delay to obtain authorization would result in the removal, destruction, or concealment of evidence. Mil. R. Evid. 315(g).

2. Burning marijuana. *United States v. Lawless*, 13 M.J. 943 (A.F.C.M.R. 1982). Police smelled marijuana coming from house, looked into a window and spotted drug activity. Police then entered and apprehended everyone in the house, and later obtained authorization to search. *Held*: this was a valid exigency. *See also United States v. Dufour*, 43 M.J. 772 (N.M.Ct.Crim.App. 1995) (Observed use of drugs in home allowed search and seizure without obtaining warrant.)

3. Following a controlled buy.

a) *United States v. Murray*, 12 M.J. 139 (C.M.A. 1981). Commander and police entered accused's barracks room and searched it immediately after a controlled buy. *Held*: Search was valid based on exigent circumstances.

b) *But see United States v. Baker*, 14 M.J. 602 (A.F.C.M.R. 1982). OSI agents and civilian police entered accused's off-post apartment immediately after a controlled buy. Search was improper because there were no real exigencies, and there was time to seek authorization.

4. Traffic Stops (Pretextual):

a) *Whren v. United States*, 517 U.S. 806 (1996). A stop of a motorist, supported by probable cause to believe he committed a traffic violation, is reasonable under the Fourth Amendment regardless of the actual motivations of the officers making the stop. Officers who lack probable cause to stop a suspect for a serious crime may use the traffic offense as a pretext for making a stop, during which they may pursue their more serious suspicions by utilizing plain view or consent. *See also Arkansas v. Sullivan*, 532 U.S. 769 (2001) (holding state supreme court erred by considering subjective intent of arresting officer when there was a valid basis for a traffic stop and probable cause to subsequently arrest motorist for a speeding violation), and *United States v. Moore*, 128 U.S. (2008) (holding the police did not violate the Fourth Amendment when they made an arrest that was based on probable cause, but prohibited by state law, or when they performed a search incident to arrest).

b) *United States v. Rodriquez*, 44 M.J. 766 (N.M.Ct.Crim.App. 1996). State Trooper had probable cause to believe that accused had violated Maryland traffic law by following too closely. Even though the violation was a pretext to investigate more serious charges, applying *Whren*, the stop was lawful.

c) Seizure of drivers and passengers.

(1) *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). The police may, as a matter of course, order the driver of a lawfully stopped car to exit. *See Maryland v. Wilson*, 519 U.S. 407 (1997) (holding that *Mimms* rule is extended to passengers). *But cf. Wilson v. Florida*, 734 So. 2d 1107, 1113 (Fla. Dist. Ct. App. 1999) applying *Mimms* and *Wilson* in holding that a police officer conducting a lawful traffic stop may not order a passenger back in the stopped vehicle.

(2) *Brendlin v. California*, 551 U.S. 249 (U.S. 2007). When police make a traffic stop, a passenger in the car, like the driver, is seized for Fourth Amendment purposes and so may challenge the stop's constitutionality.

(3) *Arizona v. Johnson*, 129 US 781 (2009). Reads *Mimms*, *Wilson*, and *Brendlin* read together to hold that officers who conduct routine traffic stop[s] may perform a 'patdown' of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous. They do not have to have a Terry-like reasonable suspicion that the driver or passengers have committed, or are committing, a crime.

5. Hot pursuit. *Warden v. Hayden*, 387 U.S. 294 (1967). Police, who chased armed robber into house, properly searched house.

6. Drugs or alcohol in the body.

a) *Schmerber v. California*, 384 U.S. 757 (1966). Warrantless blood alcohol test was justified by exigent circumstances.

b) *United States v. Porter*, 36 M.J. 812 (A.C.M.R. 1993). Warrantless blood alcohol test was not justified by exigent circumstances where there was no evidence that time was of the essence or that commander could not be contacted.

c) *United States v. Pond*, 36 M.J. 1050 (A.F.C.M.R. 1993). Warrantless seizure of urine to determine methamphetamine use was not justified by exigent circumstances because methamphetamine does not dissipate quickly from the body.

d) Nonconsensual extraction of body fluids without a warrant requires more than probable cause; there must be a "clear indication" that evidence of a crime will be found and that delay could lead to destruction of evidence. Mil. R. Evid. 312(d). See *United States v. Carter*, 54 M.J. 414 (C.A.A.F. 2001).

C. Automobile Exception.

1. General rule. Movable vehicles may be searched based on probable cause alone; no warrant is required. Mil. R. Evid. 315(g)(3).

a) *Chambers v. Maroney*, 399 U.S. 42 (1970). The word "automobile" is not a talisman, in whose presence the Fourth Amendment warrant requirement fades away. *See also Pennsylvania v. Labron*, 518 U.S. 938 (1996). The auto exception is not concerned with whether police have time to obtain a warrant. It is concerned solely with whether the vehicle is "readily mobile."

b) Ability to Obtain a Warrant Irrelevant. *Maryland v. Dyson*, 527 U.S. 465 (1999) (per curiam). Police in Maryland waited for 13 hours for suspect to return to state and did not attempt to obtain a warrant. Supreme Court reaffirmed that automobile exception does not require a "separate finding of exigency precluding the police from obtaining a warrant."

c) Rationale:

(1) Automobiles are mobile; evidence could disappear by the time a warrant is obtained; and,

(2) There is a lesser expectation of privacy in a car than in a home.

2. Scope of the search: any part of the car, including the trunk, and any containers in the car may be searched.

a) *United States v. Ross*, 456 U.S. 798 (1982). Police may search any part of the car and any containers in car if police have probable cause to believe they contain evidence of a crime.

b) *United States v. Evans*, 35 M.J. 306 (C.M.A. 1992). Military police who had probable cause to search auto for drugs properly searched accused's wallet found within vehicle.

3. Automobile is broadly defined. *California v. Carney*, 471 U.S. 386 (1985). Recreational vehicle falls within auto exception unless it is clearly used solely as a residence.

4. Timing of the search. *United States v. Johns*, 469 U.S. 478 (1985). Police had probable cause to seize truck but did not search it for three days. There is no requirement that search be contemporaneous with lawful seizure.

5. Closed containers in vehicles may also be searched. *California v. Acevedo*, 500 U.S. 565 (1991). Probable cause to believe closed container located in vehicle contains evidence of crime allows warrantless search of container. This case overruled *United States v. Chadwick*, 433 U.S. 1 (1977), which required police to have warrant where probable cause relates solely to container within vehicle. *Accord United States v. Schmitt*, 33 M.J. 24 (C.M.A. 1991).

6. No distinction between containers owned by suspect and passengers: both sorts of containers may be searched. *Wyoming v. Houghton*, 526 U.S. 295 (1999).

7. Applies to Seizure of Automobiles Themselves. *Florida v. White*, 526 U.S. 559 (1999). Automobile exception applies to seizure of vehicle for purposes of forfeiture and police do not need to get a warrant if they have probable cause to believe that car is subject to seizure. If seized, police are then allowed to conduct a warrantless inventory of the seized vehicle.

VI. EXCEPTIONS TO PROBABLE CAUSE REQUIREMENT.

A. Many searches require neither probable cause nor a search warrant/authorization. If a person voluntarily consents to a search, no probable cause or warrant is needed. Searches incident to apprehension/arrest need no other probable cause than the underlying PC for the arrest/apprehension. Certain brief detentions–called "stops"– require only "reasonable suspicion," and pat-down searches–called "frisks"–require only reasonable suspicion that the person is armed and dangerous. Inspections are technically not searches at all, but are rather administrative in nature, not criminal searches for evidence. A variety of inspections are not affected by Fourth Amendment requirements. Finally, emergency searches are also not affected by Fourth Amendment requirements.

B. Consent Searches.

1. General rule. If a person voluntarily consents to a search of his person or property under his control, no probable cause or warrant is required. Mil. R. Evid. 314(e).

2. Persons Who Can Give Consent.

a) Anyone who exercises actual control over property may grant consent to search that property. Mil. R. Evid. 314(e)(2). *United States v. Reister*, 44 M.J. 409 (C.A.A.F. 1996). House sitter had actual authority to consent to search apartment, books and nightstand. *United States v. Clow*, 26 M.J. 176 (C.M.A. 1988). When police requested consent to search family dwelling, wife consented to search, but husband who was also present refused consent.

b) The Supreme Court held that consent is not constitutionally valid if one *physically* present co-tenant grants consent, but another *physically* present co-tenant refuses consent. *Georgia v. Randolph*, 547 U.S. 103 (2006). See the novel application of *Georgia v. Randolph* in *United States v. Weston*, 67 M.J. 390 (C.A.A.F. 2009), where CID removed husband and wife from their home by bringing them to the CID office. Because they were no longer "physically present" at the home, the wife's consent was valid over her husband's lack of consent.

c) Anyone with apparent authority may grant consent.

(1) *Illinois v. Rodriguez*, 497 U.S. 177 (1990). Girlfriend with key let police into boyfriend's apartment where drugs were found in plain view. Police may enter private premises without a warrant if they are relying on the consent of a third party that they reasonably, but mistakenly, believe has a common authority over the premises.

(2) *United States v. White*, 40 M.J. 257 (C.M.A. 1994). Airman who shared off-base apartment with accused had apparent authority to consent to search of accused's bedroom. The Airman told police that the apartment occupants frequently borrowed personal property from each other and went into each other's rooms without asking permission.

(3) *See also, United States. v. Rader*, 65 M.J. 30 (C.A.A.F. 2007). Accused's roommate had sufficient access to and control over accused's computer to give valid consent to its search, where the computer was located in roommate's bedroom, it was not password protected, accused never told roommate not to access his computer or any of its files, accused's roommates used the computer to play computer games with accused's consent, and the consenting roommate accessed the computer approximately every two weeks to perform maintenance.

3. Voluntariness. Consent must be voluntary under the totality of the circumstances. Mil. R. Evid. 314(e)(4); *United States v. Frazier*, 34 M.J. 135 (C.M.A. 1992); s*ee United States v. Wallace*, 66 M.J. 5 (C.A.A.F. 2008) (adopting the six-factor *Murphy* test from an Air Force court to determine voluntariness).

a) Traffic stop. *Ohio v. Robinette*, 519 U.S. 33 (1996). A request to search a detained motorist's car following a lawful traffic stop does not require a bright line "you are free to go" warning for subsequent consent to be voluntary. Consent depends on the totality of the circumstances.

b) Coerced consent is involuntary. *But see United States v. Goudy*, 32 M.J. 88 (C.M.A. 1991). Accused's consent was voluntary despite fact that he allegedly took commander's request to be an implied order.

c) c. It's OK to Trick. *United States v. Vassar*, 52 M.J. 9 (1999). Accused taken to hospital for head injury and told that a urinalysis was needed for treatment. CAAF held it is permissible to use trickery to obtain consent as long as it does not amount to coercion. Urinalysis was admissible, despite military judge applying wrong standard for resolving questions of fact.

d) Right to counsel. Reading Article 31 rights is recommended but not required. *United States v. Roa*, 24 M.J. 297 (C.M.A. 1987). Request for consent after accused asked for lawyer was permissible. *United States v. Burns*, 33 M.J. 316 (C.M.A. 1991). Commander's failure to give Article 31 warnings did not affect voluntariness of consent to urinalysis test.

4. Scope. Consent may be limited to certain places, property and times. Mil. R. Evid. 314(e)(3). Consent to search computer necessarily implicated consent to seize and remove computer even though standard consent form did not explicitly state that computer could be seized and removed. *United States v. Rittenhouse*, 62 M.J. 504 (A. Ct.Crim.App. 2005). *See United States v. Gallagher*, 65 M.J. 601 (N-M. Ct. Crim. App. 2007) *affirmed, 66 M.J. 250 (C.A.A.F. 2008)* where the issue is whether the search of the accused's closed briefcase, located in the garage of accused's home, did not exceed the scope of his wife's consent to search the areas of the home over which she had actual or apparent authority.

5. Withdrawal. Consent may be withdrawn at any time. Mil. R. Evid. 314(e)(3). *But see United States v. Roberts*, 32 M.J. 681 (A.F.C.M.R. 1991). Search was lawful where accused initially consented, then withdrew consent, and then consented again.

6. Burden of proof. Consent must be shown by clear and convincing evidence. Mil. R. Evid. 314(e)(5).

7. Consent and closed containers. *Florida v. Jimeno*, 500 U.S. 248 (1991). General consent to search allows police to open closed containers.

C. Searches Incident to Apprehension.

1. General rule. A person who has been apprehended may be searched for weapons or evidence within his "immediate control." Mil. R. Evid. 314(g).

a) Scope of search. A person's immediate control includes his person, clothing, and the area within his wingspan (sometimes expansively defined to include "lunging distance").

b) Purpose of search: to protect police from nearby weapons and prevent destruction of evidence. *Chimel v. California*, 395 U.S. 752 (1969).

c) Substantial delay between apprehension and seizure will not invalidate the search "incident." *United States v. Curtis*, 44 M.J. 106 (C.A.A.F. 1996) (citing *United States v. Edwards*, 415 U.S. 800 (1974) (10 hours)). *Curtis* was later reversed on other grounds and the sentence was subsequently reduced by the Navy-Marine Corps Court of Criminal Appeals; this reduction to life imprisonment was upheld by the CAAF. *United States v. Curtis*, 52 M.J. 166 (C.A.A.F. 1999).

2. Search of automobiles incident to arrest.

a) When a policeman has made a lawful arrest of an occupant of an automobile he may search the entire passenger compartment and any closed containers in passenger compartment, *but not the trunk*. Mil. R. Evid. 314(g)(2).

b) Search may be conducted after the occupant has been removed from the automobile, as long as the search is "contemporaneous" with the apprehension. Mil. R. Evid. 314(g)(2); *New York v. Belton*, 453 U.S. 454 (1981) (search of zipped jacket pocket in back seat of car following removal and arrest of occupants upheld; new bright line rule established).

c) *Belton* rule extended in *Thornton v. United States*, 541 U.S. 615 (2004), to include search of a vehicle if the arrestee was a "recent occupant" of the vehicle.

d) *Belton* rule distinguished and substantially limited in *Arizona v Gant*, 129 S. Ct. 1710, 1723 (2009). "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest."

e) Arrest means arrest. A search incident to a traffic citation, as opposed to an arrest, is not constitutional. *Knowles v. Iowa*, 525 U.S. 113 (1999). *But cf. Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (Petitioner was arrested for not wearing a seatbelt and then handcuffed, searched at the police station, and held in jail for an hour. The Court found that the arrest for this minor infraction was reasonable).

D. Stop and Frisk.

1. General rule. Fourth Amendment allows a limited government intrusion ("stop and frisk") based on less than probable cause ("reasonable suspicion") where important government interests outweigh the limited invasion of a suspect's privacy. *Terry v. Ohio*, 392 U.S. 1 (1968); Mil. R. Evid. 314(f).

2. Reasonable suspicion.

a) Reasonable suspicion is specific and articulable facts, together with rational inferences drawn from those facts, which reasonably suggest criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *United States v. Bair*, 32 M.J. 404 (C.M.A. 1991). *See United States v. Robinson*, 58 M.J. 429 (C.A.A.F. 2003), for an excellent framework for a reasonable suspicion analysis.

(1) Reasonable suspicion is measured under the totality of the circumstances; and,

(2) Reasonable suspicion is less than probable cause.

b) Reasonable suspicion may be based on police officer's own observations. *United States v. Peterson*, 30 M.J. 946 (A.C.M.R. 1990). Reasonable suspicion existed to stop soldier seated with companion in car parked in dead end alley in area known for drug activity at night; car license plate was from out-of-state.

c) Reasonable suspicion may be based on collective knowledge of all police involved in investigation. *United States v. Hensley*, 469 U.S. 221, 229 (1985). Information in police department bulletin was sufficient reasonable suspicion to stop car driven by robbery suspect.

d) Reasonable suspicion may be based on an anonymous tip. *Alabama v. White*, 496 U.S. 325 (1990). Detailed anonymous tip was sufficient reasonable suspicion to stop automobile for investigative purposes. *But see Florida v. J.L.*, 529 U.S. 266 (2000) (stating that anonymous tip needs to be reliable in "its assertion of illegality").

e) Reasonable suspicion may be based on drug courier "profile." *United States v. Sokolow*, 490 U.S. 1 (1988). "Innocent" non-criminal conduct amounted to reasonable suspicion to stop air traveler who paid $2,100.00 cash for two tickets, had about $4,000.00 in cash; was traveling to a source city (Miami); was taking 20 hour flight to stay only 2 days; was checking no luggage (only carry-on luggage); was wearing same black jumpsuit and gold jewelry on both flights; appeared nervous; and, was traveling under alias. Cocaine found in carry-on bag after dog alerted was admissible.

f) Reasonable suspicion may be based on "headlong flight" coupled with other circumstances (like nervous and evasive behavior and high-crime area). *Illinois v. Wardlow*, 528 U.S. 119 (2000).

3. Nature of detention. A stop is a brief, warrantless investigatory detention based on reasonable suspicion accompanied by a limited search.

a) Frisk for weapons.

(1) The police may frisk the suspect for weapons when he or she is reasonably believed to be armed and dangerous. Mil. R. Evid. 314(f)(2).

(2) Plain feel. Police may seize contraband items felt during frisk if its contraband nature of items is readily apparent. *Minnesota v. Dickerson*, 508 U.S. 366 (1993) (seizure of cocaine during frisk held unconstitutional because the contraband nature of cocaine was not readily apparent). But looking down the front of a suspect's pants to determine if "bulges" were weapons was reasonable. *United States v. Jackson*, No. ACM 33178, 2000 CCA LEXIS 57 (A.F. Ct. Crim. App. Feb. 28, 2000) (unpublished opinion).

b) Length of the detention.

(1) 15 minutes in small room is too long. *Florida v. Royer*, 460 U.S. 491 (1983). Suspect was questioned in a large storage closet by two DEA agents was unreasonable: "investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."

(2) 20 minutes may be sufficiently brief if police are hustling. *United States v. Sharpe*, 470 U.S. 675 (1985). 20-minute detention by highway patrolman waiting for DEA agent to arrive was not unreasonable.

c) Use of firearms.

(1) *United States v. Merritt*, 695 F.2d 1263 (10th Cir. 1982). Pointing shotgun at murder suspect did not turn legitimate investigative stop into arrest requiring probable cause.

(2) *United States v. Sharpe*, 470 U.S. 695 (1985); *United States v. Hensley*, 469 U.S. 221 (1985). Merely displaying handgun did not turn an investigative detention into a seizure requiring probable cause.

d) Use of dogs. *Illinois v. Caballes*, 543 U.S. 405 (2005) (holding that otherwise lawful traffic stop was not expanded into an illegal search or seizure for contraband when officer walked a drug detection dog around vehicle during a routine traffic stop).

(1) *United States v. Alexander*, 901 F.2d 272 (2d Cir. 1990). Approaching car with drawn guns and ordering driver out of car to frisk for possible weapons did not convert *Terry* stop into full-blown arrest requiring probable cause.

4. Important government interests.

a) Police officer safety. *Terry v. Ohio*, 392 U.S. 1 (1968). Frisk was justified when officer reasonably believed suspect was about to commit robbery and likely to have weapon.

b) Illegal immigrants. *I.N.S. v. Delgado*, 466 U.S. 210 (1984); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). But Border Patrol Agent's squeezing of a canvas bag during a routine stop of bus at checkpoint violated Fourth Amendment. *Bond v. United States*, 529 U.S. 334 (2000).

c) Illegal drugs. *United States v. De Hernandez*, 473 U.S. 531 (1985). "[T]he veritable national crisis in law enforcement caused by smuggling of illicit narcotics . . . represents an important government interest." *United States v. Sharpe*, 470 U.S. 675 (1985); *United States v. Place*, 462 U.S. 696 (1983); *United States v. Mendenhall*, 446 U.S. 544 (1980). *But see Indianapolis v. Edmond*, 531 U.S. 32 (2000) (finding that use of roadblock for general search of drugs violated the Fourth Amendment).

d) Solving crimes and seeking justice. *United States v. Hensley*, 469 U.S. 221 (1985). There is an important government interest "in solving crime and bringing offenders to justice."

5. House frisk ("Protective Sweep"). *Maryland v. Buie*, 494 U.S. 325 (1990). Police may make protective sweep of home during lawful arrest if they have "reasonable belief based on specific and articulable facts" that a dangerous person may be hiding in area to be swept; evidence discovered during protective sweep is admissible.

a) *United States v. Billings*, 58 M.J. 861 (A. Ct. Crim. App. 2003). Police may conduct a protective sweep of a house, even though the arrest takes place outside the house.

E. Administrative Inspections.

1. The military's two-part test. Mil. R. Evid. 313(b).

a) Primary purpose test.

(1) Inspection. The primary purpose of an inspection must be to ensure the security, military fitness, or good order and discipline of the unit (administrative purpose).

(2) Criminal search. An examination made for the primary purpose of obtaining evidence for use in a court-martial or in other disciplinary proceedings (criminal purpose) is not an inspection.

b) Subterfuge rule. **If** a purpose of an examination is to locate weapons and contraband and if the examination:

(1) Was directed immediately following the report of a crime and not previously scheduled; or,

(2) Specific persons were selected or targeted for examination; or,

(3) Persons were subjected to substantially different intrusions; **then**,

the prosecution must prove by clear and convincing evidence that the purpose of the examination was administrative, not a subterfuge for an illegal criminal search.

2. The Supreme Court's test. *New York v. Burger*, 482 U.S. 691 (1987) ("administrative" inspection of junkyard pursuant to state statute was proper).

a) There are three requirements for a lawful administrative inspection:

(1) There must be a substantial government interest in regulating the activity;

(2) The regulation must be necessary to achieve this interest; and,

(3) The statute must provide an adequate substitute for a warrant.

(a) The statute must give notice that inspections will be held;

(b) The statute must set out who has authority to inspect; and,

(c) The statute must limit the scope and discretion of the inspection.

b) A dual purpose is permissible. A state can address a major social problem both by way of an administrative scheme and through penal sanctions.

3. Health and welfare inspections. *United States v. Tena*, 15 M.J. 728 (A.C.M.R. 1983). Commander's unit inspection for substandard conditions is permissible. *United States v. Thatcher*, 28 M.J. 20 (C.M.A. 1989). Stolen toolbox was discovered in short-timer's room. Government failed to show by clear and convincing evidence that examination was an "inspection" and not an "illegal search."

4. Unit urinalysis.

a) Invalid inspection.

(1) *United States v. Campbell*, 41 M.J. 177 (C.M.A. 1994). Urinalysis inspection test results were improperly admitted where inspection was conducted because the first sergeant heard rumors of drug use in unit and prepared list of suspects, including accused, to be tested. The military judge erred in ruling the government proved by clear and convincing evidence that the inspection was not a subterfuge for an illegal criminal search.

(2) Commander must have jurisdiction and authority over accused to order urinalysis. *See United States v. DiMuccio*, 61 M.J. 588 (A.F. Ct. Crim. App. 2005) (Commander of 162nd FW, a national guard unit, had no authority to order accused to submit to urinalysis because accused was at the time in "Title 10" status vice "Title 32" status even though accused was still part of 162nd FW).

b) Valid inspection.

(1) Knowledge of "Reports." *United States v. Brown*, 52 M.J. 565 (A. Ct. Crim. App. 1999). Commander directed random urinalysis after report that several soldiers were using drugs in the command. The court found that the urinalysis was a valid inspection with the primary purpose to protect the morale, safety and welfare of the unit, despite the recent report. In *United States v. Taylor*, 41 M.J. 168 (C.M.A. 1994), the accused's urinalysis results were properly admitted, despite the fact that the test followed report to commander's subordinate that accused had used drugs. Knowledge of a subordinate will not be imputed to the commander.

(2) Primary Purpose. *United States v. Shover*, 44 M.J. 119 (1996). The primary purpose for the inspection was to end "finger pointing, hard feelings," and "tension." The commander "wanted to get people either cleared or not cleared." The primary purpose was to "resolve the questions raised by the incident, not to prosecute someone." This was a proper administrative purpose.

(3) Primary Purpose. *United States v. Jackson*, 48 M.J. 292 (1998). Commander stated primary purpose of inspection of barracks rooms, less than 2 hours of receiving anonymous tip about drugs in a soldier's barracks room, was unit readiness. Court held inspection was proper.

5. Gate inspections.

a) Procedures. *See* AR 210-10, Installations, Administration (12 Sep. 1977), para. 2-23c (summarizes the legal requirements for gate inspections) (the regulation has been rescinded but is being revised for future promulgation).

(1) A gate search should be authorized by written memorandum or regulation signed by the installation commander defining the purpose, scope and means (time, locations, methods) of the search.

(2) Notice. All persons must receive notice in advance that they are subject to inspection upon entry, while within the confines, and upon departure, either by a sign or a visitor's pass.

(3) Technological aids. Metal detectors and drug dogs may be used. *See* AR 190-12, Military Working Dog Program (4 Jun. 2007).

(4) Civilian employees. Check labor agreement for impact on overtime and late arrivals.

(5) Female pat-downs. Use female inspectors if possible.

(6) Entry inspections.

(a) Civilians: must consent to inspection or their entry is denied; may not be inspected over their objection.

(b) Military: may be ordered to comply with an inspection and may be inspected over their objection, using reasonable force, if necessary.

(7) Exit inspections.

(a) Civilians: may be inspected over objection, using reasonable force, if necessary.

(b) Military: may be ordered to comply with an inspection and may be inspected over their objection, using reasonable force, if necessary.

b) Discretion of inspectors. *United States v. Jones*, 24 M.J. 294 (C.M.A. 1987). Police may use some discretion, per written command guidance, to select which cars are stopped and searched.

c) Scope of search. *United States v. Burney*, 66 M.J. 701 (A.F. Ct. Crim. App. 2008), AFCCA found that it was reasonable for security forces personnel conducting a lawful inspection of vehicles entering an Air Force base to look inside the closed glasses pouch found in the accused's vehicle for contraband, considering that the intrusion was very minimal, the purpose of the inspection was to protect the base from contraband, and the search was conducted at a practical and completely logical location.

F. Border Searches.

1. Customs inspections.

a) Customs inspections are constitutional border searches. *United States v. Ramsey*, 431 U.S. 606 (1977) (finding a longstanding right of sovereign to protect itself).

b) Customs inspections in the military. Border searches for customs or immigration purposes may be conducted when authorized by Congress. Mil. R. Evid. 314(b); *United States v. Williamson*, 28 M.J. 511 (A.C.M.R. 1989). Military police customs inspector's warrantless search of household goods was reasonable since inspection was conducted pursuant to DOD Customs Regulations.

2. Gate searches overseas.

a) General rule. Installation commanders overseas may authorize searches of persons and property entering and exiting the installation to ensure security, military fitness, good order and discipline. Mil. R. Evid. 314(c).

(1) Primary purpose test is applicable.

(2) Subterfuge rule is inapplicable.

b) *United States v. Stringer*, 37 M.J. 310 (C.M.A. 1993). Gate searches overseas are border searches; they need not be based on written authorization and broad discretion can be given to officials conducting the search.

G. Inventories.

1. General rule. Inventories conducted for an administrative purpose are constitutional; contraband and evidence of a crime discovered during an inventory may be seized. Mil. R. Evid. 313(c).

a) Primary purpose test is applicable.

b) Subterfuge rule is inapplicable.

2. Purpose. *Illinois v. Lafayette*, 462 U.S. 640 (1983). Inventories of incarcerated persons or impounded property are justified for three main reasons:

a) To protect the owner from loss;

b) To protect the government from false claims; and,

c) To protect the police and public from dangerous contents.

3. Military inventories. Military inventories that are required by regulations serve lawful administrative purposes. Evidence obtained during an inventory is admissible. Inventories are required when soldiers are:

a) Absent without leave (AWOL), AR 700-84, Issue and Sale of Personal Clothing (18 Nov. 2004), para 12-14;

b) Admitted to the hospital, AR 700-84, Issue and Sale of Personal Clothing (18 Nov. 2004), para 12-15; and,

c) Placed in pretrial or post-trial confinement, AR 190-47, The Army Corrections System (15 Jun. 2006).

4. Discretion and Automobile Inventories. *Florida v. Wells*, 495 U.S. 1 (1990). When defendant was arrested for DWI and his car impounded and inventoried, the police improperly searched a locked suitcase in the trunk of car despite fact that there was no written inventory regulation. This search was insufficiently regulated to satisfy the Fourth Amendment.

5. *See* Anderson, *Inventory Searches*, 110 Mil. L. Rev. 95 (1985) (examples and analysis of military inventories).

6. Sobriety Checkpoints.

a) General rule. The Fourth Amendment does not prohibit the brief stop and detention of all motorists passing through a highway roadblock set up to detect drunk driving; neither probable cause nor reasonable suspicion are required as the stop is constitutionally reasonable. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990).

7. Crime Prevention Roadblocks. *Indianapolis v. Edmond*, 531 U.S. 32 (2000). Public checkpoints/roadblocks for the purpose of drug interdiction violate the Fourth Amendment. Stops for the purpose of general crime control are only justified when there is some quantum of individualized suspicion.

8. Information Gathering Roadblocks. *Lidster v. Illinois*, 540 U.S. 419 (2004). A roadblock conducted in order to gather information regarding a crime committed one week earlier did not violate the *Edmond* rule, and was not unconstitutional.

H. Emergency Searches.

1. General rule. In emergencies, a search may be conducted to render medical aid or prevent personal injury. Mil. R. Evid. 314(i). *See Brigham City, Utah v. Stuart et al*., 547 U.S. 398 (2006). Police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously threatened with such injury.

a) *Michigan v. Fisher*, 130 S. Ct 546 (2009). Officers "do not need ironclad proof of a 'likely serious, life-threatening' injury to invoke the emergency aid exception."

b) *Michigan v. Taylor*, 436 U.S. 499 (1978). Entry into burning or recently burnt building is permissible.

c) *United States v. Jacobs*, 31 M.J. 138 (C.M.A. 1990). Warrantless entry into accused's apartment by landlord was permissible because apartment was producing offensive odor because of spoiled food.

d) *United States v. Korda*, 36 M.J. 578 (A.F.C.M.R. 1992). Warrantless entry into accused's apartment was justified by emergency when supervisor thought accused had or was about to commit suicide.

I. Searches for Medical Purposes.

1. General rule. Evidence obtained from a search of an accused's body for a valid medical purpose may be seized. Mil. R. Evid. 312(f). *See United States v. Stevenson*, 53 M.J. 257 (C.A.A.F. 2000) (holding that the medical purpose exception applies to members of the Temporary Disability Retired List), *cert. denied*, 532 U.S. 919 (2001).

2. *United States v. Maxwell*, 38 M.J. 148 (C.M.A. 1993). Blood alcohol test of accused involved in fatal traffic accident was medically necessary, despite the fact that the test result did not actually affect accused's treatment. Test result was admissible.

3. Drug Treatment Programs. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). The Court rejected "special needs" exception for warrantless (urinalysis) searches of pregnant women involved in a hospital drug treatment program. The ultimate purpose of the program was for law enforcement and not to get women in the program into substance abuse treatment.

J. School Searches. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). School officials may conduct searches of students based upon "reasonable grounds" as long as the search is not "excessively intrusive." *See also Board of Education v. Earls*, 536 U.S. 822 (2002) (holding that a policy adopted by the school district to require all students to consent to urinalysis testing in order to compete in extracurricular activities did not violate the Fourth Amendment, but was reasonable).

VII. EXCLUSIONARY RULE AND EXCEPTIONS.

A. The exclusionary rule is the remedy for illegal searches and/or illegally seized evidence: such evidence is excluded from trial. However, there are exceptions to this rule. If evidence was obtained in good faith by law enforcement officials; was discovered independent of a "tainted" source; or, would have been inevitably discovered, despite a "tainted" source, the evidence may be admitted. Illegally obtained evidence may also be introduced for impeachment purposes by the government.

B. The Exclusionary Rule.

1. Judicially created rule. Evidence obtained directly or indirectly through illegal government conduct is inadmissible. *Weeks v. United States*, 232 U.S. 383 (1914); *Nardone v. United States*, 308 U.S. 338 (1939); *Mapp v. Ohio*, 376 U.S. 643 (1961) (the exclusionary rule is a procedural rule that has no bearing on guilt, only on respect for "dignity" or "fairness").

2. Mil. R. Evid. 311(a). Evidence obtained as a result of an unlawful search or seizure made by a person acting in a government capacity is inadmissible against the accused.

3. Violation of regulations does not mandate exclusion.

a) Urinalysis regulations.

(1) *United States v. Pollard*, 27 M.J. 376 (C.M.A. 1989). Deviation from Coast Guard urinalysis regulation did not make urine sample inadmissible.

(2) *But see United States v. Strozier*, 31 M.J. 283 (C.M.A. 1990). Gross deviations from urinalysis regulation allow exclusion of positive test results.

b) Financial privacy regulations. *United States v. Wooten*, 34 M.J. 141 (C.M.A. 1992). Failure to comply with federal statute and regulation requiring notice before obtaining bank records did not mandate exclusion of records.

C. Exception: Good Faith.

1. General rule. Evidence is admissible when obtained by police relying in good faith on facially valid warrant that later is found to lacking probable cause or otherwise defective.

a) *United States v. Leon*, 468 U.S. 897 (1984). Exclusionary rule was inapplicable even though magistrate erred and issued warrant based on anonymous tipster's information which amounted to less than probable cause.

b) Rationale. Primary purpose of exclusionary rule is to deter police misconduct; rule should not apply where there has been no police misconduct. There is no need to deter a magistrate's conduct.

2. Limitations. *United States v. Leon*, 468 U.S. 897 (1984). Good faith exception does not apply, even if there is a search warrant, where:

a) Police or affiant provide deliberately or recklessly false information to the magistrate (bad faith by police);

b) Magistrate abandons his judicial role and is not neutral and detached (rubber-stamp magistrate);

c) Probable cause is so obviously lacking to make police belief in the warrant unreasonable (straight face test); or,

d) The place or things to be searched are so clearly misidentified that police cannot presume them to be valid (glaring technical deficiencies).

3. Mil. R. Evid. 311(b)(3): Evidence obtained from an unlawful search or seizure may be used if:

a) "competent individual" authorized search or seizure;

b) individual issuing authorization had "a substantial basis" to find probable cause;

c) official executing authorization objectively relied in "good faith" on the authorization.

4. What is a "substantial basis" under Mil. R. Evid. 311(b)(3)(B)? *United States v. Carter*, 54 M.J. 414 (C.A.A.F. 2001). The rule is satisfied if the law enforcement officer has a reasonable belief that the magistrate had a "substantial basis" for determining probable cause.

5. Good faith exception applies to searches authorized by a commander. *United States v. Lopez*, 35 M.J. 35 (C.M.A. 1992). Good faith exception applied to allow admission of ration cards discovered during search authorized by accused's commander.

6. Good faith exception applies to searches authorized by military magistrate. *United States v. Carter*, 54 M.J. 414 (C.A.A.F. 2001). Regardless of whether the military magistrate had a substantial basis to issue an authorization for a blood sample, the CID SA acted in good faith in collecting the sample, and it was admissible.

7. The good faith exception applies to more than just "probable cause" determinations; it may also save a search authorization where the commander who authorized the search did not have control over the area searched.

a) On-post searches. *United States v. Mix*, 35 M.J. 283 (C.M.A. 1992). The good faith exception applied where a commander had a good faith reasonable belief that he could authorize a search of an auto in a dining facility parking lot, even though the commander may not have had authority over the parking lot.

b) Off-post searches overseas. *United States v. Chapple*, 36 M.J. 410 (C.M.A. 1993). The good faith exception applied to search of accused's off-post apartment overseas even though commander did not have authority to authorize search because accused was not in his unit.

8. The good faith exception may apply even when a warrant has been quashed. *Arizona v. Evans*, 514 U.S. 1 (1995). The exclusionary rule does not require suppression of evidence seized incident to an arrest based on an outstanding arrest warrant in a police computer, despite the fact the warrant was quashed 17 days earlier. Court personnel were responsible for the inaccurate computer record, because they failed to report that the warrant had been quashed.

a) *Arizona v. Evans* rule expanded in *Herring v. United States*, 129 S. Ct 695 (2009). Exclusionary rule does not apply when police officers rely on arrest warrant from a different county that had been recalled, but never removed from a shared computer database due to negligence by other county's police officers. Exclusionary rule has no deterrent value when police mistakes are the result of negligence, rather than deliberate violations or "systemic error or disregard of constitutional requirements."

9. *But cf. United States v. Maxwell*, 45 M.J. 406 (C.A.A.F. 1996). Anticipatory search of e-mail by online company, at behest of government and prior to service of warrant shows "no reliance on the language of the warrant for the scope of the search." Thus, good faith exception was not applicable. Evidence suppressed.

D. Exception: Independent Source.

1. General rule. Evidence discovered through a source independent of the illegality is admissible.

a) *Murray v. United States*, 487 U.S. 533 (1988). Police illegally entered warehouse without warrant and saw marijuana. Police left warehouse without disturbing evidence and obtained warrant without telling judge about earlier illegal entry. Evidence was admissible because it was obtained with warrant untainted by initial illegality.

b) Rationale. Police should not be put in worse position than they would have been in absent their improper conduct.

2. Evidence obtained through independent and voluntary acts of third parties will render evidence admissible under independent-source doctrine. See *United States v. Fogg*, 52 M.J. 144, 151 (C.A.A.F. 1999) (discussing independent-source doctrine as alternative basis for not invoking the exclusionary rule).

3. Search based on both legally and illegally obtained evidence. *United States v. Camanga*, 38 M.J. 249 (C.M.A. 1993). Independent source doctrine applied where affidavit supporting search authorization contained both legally and illegally obtained evidence. After excising illegal information, court found remaining information sufficient to establish probable cause.

4. Mil. R. Evid. 311(e)(2). Evidence challenged as derived from an illegal search or seizure may be admitted if the military judge finds by a preponderance of evidence that it was not obtained as a result of the unlawful search or seizure.

E. Exception: Inevitable Discovery.

1. General rule. Illegally obtained evidence is admissible if it inevitably would have been discovered through independent, lawful means. *See* Mil. R. Evid. 311(b)(2).

a) *Nix v. Williams*, 467 U.S. 431 (1984). Accused directed police to murder victim's body after illegal interrogation. Body was admissible because it would have inevitably been discovered; a systematic search of the area where the body was found was being conducted by 200 volunteers.

b) Rationale. The police should not benefit from illegality, but should also not be put in worse position.

2. Examples:

a) *United States v. Kozak*, 12 M.J. 389 (C.M.A. 1982). Illegal search of train station locker and seizure of hashish, which exceeded authority to wait for accused to open locker and then apprehend him, did not so taint apprehension of accused as to make subsequent seizure of drugs after accused opened locker inadmissible. Drugs would have been inevitably discovered.

b) *United States v. Carrubba*, 19 M.J. 896 (A.C.M.R. 1985). Evidence found in trunk of accused's car admissible despite invalid consent to search. Evidence inevitably would have been discovered as police had probable cause and were in process of getting search authorization.

c) *United States v. Kaliski*, 37 M.J. 105 (C.M.A. 1993). Inevitable discovery doctrine should be applied to witness testimony only if prosecution establishes witness is testifying of her own free will, independent of illegal search or seizure. Testimony of accused's partner in sodomy should have been suppressed where she testified against accused only after police witnessed sodomy during illegal search.

d) *Computers* – Inevitable discovery is a commonly argued exception in otherwise unlawful computer searches. *See United States v. Wallace*, 66 M.J. 5 (C.A.A.F. 2008) (finding results of unlawful search admissible, but with only 3 judges finding inevitable discovery as the basis for admissibility); *United States v. Osorio*, 66 M.J. 632 (A.F. Ct. Crim. App. 2008) (finding forensic examiner's search of computer unlawful because it went beyond the scope of the warrant and refusing to allow inevitable discovery exception based on facts of the case).

3. Distinguish between "independent source" and "inevitable discovery."

a) Independent source deals with *facts*. Did police in fact find the evidence independently of the illegality?

b) Inevitable discovery deals with hypotheticals. *Would* the police have found the evidence independently of the illegal means?

F. Exception: Attenuation of Taint.

1. General rule. Evidence that would not have been found *but for* official misconduct is admissible if the causal connection between the illegal act and the finding of the evidence is so attenuated as to purge that evidence of the primary taint. *See Wong Sun v. United States*, 371 U.S. 471, 484-87 (1963)(holding that the unlawful arrest did not taint subsequent confession where it was made after his arraignment, release on own recognizance, and voluntary return to the police station several days later). *See also U.S. v. Conklin*, 63 M.J. 333 (C.A.A.F. 2006) which establishes three factors to determine whether an accused's consent was an independent act of free will, breaking the causal chain between the consent and a prior unconstitutional search: (1) the temporal proximity of the illegal search and the consent; (2) the presence of intervening circumstances; and (3) the purpose and the flagrancy of the initial search. *See also U.S. v. Jones*, 64 M.J. 596 (A. Ct. Crim. App., 2007).

2. *United States v. Rengel*, 15 M.J. 1077 (N.M.C.M.R. 1983). Even if accused was illegally apprehended, later seizure of LSD from him was attenuated because he had left the area and was trying to get rid of drugs at the time of the seizure.

3. *But see Taylor v. Alabama*, 457 U.S. 687, 691 (1982). Defendant was arrested without probable cause, repeatedly questioned by police who took fingerprints and put him in line-up without counsel present. Confession was obtained six hours after arrest was inadmissible.

4. Mil. R. Evid. 311(e)(2). Evidence challenged as derived from an illegal search or seizure may be admitted if the military judge finds by a preponderance of evidence that it was not obtained as a result of the unlawful search or seizure.

G. Exception: Impeachment.

1. Illegally obtained evidence may be used to impeach accused's in-court testimony on direct examination or to impeach answers to questions on cross-examination. *United States v. Havens*, 44 U.S. 962 (1980). Defendant's testimony on direct that he did not know his luggage had a T-shirt that was being used for smuggling cocaine allowed admissibility of illegally obtained T-shirt on cross-examination to impeach defendant's credibility. *See also Walder v. United States*, 347 U.S. 62 (1954).

2. Mil. R. Evid. 311(b)(1). Evidence that was obtained as a result of an unlawful search or seizure may be used to impeach by contradiction the in-court testimony of the accused.

APPENDIX A: SECTION III DISCLOSURE

UNITED STATES	)	
	)	Fort Blank, Missouri
v.	)	
	)	DISCLOSURE OF
William Green	)	SECTION III EVIDENCE
Private (E-1), U.S. Army	)	
A Co., 1st Bn, 13th Inf.	)	22 July 200X
8th Inf. Div. (Mech)	)	

Pursuant to Section III of the Military Rules of Evidence, the defense is hereby notified:

1. Rule 304(d)(1). There are (no) relevant statements, oral or written, by the accused in this case, presently known to the trial counsel (and they are appended hereto as enclosure ___).

2. Rule 311(d)(1). There is (no) evidence seized from the person or property of the accused or believed to be owned by the accused that the prosecution intends to offer into evidence against the accused at trial (and it is described with particularity in enclosure ____) (and it is described as follows: _____).

3. Rule 321(d)(1). There is (no) evidence of a prior identification of the accused at a lineup or other identification process which the prosecution intends to offer against the accused at trial (and it is described with particularity in enclosure ____) (and it is described as follows: _____

_____).

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

PETER MUSHMAN
CPT, JA
Trial Counsel

APPENDIX B: GUIDE TO ARTICULATING PROBABLE CAUSE

1. Probable cause to authorize a search exists if there is a *reasonable belief, based on facts*, that the person or evidence sought is at the place to be searched. Reasonable belief is more than mere suspicion. Witness or source should be asked three questions:

A. What is where and when? Get the facts!

1. Be specific: how much, size, color, etc.

2. Is it still there (or is information stale)?

a) If the witness saw a joint in barracks room two weeks ago, it is probably gone; the information is stale.

b) If the witness saw a large quantity of marijuana in barracks room one day ago, probably some is still there; the information is not stale.

B. How do you know? Which of these apply?

1. "I saw it there." Such personal observation is extremely reliable.

2. "He [the suspect] told me." Such an admission is reliable.

3. "His [the suspect's] roommate/wife/ friend told me." This is hearsay. Get details and call in source if possible.

4. "I heard it in the barracks." Such rumor is unreliable unless there are specific corroborating and verifying details.

C. Why should I believe you? Which of these apply?

1. Witness is a good, honest soldier; you know him from personal knowledge or by reputation or opinion of chain of command.

2. Witness has given reliable information before; he has a good track record (CID may have records).

3. Witness has no reason to lie.

4. Witness has truthful demeanor.

5. Witness made statement under oath. ("Do you swear or affirm that any information you give is true to the best of your knowledge, so help you God?")

6. Other information corroborates or verifies details.

7. Witness made admission against own interests.

2. The determination that probable cause exists must be based on facts, not only on the conclusion of others.

3. The determination should be a common sense appraisal of the totality of all the facts and circumstances presented.

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TAB L

Table of Contents

I. BACKGROUND 1

II. FIFTH AMENDMENT & *MIRANDA* 4

III. SIXTH AMENDMENT 8

IV. ARTICLE 31, UCMJ 9

V. RIGHTS WARNINGS CHART 26

VI. EFFECT OF IMPLEMENTING THE RIGHTS 27

VII. WAIVER OF RIGHTS 35

VIII. VOLUNTARINESS 39

IX. ADMITTING CONFESSIONS MADE AFTER IMPROPER POLICE CONDUCT 44

X. THE EXCLUSIONARY RULE 46

XI. MENTION OF INVOCATION AT TRIAL 48

XII. PROCEDURE 52

XIII. IMMUNITY 56

XIV. CONCLUSION 61

MAJ ANDREW D. FLOR
JANUARY 2011

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SELF-INCRIMINATION

Outline of Instruction

Open confession is good for the soul.

- Old Scottish Proverb

I. BACKGROUND

A. Introduction.

In the military, the law of self-incrimination embraces Article 31, UCMJ; the Fifth Amendment; the Sixth Amendment; and, the voluntariness doctrine. Each source of law provides unique protections, triggered by distinct events. When analyzing a self-incrimination issue, therefore, it is imperative to categorize the analysis. First, determine the relevant source or sources of law in issue. Next, evaluate the situation and decide if the protections afforded under each particular source of law have been triggered. If protections have been triggered, determine if there has been a violation of those protections. Typically, a challenge to a confession involves more than one source of self-incrimination law, and several steps of analysis. The confession or admission is admissible when the rights afforded under each source of applicable law have been observed.

B. Sources of law.

1. The Fifth Amendment.

"No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

2. Article 31(a), UCMJ.

"No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him."

3. The Sixth Amendment.

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

4. The Voluntariness Doctrine.

Looking at the totality of the circumstances, was the confession the product of an essentially free and unconstrained choice by its maker, or was the accused's will overborne and his capacity for self-determination critically impaired. *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961).

5. The collected law of *Privilege Against Self-Incrimination* (PASI) principles, statutes, and decisions is embodied in the MCM at Mil. R. Evid. 301, 304-305.

C. Definitions. Mil. R. Evid. 304(c).

1. Confession: "A 'confession' is an acknowledgement of guilt."

2. Admission: "An 'admission' is a self-incriminating statement falling short of an acknowledgment of guilt, even if it was intended by its maker to be exculpatory."

D. Scope of the protection.

1. Standard for protection.

MAJ ANDREW D. FLOR
JANUARY 2011

Mil. R. Evid. 301(a): ". . . evidence of a testimonial or communicative nature." "Article 31, like the Fifth Amendment, focuses on testimonial compulsion." *United States v. Williams*, 23 M.J. 362, 366 (C.M.A. 1987).

2. Applying the standard.

a. Oral or written statements are generally protected.

Pennsylvania v. Muniz, 496 U.S. 582 (1990). Drunk driving suspect's slurred speech and other evidence showing his lack of muscular coordination constituted nontestimonial and, therefore, admissible aspects of his unwarned responses to police questioning. In contrast, the suspect's answer to police questioning about the date of his sixth birthday was testimonial and should have been suppressed. "Whenever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief, the suspect confronts the 'trilemma' of truth, falsity, or silence and hence the response (whether based on truth or falsity) contains a testimonial component." *Id*. at 597.

b. Verbal acts (physical act which is the equivalent of speaking) are generally protected.

(1) *United States v. Whipple*, 4 M.J. 773 (C.G.C.M.R. 1978). The accused's verbal act of handing over drugs in response to officer's request was found to be a protected "statement."

(2) *Fisher v. United States*, 425 U.S. 391 (1976). Accounting documents used to prepare tax returns were not protected because they were prepared voluntarily, long before any prosecution was being considered. Additionally, the act of turning over the documents was not testimonial because it conveyed no factual information that the government did not already have.

(3) *United States v. Hubbell*, 530 U.S. 27 (2000). The Supreme Court held that the act of turning over documents in response to a subpoena *duces tecum* and a grant of immunity was a testimonial act because the prosecutor did not know of the location or even existence of the documents. The defendant had to use mental and physical steps to inventory the documents, and his production of the documents communicated their existence, possession, and authenticity.

(4) *United States v. Swift*, 53 M.J. 439 (C.A.A.F. 2000). A divorce decree turned over by the accused was not testimonial evidence because it was voluntarily prepared before he was ordered to produce it by his command. Additionally, the act of turning over the decree was not testimonial because the existence and location of the document was a "foregone conclusion" and added "little or nothing to the sum total of the Government's information." Finally, the Court stated that even if the act was testimonial, it fell under the "required records exception," since the decree was maintained for "legitimate administrative purposes."

c. Physical characteristics are not protected.

(1) Dental Impressions for bite mark comparisons not protected. *United States v. Martin*, 9 M.J. 731 (N.M.C.M.R. 1979), *aff'd on other grounds*, 13 M.J. 66 (C.M.A. 1982).

(2) Handwriting sample not protected; dicta on voice sample. *United States v. Harden*, 18 M.J. 81 (C.M.A. 1984).

(3) Voice samples not protected. *United States v. Akgun*, 24 M.J. 434 (C.M.A. 1987).

(4) Body fluids not protected.

(a) Blood sample is not testimonial. *United States v. Armstrong*, 9 M.J. 374 (C.M.A. 1980).

(b) Urine specimen not protected. *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983).

(c) Note however, that under Mil. R. Evid. 304(h)(4), if an accused refuses a lawful order to submit for chemical analysis a sample of his or her blood, breath, urine, or other body substance, evidence of such refusal may be admitted into evidence on:

(i) A charge of violating an order to submit such a sample; or,

(ii) Any other charge on which the results of the chemical analysis would have been admissible.

d. Identification is generally not protected by PASI. *Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County*, 542 U.S. 177 (2004). A request for identification during a *Terry* stop did not fall within the scope of protection afforded by the Fifth Amendment and *Miranda*. The Court held that to qualify as incriminating, the individual must reasonably believe that his communication could be used in a criminal prosecution against him or could provide a link to other evidence that might be so used. Providing personal identification is normally insignificant, and would be incriminating in only the most unusual circumstances. In this case, the defendant failed to show that his refusal to comply with the officer's requests was based on a real fear that his identity would incriminate him or lead to evidence that could be used against him. However, the Court left open the possibility that there may be a circumstance where furnishing identification might lead to evidence needed to convict the witness of a separate offense, and therefore be protected by the Fifth Amendment. *See also Pennsylvania v. Muniz*, 496 U.S. 582 (1990); *United States v. Tubbs*, 34 M.J. 654 (A.C.M.R. 1992) (questioning to identify a suspect during "booking" process does not require a testimonial response).

e. Duty to report — partially protected. PASI is violated if a regulatory duty to report misconduct will directly lead to, or is, evidence of one's own misconduct.

(1) *United States v. Heyward*, 22 M.J. 35 (C.M.A. 1986). Regulation requiring Airmen to report drug abuse of other Airmen is valid, but the PASI protects against conviction for dereliction of duty where "at the time the duty to report arises, the witness to drug abuse is already an accessory or principal to the illegal activity that he fails to report . . . ."

(2) *United States v. Sanchez*, 51 M.J. 165 (C.A.A.F. 1999). Conviction for misprision of a serious offense upheld where accused failed to report an aggravated assault. Court said if accused had immediately reported the offense, he would not have committed misprision.

(3) *United States v. Medley*, 33 M.J. 75 (C.M.A. 1991). Court declined to extend *Heyward* exception to cases where a social relationship between drug users is so interrelated that it would be impossible to reveal one incident without potentially incriminating the accused on a separate incident. *See also United States v. Bland*, 39 M.J. 921 (N.M.C.M.R. 1994).

(4) *United States v. Hammond*, 60 M.J. 512 (A. Ct. Crim. App. 2004). The Army court held that a conviction of fleeing the scene of an intentional collision does not violate the Fifth Amendment or Article 31, UCMJ. Balancing "the important governmental purpose in securing . . . information against the right of the servicemember to be protected from compulsory self-incrimination," the service court found that "although staying at the scene may lead to inquiry that in turn leads to arrest and charge, those developments depend on different factors and independent evidence."

II. FIFTH AMENDMENT & *MIRANDA*

"No person . . . shall be compelled in any criminal case to be a witness against himself . . ." U.S. Const. amend. V.

In 1966, with the case *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that prior to any custodial interrogation, a subject must be warned that he has a right: (1) to remain silent, (2) to be informed that any statement made may be used as evidence against him, and (3) to the presence of an attorney. The goal of *Miranda* was to put in place a procedural safeguard that would counter the inherently coercive environment of a police-dominated, incommunicado interrogation. In 1967, the Court of Military Appeals applied *Miranda* to military interrogations in *United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967). In *Dickerson v. United States*, 530 U.S. 428 (2000), the Supreme Court reaffirmed that *Miranda* is a constitutional decision that the Congress is not permitted to "overrule." The Supreme Court also implicitly reaffirmed all of the exceptions to *Miranda*.

The trigger for *Miranda* warnings is "custodial interrogation." The test for custody is an objective examination, from the perspective of the subject, into whether there was a formal arrest or restraint or other deprivation of freedom of action in any significant way. The test for an interrogation is also an objective test, but from the perspective of the person asking the questions, i.e., the police officer. The test is whether the comments made are those reasonably likely to elicit an incriminating response. For both, the subjective views harbored by either the interrogating officer or the person being questioned are irrelevant.

A. The *Miranda* Warnings.

Miranda v. Arizona, 384 U.S. 436 (1966). Prior to any custodial interrogation, a subject must be warned:

1. That he/she has a right to remain silent;

2. That any statement made may be used as evidence against him/her; and,

3. That he/she has a right to the presence of an attorney, either retained or appointed.

Florida v. Powell, 130 S.Ct. 1195 (2010). *Miranda* did not require specific language to be used. As long as the warnings reasonably convey the three warnings above, then the warnings will be held to comply with *Miranda*.

B. Application to the Military.

1. Mil. R. Evid. 305(d)(1). "When evidence of a testimonial or communicative nature . . . is sought or is a reasonable consequence of an interrogation, an accused or a person suspected of an offense is entitled to consult with counsel . . . ."

2. *United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967). *Miranda* applies to military interrogations.

C. The *Miranda* Trigger.

The requirement for *Miranda* warnings is triggered by initiation of custodial interrogation.

1. What is the test for custody?

a. A person is in custody if he is taken into custody, could reasonably believe himself to be in custody, or otherwise deprived of his freedom of action in any significant way. *See* Mil. R. Evid. 305(d)(1)(A).

b. Custody is evaluated based on an objective test from the perspective of a "reasonable" subject.

c. *Stansbury v. California*, 511 U.S. 318 (1994). In 1994, the Supreme Court reaffirmed that the test for custody under *Miranda* is an objective examination of whether there was formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. The subjective views harbored by either the interrogating officer or the person being questioned are irrelevant.

Why? It was the coercive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time of the questioning, which led to imposition of the *Miranda* requirements.

d. *United States v. Miller*, 46 M.J. 80 (C.A.A.F. 1997). The CAAF applied the following "mixed question of law and fact" analysis in determining custody: 1) what were the circumstances surrounding the interrogation (question of fact); and, 2) given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave (question of law). Applying this objective standard, the court found no custody where the accused (1) was not under formal arrest; (2) voluntarily accepted an invitation to talk with an officer about the alleged misconduct; (3) voluntarily participated in the interview; (4) was treated cordially by the officer; and, (5) was left alone in the station house for a short period of time.

e. *United States v. Miller*, 48 M.J. 49 (C.A.A.F. 1998). After receiving a report about a gang robbery, an MP detained the accused to ascertain his identity and whereabouts during the evening. The CAAF determined that *Miranda* warnings were not required because the accused was not in custody. [Note: This is a different *Miller* than the case above, 46 M.J. 80.]

f. *United States v. Chatfield*, 67 M.J. 432 (C.A.A.F. 2009). The CAAF cited *Thompson v. Keohane*, 516 U.S. 99 (1995), for the proposition that two inquiries are necessary to determine custody: 1) what are the circumstances surrounding the interrogation; and, 2) would a reasonable person in those circumstances have felt that he or she was not at liberty to terminate the interrogation. Despite the fact that questioning occurred in the station house, the CAAF held that appellant appeared there voluntarily, that the interrogation occurred in the detective's office instead of an interrogation room, and the duration of the interrogation all point to the fact that a reasonable person would not find that the appellant was in custody. No *Miranda* warnings were required.

2. Situation and location factors for determining custody.

a. Roadside stops.

Berkemer v. McCarty, 468 U.S. 420 (1984). Highway patrol stopped a car that was weaving and, without giving *Miranda* warnings, asked the driver if he had used intoxicants. Court found no custody for *Miranda* purposes because: (1) motorist expects detention will be brief; and, (2) stop is in "public" and less "police dominated." "[T]he safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" The initially uncommunicated decision by the police to arrest the driver does not bear on whether the defendant is "in custody." *See also United States v. Rodriguez*, 44 M.J. 766 (N-M. Ct. Crim. App. 1996) (questioning of suspect about illegal gun sales during roadside stop was noncustodial), *aff'd*, 60 M.J. 239 (C.A.A.F. 2004).

b. In the bedroom.

Orozco v. Texas, 394 U.S. 324 (1969). Suspect was "in custody" for *Miranda* purposes where he was questioned in his bedroom and an officer testified the suspect was not free to go, but was "under arrest."

c. Age is not a factor.

Yarborough v. Alvarado, 541 U.S. 652 (2004). The Supreme Court overruled the 9th Circuit's determination that *Miranda* required courts to consider a defendant's age and his lack of a prior criminal history in determining custody. The Court noted that *Miranda* established an objective test for custody. Age and prior criminal experience are individual characteristics of a suspect, which if required for a custody determination, would create a subjective test.

d. Military status as a factor in custody evaluation.

United States v. Jordan, 44 C.M.R. 44 (C.M.A. 1971). Questioning by a superior is not *per se* custodial, but "questioning by a commanding officer or military police or investigators at which the accused is given an Article

31 warning, strongly suggests that an accused is also entitled to a right to counsel warning under *Miranda* and *Tempia*."

e. Coercive environment.

Illinois v. Perkins, 496 U.S. 292 (1990). "[A]n undercover law enforcement officer posing as a fellow inmate need not give *Miranda* warnings to an incarcerated suspect before asking questions that may elicit an incriminating response" about an uncharged offense. "*Miranda* forbids coercion, not strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner."

3. Interrogation.

Mil. R. Evid. 305(b)(2). "'Interrogation' includes any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning." Note: the term "interrogation" has the same meaning under the Fifth Amendment as it does for Article 31(b) (*see infra* Sec. IV. G. 3. [When must warnings be given?] of this outline).

D. The "Public Safety" Exception.

New York v. Quarles, 467 U.S. 649 (1984). After apprehending a suspect with an empty shoulder holster in a grocery store, officer did not read rights warnings, but asked where the gun was. The Court held that "overriding considerations of public safety justify the officer's failure to provide *Miranda* warnings before he asked questions devoted to locating the abandoned weapon."

E. Who can invoke the Fifth Amendment Privilege?

1. *Ohio v. Reiner*, 532 U.S. 17 (2001). The Supreme Court held that an individual could invoke his Fifth Amendment rights even if he believed he was innocent. All that is necessary for a valid invocation of the privilege against self-incrimination is that it be "evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." The Court further recognized "that truthful responses of an innocent witness, as well as those of a wrongdoer, may provide the government with incriminating evidence from the speaker's own mouth."

2. *Hoffman v. United States*, 341 U.S. 479 (1951). Privilege not only extends to answers that would in themselves support a conviction, but also apply to those responses which "would furnish a link in the chain of evidence needed to prosecute the claimant."

3. *McKune v. Lile*, 536 U.S. 24 (2002). As part of a sexual abuse treatment program, qualifying inmates can be required to complete and sign an "Admission of Responsibility" form, in which they accept responsibility for the crimes for which they have been sentenced, and complete a sexual history form detailing all prior sexual activities, or face a reduction of their prison privileges for noncompliance. The Supreme Court held that the state had a legitimate penological interest in rehabilitating inmates, and the *de minimus* adjustment of prison restrictions served this proper prison goal. *See also United States v. McDowell*, 59 M.J. 662 (A.F. Ct. Crim. App. 2003) (holding that a naval brig's policy of encouraging participation in its sex offender treatment program and conditioning relatively minor privileges on such participation does not violate a prisoner's Fifth Amendment privilege against self-incrimination).

III. SIXTH AMENDMENT

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

The *Miranda* counsel warning requirement must be distinguished from the Sixth Amendment counsel warning.[1] Whereas *Miranda* concerns assistance of counsel in determining whether to exercise the PASI, under the Sixth Amendment an individual has the right to assistance of counsel for his defense in all criminal prosecutions. Although an individual's exercise of his Sixth Amendment right may have the ancillary effect of invoking the PASI, the trigger and scope of the rights are different. Under the Sixth Amendment, a right to counsel is triggered by initiation of the adversarial criminal justice process. In the civilian sector, the trigger point is reached upon indictment. In the military, it is triggered by the preferral of charges.

A. Under Mil. R. Evid. 305(d)(1)(B), the Sixth Amendment right to counsel warning is required for interrogations by a person subject to the code acting in a law enforcement capacity, conducted subsequent to preferral of charges (not the imposition of pretrial restraint under RCM 304), where the interrogation concerns the offenses or matters that were the subject of the preferral.[2]

B. Sixth Amendment provisions are limited to law enforcement activity.

There was no violation of the Sixth Amendment where, following preferral, a state social services worker who had an independent duty under state law to investigate child abuse interviewed the accused. The social worker never contacted the government before or after the interview until subpoenaed. If a non-law enforcement official is not serving the "prosecution team," he is not a member of the "prosecutorial forces of organized society," and thus is not barred from contacting an accused based on a prior Sixth Amendment invocation. *United States v. Moreno*, 36 M.J. 107 (C.M.A. 1992).

C. Neither custody nor "coercive influences" are required to trigger Sixth Amendment protections.

1. Once formal proceedings begin, police may not "deliberately elicit" statements from an accused without an express waiver of the right to counsel. Mil. R. Evid. 305(g). This is true whether the questioning is in a custodial setting by persons known by the accused to be police, *Brewer v. Williams*, 430 U.S. 387 (1977); surreptitiously by a co-accused, *Maine v. Moulton*, 474 U.S. 159 (1985); through police monitored radio transmissions, *Massiah v. United States*, 377 U.S. 201 (1964); or, when police ask questions of an indictee about his drug use and affiliations, *Fellers v. United States*, 540 U.S. 519 (2004).

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[1] Issuing *Miranda* warnings has been found sufficient to satisfy the Sixth Amendment right to counsel warning requirement. *Patterson v. Illinois*, 487 U.S. 285 (1988). *See also Montejo v. Louisiana*, 129 S.Ct. 2079 (2009).

[2] The Analysis to Mil. R. Evid. 305(d) notes it may be possible under unusual circumstances for the courts to find the Sixth Amendment right attaches prior to preferral. *See United States v. Wattenbarger*, 21 M.J. 41 (C.M.A. 1985) (pretrial confinement and clear movement toward prosecution found to trigger Sixth Amendment counsel right).

That being said, mere confinement is not enough to trigger Sixth Amendment protections. A request for counsel at an RCM 305(i) hearing (hearing to review pretrial restraint) before charges have been preferred neither invokes a Sixth Amendment right to counsel, because the hearing is not an adversarial proceeding, nor invokes a Fifth Amendment right to counsel, because the hearing is not the functional equivalent of a custodial interrogation. *United States v. Hanes*, 34 M.J. 1168 (N.M.C.M.R. 1992).

2. Mere presence as a listening post does not violate Sixth Amendment rights. *Kuhlmann v. Wilson*, 477 U.S. 436 (1986) (defendant's cellmate instructed only to listen and report). However, if an informant initiates contact and conversation after indictment for express purpose of gathering information about charged activities, statements made by defendant are obtained in violation of accused's Sixth Amendment right to counsel and may not be used in government's case-in-chief. *United States v. Henry*, 447 U.S. 264 (1980); *Kansas v. Ventris*, 129 S.Ct. 1841 (2009); *United States v. Langer*, 41 M.J. 780 (A.F. Ct. Crim. App. 1995).

D. Questioning must relate to the charged offense.

Texas v. Cobb, 532 U.S. 162 (2001). Appellant's Sixth Amendment right to counsel was not violated when police questioned him, without his counsel being present, about a murder that occurred during a burglary, after he had previously been arraigned for the underlying burglary offense. The Supreme Court stated that the Sixth Amendment right to counsel attaches only to charged offenses and to those offenses that would be "considered the same offense under the *Blockburger*[3] test," even if not formally charged.

IV. ARTICLE 31, UCMJ

While the plain meaning of the statute would appear to answer these questions, 25 years of litigation and judicial interpretation have made it clear that virtually nothing involving Article 31 has a "plain meaning."[4]

Fredric Lederer, 1976

A. Introduction.

In 1950, Congress enacted Article 31(b) to dispel a service member's inherent compulsion to respond to questioning from a superior in either rank or position. As a result, the protections under Article 31(b) are triggered when a suspect or an accused is questioned (for law enforcement or disciplinary purposes) by a person subject to the UCMJ who is acting in an official capacity, and perceived as such by the suspect or accused. Questioning refers to any words or actions by the questioner that he should know are reasonably likely to elicit an incriminating response. A suspect is a person who the questioner believes, or reasonably should believe, committed an offense. An accused is a person against whom a charge has been preferred.

B. Content of the warning. *See also* Mil. R. Evid. 305(c).

A person subject to the code who is required to give warnings under Article 31(b) may not interrogate or request any statement from an accused or suspect without first informing him/her:

1. of the nature of the accusation;
2. that he/she has the right to remain silent; and,
3. that any statement he/she does make may be used as evidence against him/her.

(Note: Unlike *Miranda* warnings, there is no right to counsel.)

C. General notice requirement.

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[3] *Blockburger v. United States*, 284 U.S. 299 (1932). "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."

[4] Captain Fredric I. Lederer, *Rights Warnings in the Armed Services*, 72 MIL. L. REV. 1, 11 (1976).

Article 31(b) may be satisfied by a general recitation of the three elements described above. For example, Article 31(b) was satisfied when state child protective services social worker advised the accused: he was suspected of sexually abusing his daughter; he did not have to speak with her or answer any questions; and, anything he said could be repeated by her in court if subpoenaed. *United States v. Kline*, 35 M.J. 329 (C.M.A. 1992).

D. Nature of the accusation.

1. An individual must be provided a frame of reference for the impending interrogation by being told generally about all known offenses. "It is not necessary to spell out the details . . . with technical nicety." Informing the accused that he was suspected of larceny of ship's store funds was held sufficient to cover wrongful appropriation of store funds during an earlier period. *United States v. Quintana*, 5 M.J. 484 (C.M.A. 1978). *See also United States v. Rogers*, 47 M.J. 135 (C.A.A.F. 1997) (informing of "sexual assault" of one victim held sufficient to orient the accused to the offense of rape of a separate victim that occurred 4 years earlier).

2. *United States v. Kelley*, 48 M.J. 677 (A. Ct. Crim. App. 1998). Advising the accused that he was going to be questioned about rape implicitly included the offense of burglary. The ACCA determined that the burglary was a part of the accused's plan to commit the rape. Therefore, by informing the accused that he was suspected of rape, he was sufficiently oriented to the particular incident, even though it involved several offenses.

3. Whether the stated warning sufficiently provided notice of the accusation is tested on the basis of the totality of the circumstances. For example, in *United States v. Erie*, 29 M.J. 1008 (A.C.M.R. 1990), a rights warning for suspected use of hashish was judged sufficient to cover distribution of hashish and cocaine. The court found that the rights warning oriented accused to that fact that the investigation was focused on controlled substances. *See also United States v. Pipkin*, 58 M.J. 358 (C.A.A.F. 2003) (warning covering distribution of a controlled substance was sufficient to cover conspiracy to distribute).

4. The requirement to advise a suspect/accused concerning the nature of the accusation is a continuing responsibility. If, during the course of an interrogation, the questions will address offenses not described in the initial warning, an additional warning must be provided. For example, in *United States v. Huelsman*, 27 M.J. 511 (A.C.M.R. 1988), an initial warning that the accused was suspected of "larceny by uttering worthless checks" was not sufficient to cover offenses involving possession and distribution of marijuana. When the agent learned that the reason for writing the checks related to drugs, the accused became a suspect for drug offenses and was entitled to an additional Article 31(b) warning. *But see United States v. Kelley*, 48 M.J. 677 (A. Ct. Crim. App. 1998) (investigators did not have to halt the interrogation and renew rights warnings when the accused stated that he had provided false information. The questioning centered on the rape and the burglary, and not the false statements).

5. *United States v. Simpson*, 54 M.J. 281 (C.A.A.F. 2000). Advising the appellant that he was suspected of indecent acts or liberties with a child was held sufficient to focus him toward the circumstances surrounding the event and to inform him of the general nature of the allegations, to include rape, indecent assault, and sodomy of the same child. When determining whether the nature of the accusation requirement has been met, the court will examine: whether the conduct is part of a continuous sequence of events; whether the conduct was within the frame of reference supplied by the warnings; and, whether the interrogator had previous knowledge of an unwarned offense.

E. Right to remain silent.

1. The main PASI aspect of the Article 31(b) warning is practically the same as its *Miranda* warning counterpart.

2. The most significant area of concern regarding this prong of the warning is the occasional improper qualification of the PASI when the investigator recites the warning. In *United States v. Allen*, 48 C.M.R. 474 (A.C.M.R. 1974), the accused was advised he could remain silent only if he was in fact involved in the suspected misconduct. He was also told that if he knew who was involved in the robbery under investigation and remained silent, he could be found guilty. Both of these statements were held improper. A suspect has an "absolute right to silence."

F. Statements may be used as evidence.

1. The "use" aspect of the Article 31 warning is identical to its *Miranda* warning counterpart.

2. As with the right to silence provision described above, problems with the "use" provision generally arise when interrogators accompany the warning with provisos or disclaimers concerning the prospective use of the subject's statements. It is well settled that such comments may negate the validity of the entire warning. *United States v. Hanna*, 2 M.J. 69 (C.M.A. 1976) (subsequent assurance of confidentiality negates the effectiveness of otherwise proper Article 31 warning; "[B]etween you and me, did you do it?").

G. Triggering the warning requirement.

1. Statutory requirement.

a. "No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing . . . ." Article 31(b).

b. The phrasing of Article 31(b) supplies a framework for analyzing situations which may trigger the Article 31 warning requirement.[5] Beyond consideration of the content of the warning, the following questions must be considered:

(1) Who must warn?

(2) When must the warning be provided?

[5] This type of analysis was first suggested by Professor Maguire in 1958. Major Robert F. Maguire, *The Warning Requirement of Article 31(b): Who Must do What to Whom and When?*, 2 MIL. L. REV. 1 (1958). The analysis was examined and explained in light of *Miranda* and ten years of its progeny by Professor (then Captain) Lederer in 1976. Captain Fredric I. Lederer, *Rights Warnings in the Armed Services*, 72 MIL. L. REV. 1 (1976).

(3) Who must be warned?

2. Who must warn?

a. The literal language of Article 31(b) seems to require warnings during any criminal interrogation of a suspect/accused by a person subject to the UCMJ. However, judicial interpretations have both expanded and contracted the scope of the statute's literal language to conform to the practicalities of the military as well as the courts' various views of the drafter's intent.

b. In the years following the enactment of the UCMJ, military courts applied both an "official questioning" test and a "position of authority" test to narrow the broad "[p]erson subject to this chapter" language of Article 31. Key elements of these tests were merged by the CMA in *United States v. Duga*, 10 M.J. 206 (C.M.A. 1981).[6]

c. Failure to provide warnings when required could result in a violation of Article 98, Noncompliance with Procedural Rules.

d. The current standard:

(1) In *Duga*, the CMA held Article 31(b) applies only to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry. Accordingly, the court set forth a two-pronged test to determine whether a person is "a person subject to this chapter" for the purposes of Article 31. The points of analysis are:

(a) Was the questioner subject to the Code acting in an official capacity in the inquiry or was the questioning based on personal motivation?; and,

(b) Did the person questioned perceive the inquiry as involving more than a casual conversation?

(2) The *Duga* version of the official questioning standard was further defined by the court in *United States v. Loukas*, 29 M.J. 385 (C.M.A. 1990). The *Loukas* court held that Article 31(b) warnings were not required prior to an aircraft crew chief's questioning of a crew member about drug use, where the questions were limited to those needed to "fulfill operational responsibilities, and there was no evidence suggesting his inquiries were designed to evade constitutional or codal rights." Now Article 31 "requires warnings only when questioning is done during an official law-enforcement investigation or disciplinary inquiry."[7]

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[6] The foundation for what we now know as "the *Duga* test" was laid twenty-seven years earlier in *United States v. Gibson*, 14 C.M.R. 164 (C.M.A. 1954). In *Gibson*, the court also provided a review of Article 31's purpose and the legislative history.

[7] Analysis of whether questioning is part of an official law enforcement investigation or disciplinary inquiry is governed by an objective test. An investigation is law enforcement or disciplinary when, based on all the facts and circumstances at the time of the interview, "the military questioner was acting or could reasonably be considered as acting in an official law enforcement or disciplinary capacity." *United States v. Good*, 32 M.J. 105 (C.M.A. 1991).

e. Law enforcement or disciplinary inquiry: the Primary Purpose Test.

(1) *United States v. Cohen*, 63 M.J. 45 (C.A.A.F. 2006). Air Force IG's conversations with a servicemember filing a complaint extended beyond the boundaries necessary to fulfill his administrative duties and should have been proceeded by an Article 31 rights warning. While the IG's responsibilities were primarily administrative, they were not exclusively so under the applicable Air Force Instructions. Under the circumstances of the case the IG had disciplinary responsibilities and should have suspected the complainant of an offense and advised him of his Article 31 rights prior eliciting incriminating statements from him.

(2) *United States v. Pittman*, 36 M.J. 404 (C.M.A. 1993). Accused's section leader, and friend, was required to escort him off-post. Unaware of the child abuse allegations, the escort asked the accused what was going on. Accused admitted hitting his stepson. Trial court held this questioning was motivated out of personal curiosity and not interrogation or a request for a statement within the meaning of Article 31(b). The CMA affirmed, citing *Duga*. *See also United States v. Jones*, 24 M.J. 367 (C.M.A. 1987); *United States v. Williams*, 39 M.J. 758 (A.C.M.R. 1994).

(3) *United States v. Guron*, 37 M.J. 942 (A.F.C.M.R. 1993). Interviews by accounting and finance personnel to determine eligibility for pay and allowances, but not for purposes of disciplinary action or criminal prosecution, do not require Article 31 warnings be given.

(4) *United States v. Bowerman*, 39 M.J. 219 (C.M.A. 1994). Army doctor was not required to inform accused of Article 31 rights when questioning him about child's injuries even though doctor thought child abuse was a distinct possibility.[8]

(5) *United States v. Dudley*, 42 M.J. 528 (N-M. Ct. Crim. App. 1995). Statement by accused to psychiatrist was admissible, even though psychiatrist had not given accused Article 31 warnings and knew of charges against accused. Accused was brought to psychiatrist by investigator who feared that accused might be suicidal and the psychiatrist asked questions for diagnostic purposes in order to determine whether accused was a suicide risk.

Dicta in both *Loukas* and *Good* indicate that when a military supervisor in the subject's chain of command conducts the questioning, there is a rebuttable presumption that the questioning was done for disciplinary purposes.

[8] *See also United States v. Brown*, 38 M.J. 696 (A.F.C.M.R. 1993); *United States v Baker*, 29 C.M.R. 129 (C.M.A. 1960) (doctor not required to read rights before questioning appellant during a physical about needle marks on his arms).

(6) *United States v. Bell*, 44 M.J. 403 (C.A.A.F. 1996). Article 31 requirement for warnings does not apply at trial or Article 32 investigations because they are "judicial proceeding[s]; not disciplinary or law enforcement tools within the context of Article 31." However, RCM 405(f)(7) requires that warnings be given to the accused at an Article 32 hearing. *See also* Mil. R. Evid. 301(b)(2) regarding the military judge obligation to provide witnesses warnings.

(7) *United States v. Moses*, 45 M.J. 132 (C.A.A.F. 1996). Naval Criminal Investigative Service (NCIS) agents engaged in an armed standoff with the accused were not engaged in a law enforcement or disciplinary inquiry when they asked the accused what weapons he had inside the house. Rather, the questioning was considered negotiations designed to bring criminal conduct to an end peacefully.

(8) *United States v. Payne*, 47 M.J. 37 (C.A.A.F. 1997). Defense Investigative Service (DIS) agents conducting background investigation were not engaged in law enforcement activities, therefore, they did not have to warn the accused of his rights under Article 31. *See also United States v. Tanksley*, 50 M.J. 609 (N-M. Ct. Crim. App. 1999) (NCIS agents conducting background investigation).

(9) *United States v. Bradley*, 51 M.J. 437 (C.A.A.F. 1999). A commander, questioning his Soldier about whether the Soldier had been charged with criminal conduct in order to determine whether the accused's security clearance should be terminated, was not required to give Article 31(b) warnings, since the purpose of the questioning was not for law enforcement of disciplinary purposes. The CAAF recognized an "administrative and operational exception" that may overcome the presumption that "a superior in the immediate chain of command is acting in an investigatory or disciplinary role" when questioning a subordinate about misconduct.

(10) *United States v. Norris*, 55 M.J. 209 (C.A.A.F. 2001). The appellant was friends with the family of the victim. When the father (E-7) of the victim asked the appellant (E-4) about the relationship, he admitted that he had kissed and performed oral sex on her. The conversation lasted two hours, during which neither man referred to each other by rank. The court concluded that the victim's father was not asking questions for a disciplinary or law enforcement purpose, but rather sought out the appellant to clarify the matter.

(11) *United States v. Guyton-Bhatt*, 56 M.J. 484 (C.A.A.F. 2002). A legal assistance attorney was required to give Article 31 warnings to a debtor of his client, where the attorney suspected the debtor of committing forgery, planned to pursue criminal action against the debtor as a way to help his client, and used the authority of his position when he called the debtor to gather information. The CAAF concluded that the legal assistance attorney was "acting as an investigator in pursuing this criminal action."

(12) *United States v. Benner*, 57 M.J. 210 (C.A.A.F. 2002). A chaplain was required to give warnings when he abandoned his clerical role and was acting solely as an Army officer. He did this when he breached the "communications to clergy" privilege by informing the appellant that he would have to report the appellant's child sexual abuse incident to authorities if the appellant did not.

(13) *United States v. Smith*, 56 M.J. 653 (A. Ct. Crim. App. 2001). President of prison's Unscheduled Reclassification Board was not required to read Article 31 rights to an inmate prior to asking him if he would like to make a statement about his recent escape, since the purpose of the board was to determine if the inmate's custody classification should be tightened.

(14) Defense counsel are not required to read Article 31 rights when conducting interviews of a witness on behalf of their clients, even if he suspects the witness committed a criminal offense. TJAG's PRC Opinion 90-2; *United States v. Howard*, 17 C.M.R. 186 (C.M.A. 1954); *United States v. Marshall*, 45 C.M.R. 802 (N.M.C.M.R. 1972); *but see United States v. Milburn*, 8 M.J. 110 (C.M.R 1979).

f. Civilian interrogations.

(1) General Rule. The plain language of the statute seems to limit the class of people who must provide Article 31(b) warnings to those who are subject to the UCMJ themselves. Mil. R. Evid. 305(b)(1) provides, however, that a "[p]erson subject to the code . . . includes a person acting as a knowing agent . . . ." Additionally, the courts have rejected literal application of the statute and provide instead that in those cases where military and civilian agents are working in close cooperation with each other for law enforcement or disciplinary purposes, civilian interrogators are "persons subject to the chapter" for the purposes of Article 31.

(2) Tests. Civilian agents may have to provide Article 31 warnings when, under the "totality of the circumstances" they are either acting as "instruments" of military investigators, or where the military and civilian investigations have "merged."

(a) The merger test: (1) Are there different purposes or objectives to the investigations?; and (2) Are the investigations conducted separately? Additionally, the test to determine the second prong is: (a) Was the activity coordinated between military and civilian authorities?; (b) Did the military give guidance or advice?; and, (c) Did the military influence the civilian investigation?

(b) The instrumentality test: (1) Is the civilian agent employed by, or otherwise subordinate to, military authority?; (2) Is the civilian under the control, direction, or supervision of military authority?; and, (3) Did the civilian acted at the behest of military authority or, instead, had an independent duty to investigate?[9]

(3) *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992). Civilian intelligence agents were not required to read Article 31 warnings to Marine suspected of espionage because (1) their investigation had not merged into an "indivisible entity" with the military investigation, and (2) the civilian investigators were not acting in furtherance of any military investigation or as an instrument of the military.[10]

(4) *United States v. Quillen*, 27 M.J. 312 (C.M.A. 1988). A civilian PX detective was required to advise a Soldier suspected of shoplifting of his Article 31 rights before questioning him. The detective was an "instrument of the military" whose conduct in questioning the suspect was "at the behest of military authorities and in furtherance of their duty to investigate crime." Furthermore, the suspect perceived the detective's questioning to be more than casual conversation. *See also United States v. Ruiz*, 54 M.J. 138 (C.A.A.F. 2000).

(5) *United States v. Moreno*, 36 M.J. 107 (C.M.A. 1992). State social services worker who had an independent duty under state law to investigate child abuse was not required to provide Article 31 or *Miranda* warnings prior to interviewing the accused. The court found no investigative merger or agency relationship. "[O]ne of the prime elements of an agency relationship is the existence of some degree of control by the principal over the conduct and activities of the agent."

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[9] *United States v. Grisham*, 16 C.M.R. 268 (C.M.A. 1954).

[10] *United States v. Oakley, Jr.*, 33 M.J. 27 (C.M.A. 1991). A military policeman was present when civilian police questioned appellant regarding civilian fraud charges. The military policeman, acting as a military liaison, advised the appellant that he should cooperate with the civilian police and even asked a few questions of appellant during the interrogation. The CMA denied appellant's motion to suppress, holding that the civilian police investigation had not merged with a military investigation.

(6) *United States v. Raymond*, 38 M.J. 136 (C.M.A. 1993). Social worker, subject to AR 608-18's reporting requirements, was not acting as an investigative agent of law enforcement when he counseled the accused with full knowledge that the accused was pending charges for child sexual abuse. The CMA also ruled that health professionals engaged in treatment do not have a duty to provide Article 31(b) warnings.[11]

(7) *United States v. Brisbane*, 63 M.J. 106 (C.A.A.F. 2006). Family Advocacy representative was acting as an "investigative agent of law enforcement" and should have provided the accused an Article 31 warning when she questioned him after a Family Advocacy committee meeting which included a legal officer and a military investigator. The CAAF found that the Family Advocacy representative worked in close coordination with law enforcement before and after her questioning of the accused, that she suspected the accused of an offense at their first meeting, and that evidence of her investigatory purpose could be seen in her first question ("Did you do it?").[12]

(8) *United States v. Payne*, 47 M.J. 37 (C.A.A.F. 1997). The CAAF held that Defense Investigative Service (DIS) agents conducting a background investigation per the request of the accused were not acting under the direction of military authorities and were not, therefore, subject to the UCMJ. Accordingly, the DIS agents did not have to warn the accused of his rights under Article 31.

(9) *United States v. Redd*, 67 M.J. 581 (A. Ct. Crim. App. 2008). The ACCA held that where a CID agent actively participates in civilian law enforcement interview, Article 31 rights must be read to the accused. However, *Miranda* warnings given in this case, combined with notification that accused was under investigation for child sex offenses was sufficient to meet Article 31 requirements.

(10) *United States v. Garcia*, 69 M.J. 658 (C.G. Ct. Crim. App. 2010). The CGCCA held that where CGIS and civilian investigations did not coordinate their activities and that the civilian investigators did not seek military guidance, Article 31, UCMJ rights were not required by the civilian investigators when questioning the appellant. The court did note that there were several coordinated joint witness interviews, but there was "no significant basis for questioning the independence of the two investigations."

g. Foreign police interrogations.

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[11] Diagnostic questioning had been previously placed outside the scope of Article 31 in *United States v. Fisher*, 44 C.M.R. 277 (C.M.A. 1972). *Raymond* is significant in that it upheld the concept of diagnostic questioning in spite of the regulatory reporting requirement.

[12] The CAAF noted that the "cooperative effort" between law enforcement and other members of the military community required by Air Force Regulations "does not render every member of the military community a criminal investigator or investigative agent," but that this particular Family Advocacy representative's actions were more akin to an investigative agent than a social worker. *Brisbane*, 63 M.J. at 112.

(1) The rule for interrogations by foreign police agents is similar to that set forth for U.S. civilian police agents. Mil. R. Evid. 305(h)(2) provides that no warnings are required unless the foreign police interrogation is "conducted, instigated, or participated in by military personnel or their agents . . . ." An interrogation is not "participated in" merely because U.S. agents were "present," "acted as interpreter," or took steps to mitigate harm.[13]

(2) *United States v. Coleman*, 25 M.J. 679 (A.C.M.R. 1987), *aff'd*, 26 M.J. 451 (C.M.A. 1988). "Cooperative assistance" between CID and German police investigating a murder did not turn the German interrogation into a U.S. interrogation, since the German interrogation "was, in no way 'conducted, instigated, or participated in' by the CID" nor was there "subterfuge" or any violation of due process voluntariness.

(3) *United States v. French*, 38 M.J. 420 (C.M.A. 1993). Accused was questioned by British police in presence of his First Sergeant and an OSI agent. Despite OSI's knowledge of the investigation, their presence during the interview, an agent's comment during interview that it would be better for accused to remain silent than to continue lying, and brief use of OSI agent's handcuffs during arrest, "participation" of military agents did not reach level which would require Article 31 and *Miranda* rights.

(4) *United States v. Pinson III*, 56 M.J. 489 (C.A.A.F. 2002). Icelandic police were not required to give appellant Article 31 warnings prior to questioning him as part of an investigation, where the Icelandic police did not ask NCIS agents for information or leads, NCIS did not ask Icelandic police to ask certain questions, and the two governments conducted separate investigations. The CAAF found that the interrogation was "purely for the benefit of the Icelandic" authorities.

3. When must warnings be given?

a. Under Mil. R. Evid. 305(b)(2), action that triggers the requirement for Article 31 (or *Miranda*) warnings includes "any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning." This includes direct questioning or action that amounts to the functional equivalent of questioning, and is evaluated based on an objective test from the perspective of a reasonable police officer/investigator.

b. Words or actions reasonably likely to elicit an incriminating response.

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[13] *See United States v. Plante*, 32 C.M.R. 266 (C.M.A. 1962) (holding that no Article 31(b) warnings required where MP accompanied service member to French police headquarters, but where MP did not take part in the interrogation); *United States v. Jones*, 6 M.J. 226 (C.M.A. 1979) (holding no Article 31(b) warnings required when German police interrogated accused in U.S. CID headquarters building solely for the benefit of the German authorities where no U.S. personnel were present).

(1) *Brewer v. Williams*, 430 U.S. 387 (1977). "Christian burial speech" was intended to elicit incriminating information and was tantamount to interrogation where police knew accused was "deeply religious," and the speech was directed to him.

(2) *Rhode Island v. Innis*, 446 U.S. 291 (1980). "'Interrogation' under *Miranda* refers . . . to express questioning, . . . [and] also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response . . . ." Conversation between police while transporting suspect to station that children from nearby school for handicapped might find the shotgun and hurt themselves was held *not* an interrogation, since it was not directed to suspect and no reason to believe he was susceptible to such remarks.

(3) *United States v. Byers*, 26 M.J. 132 (C.M.A. 1988). "Interrogate" for purposes of Article 31(b) corresponds with Supreme Court interpretation of "interrogation" in applying *Miranda* warning requirement. An OSI agent's 20-40 minute pre-warning commentary was interrogation. The agent could tell the suspect that "the suspicion results from a positive drug test. To go further violates Article 31(b)." Taint attenuated, however, and statement admitted.

(4) *United States v. Guron*, 37 M.J. 942 (A.F.C.M.R. 1993). A 9-minute pre-warning conversation about a variety of subjects having nothing to do with the BAQ fraud investigation, the purpose of which was to relax the subject and get acquainted, was not the functional equivalent of interrogation.

(5) *United States v. Young*, 49 M.J. 265 (C.A.A.F. 1998). Investigator's comment: "I want you to remember me, and I want you to remember my face, and I want you to remember that I gave you a chance," directed to the accused after the accused invoked his right to counsel may have been an interrogation. Judge Cox, in a concurring opinion, firmly believes that it was. The court affirmed the admissibility of the subsequent confession on other grounds.

(6) *United States v. Muldoon*, 10 M.J. 254 (C.M.A 1981). The "time-honored technique to elicit a statement -- namely, informing the suspect that he has been implicated by someone else," is interrogation.

c. Not "interrogation."

(1) Subjects who begin a statement in a spontaneous fashion do not need to be stopped and warned. The appropriate rights warning, however, must precede any follow-up interrogation. *See* Analysis to Mil. R. Evid. 305(c).

(2) *United States v. Warren*, 47 M.J. 649 (A. Ct. Crim. App. 1997). Asking the accused to put his spontaneous statement in writing was not an interrogation. An interrogation began, however, when the investigator asked the accused to elaborate and explain portions of the statement.

(3) *United States v. Turner*, 48 M.J. 513 (A. Ct. Crim. App. 1998). Telling the accused that he was AWOL and would be turned over to a particular military law enforcement authority did not constitute an interrogation. The ACCA viewed these comments as statements regarding the nature of evidence against the accused and not an interrogation.

(4) *United States v. Vitale*, 34 M.J. 210 (C.M.A. 1992). First Sergeant warned accused not to discuss the matter and to let OSI handle it because she did not want to get involved. Accused was previously interviewed by another NCO following an improper rights advice. Held: First Sergeant's conduct was not the "functional equivalent of interrogation," and accused's subsequent unsolicited statements were uttered spontaneously, voluntarily, and without coercion.

(5) *United States v. Lichtenhan*, 40 M.J. 466 (C.M.A. 1994). An investigator (Inv.) considered the accused a suspect in a series of thefts, and intended to question him regarding a related matter. The investigator approached the accused and initiated the following interchange:

Inv.: "[Y]ou got a minute to talk?"

Accused: "Sure, chief, but there's something I need to talk to you about first."

Inv.: "Go ahead."

The accused proceeded to make a series of incriminating remarks. The CMA ruled the investigator's approach and comments did not amount to questioning such that Article 31 requirements were triggered.

(6) *United States v. Watkins*, 34 M.J. 344 (C.M.A. 1992). Suspect invoked right to silence. Several hours later, suspect was re-approached by same CID agent and asked for a re-interview, whereupon the suspect made some incriminating statements. Held: Simply asking for a re-interview of an individual not in custody was not questioning designed "to elicit an incriminating" statement.

(7) *United States v. Ruiz*, 54 M.J. 138 (C.A.A.F. 2000). A civilian store detective employed by AAFES, upon suspecting that the appellant had stolen store merchandise, stated to him, "[t]here seems to be some AAFES merchandise that hasn't [sic] been paid for." The appellant replied, "yes," produced the merchandise from under his coat, and said "you got me." The CAAF ruled that Article 31(b) warnings were not required because the detective did not "interrogate" the accused, but rather informed him of why he was stopped and why he was asked to accompany the detective back to the store's office.

(8) *United States v. Allen*, 54 M.J. 854 (A.F. Ct. Crim. App. 2001). During the reading of his charges by his commander, the appellant appeared pale and shocked, and near the end of the reading stated, "the fourth one is true, or partially true." The court concluded that the reading of the charges in this case was not the functional equivalent of an interrogation. The court placed special emphasis on the circumstances surrounding the reading of the charges. Specifically, that the appellant was not asked any questions before being read his charges, the accused was not in confinement, and he was a lieutenant colonel.

(9) Consent to search.

(a) *United States v. Burns*, 33 M.J. 316 (C.M.A. 1991). Requesting consent to search and also conducting a urine test did not violate the Fifth Amendment even though the accused previously requested counsel. Asking the accused questions during the search of his residence did violate the Fifth Amendment, but were non-prejudicial errors.

(b) *United States v. Vassar*, 52 M.J. 9 (C.A.A.F. 1999). While in the hospital, the accused signed a written consent form and gave a urine sample, which tested positive for drugs. The CAAF held that the consent was voluntary and that there is no requirement to give Article 31(b) warnings before asking for consent to search.

d. Continuous or successive interrogations.

(1) The general rule is that if the warnings were given properly at the first interrogation session and that the time elapsed between the first and subsequent sessions is sufficiently short as to constitute one entire continuous interrogation, separate warnings need not be given. On the other hand, if the time interval is long enough to contain separate and distinct interrogation sessions, then each session must be prefaced by Article 31(b) warnings. No firm guidance can be given as to what the minimum time interval will result in a determination that the sessions constituted continuing interrogation.

(2) Military courts have decided these matters on an ad hoc basis. *United States v. Schultz*, 41 C.M.R. 311 (C.M.A. 1970) (second interrogation by same agents about six hours after initial warnings does not require new warnings). *Accord United States v. Thompson*, 31 M.J. 781 (A.C.M.R. 1990) (seven hours between interrogations).

(3) *United States v. Jefferson*, 44 M.J. 312 (C.A.A.F. 1996). Re-interrogation of accused four days after initial interrogation was not preceded by rights warning, but rather with question if he remembered his previous rights warning. Reminder was held to be sufficient warning under the facts of the case.

e. Perception of the person questioned; was it more than casual conversation?

(1) *United States v. Parrillo*, 31 M.J. 886 (A.F.C.M.R. 1990), *aff'd on other grounds*, 34 M.J. 112 (C.M.A. 1992). Air Force sergeant acting as agent of OSI was not required to read Article 31 warnings before questioning lieutenant about drugs. Although questioning was official, lieutenant perceived it as casual conversation because of prior sexual relationship with the sergeant.

(2) *United States v. Harvey*, 37 M.J. 140 (C.M.A. 1993). Accused, after invoking her rights, arranged 3 meetings with co-accused to discuss pending government investigation. The meetings were taped by the co-accused with OSI assistance. The CMA found no Article 31(b) violation because the accused could not have perceived it as an inquiry by a person acting in an official capacity.

(3) *United States v. Price*, 44 M.J. 430 (C.A.A.F. 1996). A subordinate of the accused questioned the accused several times about suspected drug use without advising the accused of his Article 31 rights. The court found that even if one assumes that the subordinate was acting as an OSI agent, the second prong of the *Duga* test was not present. The court focused on the following facts: 1) the accused was senior; 2) the environment where the conversations took place was non-coercive; and, 3) the accused was not aware that the subordinate had contacted OSI.

(4) *United States v. Rios*, 48 M.J. 261 (C.A.A.F. 1998). The accused's commander directed him to telephone his daughter whom he was suspected of sexually abusing. The call was being recorded. Although the accused testified that he thought the call was being recorded, Article 31(b) warnings were not required because the accused perceived the call to be a casual conversation. *See also United States v. White*, 48 M.J. 251 (C.A.A.F. 1998) (telephone call between the accused and his accomplice, which was arranged and monitored by government investigators, was viewed as a casual conversation).

(5) *United States v. Aaron*, 54 M.J. 538 (A.F. Ct. Crim. App. 2000). Rights warnings were not required to be given to the suspect prior to a conversation between him and his daughter, whom he was suspected of having a sexual relationship with, in a hotel room that was arranged and taped by OSI agents. Concluding that the meeting between the appellant and his daughter was not a custodial interrogation nor could appellant perceive it as "official questioning," the court held that neither the Fifth Amendment, nor Article 31 were violated.

4. Who must be warned?

a. Article 31 warning requirements apply only to members of the armed forces. Within this subset, warnings must be provided only to accused or persons suspected of an offense. Mere witnesses are not entitled to Article 31 protections.

b. An accused is a person against whom a charge has been preferred.

c. A person is a suspect if, considering all facts and circumstances at the time of the interview, the government interrogator believed, or reasonably should have believed, that the one being interrogated committed an offense. *United States v. Morris*, 13 M.J. 297 (C.M.A. 1982). Note that this test has both a subjective and objective prong. The interrogator's subjective belief that the subject has committed an offense will trigger the warning requirement. Even if there is not subjective belief, however, if the totality of the circumstances would cause a reasonable person to believe that the subject had committed an offense, the warnings will be required. *United States v. Leiffer*, 13 M.J. 337 (C.M.A. 1982).

d. *United States v. Swift*, 53 M.J. 439 (C.A.A.F. 2000). The accused was a suspect where his wife called the command and alleged that she was contacted by a woman also claiming to married to the accused, and the command then consulted the chief of military justice and the MCM about possible bigamy charges before questioning the accused.

e. *United States v. Murphy*, 33 M.J. 323 (C.M.A. 1991). Accused became a suspect once commander received a specific report that she had illegally used cocaine and the commander then prepared to ask specific questions suggested by law-enforcement agents.

f. *United States v. Davis*, 36 M.J. 337 (C.M.A. 1993), *aff'd on other grounds*, 512 U.S. 452 (1994). The CMA holds that the accused was not a suspect and no Article 31(b) warnings were required prior to the initial interview, despite several facts narrowing the investigation's focus onto him and several others.

g. *United States v. Brown*, 40 M.J. 152 (C.M.A. 1994). Unknown and unknowable future criminal proclivities of the accused cannot transform leadership counseling into a criminal interrogation such that Article 31(b) requirements were triggered. Accused's commander neither suspected, nor reasonably should have suspected, accused of criminal misconduct at time of formal counseling regarding dishonored checks.

h. *United States v. Meeks*, 41 M.J. 150 (C.M.A. 1994). Accused was not a suspect at the time his commander met with him in attempt to persuade him to deploy, even though commander knew sergeant had missed a mobility meeting and had a hunch that accused might ultimately choose not to deploy. At time of meeting, commander thought there might be legitimate reason for accused's missing the meeting, and until the accused informed his commander that he would not deploy, no offense had been committed.

i. *United States v. Schlamer*, 47 M.J. 670 (N-M. Ct. Crim. App. 1997). Before unwarned questioning, NCIS agents were informed that the accused was seen in the area where a murder occurred. The NMCCA held that the accused was one of hundreds of individuals who the investigators believed might have helpful information and was, therefore, not a suspect requiring Article 31(b) warnings.

j. *United States v. Miller*, 48 M.J. 49 (C.A.A.F. 1998). After receiving a report about a gang robbery, an MP stopped the accused to ascertain his identity and whereabouts during the evening. The accused answered the questions without being warned of his rights under *Miranda* or Article 31. Even though the accused matched the general description of one of the assailants, the CAAF found that the investigation had not sufficiently narrowed to make the accused a suspect and, therefore, Article 31(b) was not triggered. *See also United States v. Henry*, 44 C.M.R. 152 (C.M.A. 1971).

k. *United States v. Muirhead*, 51 M.J. 94 (C.A.A.F. 1999). The accused was a suspect, and investigators were required to advise him of his rights under Article 31(b) when they questioned him during a permissive search of his residence. Prior to the search, a physician had told investigators that he suspected child abuse based on his examination of the victim.

l. *United States v. Duncan*, 48 M.J. 797 (N-M. Ct. Crim. App. 1998). Asking the accused questions about alleged misconduct his roommate committed was not an interrogation, since the accused was not yet a suspect.

5. The "Public Safety" exception for Article 31 warnings?

a. *United States v. Loukas*, 29 M.J. 385 (C.M.A. 1990). "Whether a [public safety] exception to Article 31 exists for military superiors acting in a command disciplinary function when questioning a suspect who is not in custody is an issue beyond the facts of this case." However, the court considered the "unquestionable urgency of the threat and the immediacy of the crew chief's response" in deciding that there was a "legitimate operational nature of his questions" that obviated the need for Article 31 warnings.

b. *United States v. Shepard*, 34 M.J. 583 (A.C.M.R. 1992). The accused told his platoon sergeant that he had killed his wife. Platoon sergeant questioned accused, absent rights warnings, about his wife's condition and location. Trial court admitted statements under "Public Safety" exception because the platoon sergeant was motivated by concerns for the wife's health and safety. The ACMR found no abuse of discretion. *Aff'd*, 38 M.J. 408 (C.M.A. 1993) (court affirms on other grounds but indicates in dicta that there might be a public safety exception to Article 31).

c. *United States v. Jones*, 19 M.J. 961 (A.C.M.R. 1985). Applying a "rescue doctrine," the court held that the questioning of a suspect, who had not had right warnings, was not error where the purpose of the questions was to locate a possibly critically injured victim.

V. RIGHTS WARNINGS CHART

	Article 31(b)	*Miranda* (Fifth Amendment)	Sixth Amendment
Purpose	To dispel a service member's inherent compulsion to respond to questioning from a superior in rank or position	To provide protection against an inherently intimidating and coercive interrogation environment	To provide accused the assistance of counsel during critical stages of the criminal process.
Who must warn?	1) Person subject to the code 2) Acting in official capacity 3) For law enforcement or disciplinary purposes	Law enforcement officer	Government agent acting in law enforcement capacity
Test:	1) Was the military questioner acting, or could reasonably be considered as acting, in an official law enforcement or disciplinary capacity, and 2) Did the person questioned perceive it as official questioning?		
Who must be warned?	Accused or suspect	Person subject to custodial interrogation	Accused
Test:	Did the questioner believe, or reasonably should have believed, that the person committed an offense?		
When are warnings required?	Questioning where an incriminating response is either sought or is a reasonable consequence	Custodial interrogation	Questioning after the preferral of charges on matters related to the charged offense(s)
Test:	Would a reasonable interrogator see the questions as ones likely to elicit an incriminating response?	Custodial – Would a reasonable person in the subject's position feel that they were under arrest or significant restraint? Interrogation – Would a reasonable interrogator see the questions as ones likely to elicit an incriminating response?	Right to counsel attaches only to charged offenses and to those offenses that would be "considered the same offense under the *Blockburger* test," even if not formally charged
Content of warnings	1) Nature of offense 2) Right to silence 3) Use of statement	1) Right to silence 2) Use of statement 3) Right to counsel	Right to counsel
Effect of invocation:			
Right to silence	Temporary respite from interrogation	Temporary respite from interrogation	Not applicable
Right to counsel	Not applicable	Questioning ceases until: 1) Counsel made available (for continuous custody, counsel must be present; if break in custody, real opportunity to seek legal advice required), or 2) Subject re-initiates and valid waiver obtained	Questioning about charged offense ceases until: 1) Counsel present, or 2) Subject re-initiates and valid waiver obtained

VI. EFFECT OF IMPLEMENTING THE RIGHTS

Whenever a subject invokes a right in response to an Article 31(b) or Fifth or Sixth Amendment warning, the first thing that must happen is the same: the interrogation must stop immediately. What may happen next is dependent on what source of self-incrimination law applies and what right has been invoked.

If the subject invokes the right to remain silent under Article 31(b) or *Miranda*, he or she is entitled to a temporary respite from questioning that the government must scrupulously honor. Once honored, the government may re-approach the subject for further questioning.

If the subject invokes the right to counsel under the Fifth Amendment, the subject cannot be questioned further unless: (1) counsel is made available; or (2) the subject re-initiates questioning. In a continuous custody setting, counsel is made available when counsel is present. When there is a break in custody, counsel is made available when the subject has had a real opportunity to seek legal advice. If the subject has not had a real opportunity to seek legal advice, then counsel must be present. If the subject re-initiates the questioning, the investigator must obtain a valid waiver of rights before continuing the interrogation.

If the subject invokes the right to counsel under the Sixth Amendment, the subject cannot be questioned further unless: (1) counsel is present; or (2) the subject re-initiates questioning. For purposes of the Sixth Amendment, continuous custody or a break in custody is irrelevant.

The questioner must clarify any ambiguous invocation of rights before questioning may begin. However, if the subject initially waives his rights and begins making a statement, any subsequent invocation of his rights must be unambiguous. Ambiguous requests do not have to be clarified by the questioner and the interrogation may proceed.

A. The right to remain silent (*Miranda* or Article 31(b)).

1. A subject may invoke any or all of his/her rights either prior to or during an interrogation. Whether invoked in response to an Article 31(b) or *Miranda* warnings, the right to remain silent entitles a subject to a temporary respite from interrogation. There is no *per se* prohibition against re-approaching a suspect following invocation of the right to remain silent.

2. Factors to consider in determining if the PASI has been violated include: which right was invoked, who initiated communication, subject matter of the communication, when the communication took place, where the communication took place, and the time between invocation of the right and the second interview. *See generally Michigan v. Mosley*, 423 U.S. 96 (1975) (suspect's "right to cut off questioning" and remain silent was "scrupulously honored" when first officer stopped questioning on robbery after suspect invoked *Miranda* right to silence and second officer, after a lapse of over two hours, re-advised the suspect of his rights and questioned him on unrelated murder).

3. *United States v. Watkins*, 34 M.J. 344 (C.M.A. 1992). CID "scrupulously honored" the accused's Fifth Amendment "right to cut off questioning," (*i.e.*, right to silence) when the agent immediately ended the interview, permitted the accused to leave the CID office, and waited more than two hours before attempting to re-interview him.

4. *United States v. Doucet*, 43 M.J. 656 (N-M. Ct. Crim. App. 1995). Under the circumstances of the case, appellant's request to go home and refusal to sign a prepared written statement constituted an invocation of his right to remain silent, even though he had made prior oral admissions and had agreed to work on a written statement.

5. *United States v. Rittenhouse*, 62 M.J. 509 (A. Ct. Crim. App. 2005). Once a suspect waives the right to silence, interrogators may continue questioning unless and until the suspect unequivocally invokes the right to silence. If a suspect makes an ambiguous or equivocal invocation of his right to remain silent, law enforcement agents have no duty to clarify the suspect's intent and may continue with questioning. *See also Davis v. United States*, 512 U.S. 452 (1994).

B. The Fifth Amendment (*Miranda*) Right to Counsel.

1. Mil. R. Evid. 305(e)(1); 305(g)(2)(B).

2. The *per se* rule of *Edwards.*

a. When a subject has invoked his right to counsel in response to a *Miranda* warning, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation, even if he has been advised of his rights. "Having expressed his desire to deal with the police only through counsel, the subject is not subject to further interrogation . . . until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477 (1981); *see also United States v. Harris*, 19 M.J. 331 (C.M.A. 1985) (*Edwards* applies to military interrogations).

b. There is no exception to *Edwards* for police-initiated, custodial interrogations relating to a separate investigation once a suspect has invoked his right to counsel under the Fifth Amendment. "As a matter of law, the presumption raised by a suspect's request for counsel - that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance - does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation." Additionally, the fact that the officer conducting the second interrogation does not know of the request for counsel is of "no significance." Knowledge of the suspect's invocation is imputed to other officers. *Arizona v. Roberson*, 486 U.S. 675 (1988).

c. The *Edwards* requirement that counsel be "made available" means more than an opportunity to consult with an attorney outside the interrogation room. In *Minnick v. Mississippi*, 498 U.S. 146 (1990), the Supreme Court held "that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." [14] *But see McNeil v. Wisconsin*, 501 U.S. 171 (1991) (limiting *Minnick* holding regarding *Edwards* rule to periods of continuous custody).

[14] *See* Mil. R. Evid. 305(e)(1). In 1994, this subdivision was amended to conform military practice with the Supreme Court's decision in *Minnick.*

d. *United States v. Mitchell*, 51 M.J. 234 (C.A.A.F. 1999). After a clear invocation of his Fifth Amendment right to counsel, the accused was asked by his work supervisor during a brig visit if it was worth committing the alleged misconduct. Even though the accused's supervisor was not a law enforcement official, the CAAF held that the questioning of the accused in custody, after invocation of his Fifth Amendment right to counsel, violated the protections of *Edwards v. Arizona*, 451 U.S. 477 (1981).

e. *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999). At trial, the prosecutor introduced the accused's statements that were made as part of a separate state plea agreement. Prior to making the statements, the accused unambiguously invoked his right to counsel, however, since counsel was present during the interview, the CAAF held that there was no violation of the Fifth Amendment.

f. *United States v. Thompson*, 67 M.J. 106 (C.A.A.F. 2009). After accused was placed in pretrial confinement and given defense counsel, a CID agent questioned accused without defense counsel notified or present, but after a rights waiver was signed. The CAAF presumed that the confession was obtained in violation of his Fifth Amendment right to counsel, but found the error harmless beyond a reasonable doubt. The confession was not ultimately admitted, except in redacted form by the defense. The confession only contained statements regarding the offenses for which he was acquitted or pled guilty.

3. Limits of the *Edwards* rule.

a. Counsel "made available."

(1) *United States v. Schake*, 30 M.J. 314 (C.M.A. 1990). Accused who requested counsel during police interrogation could be re-interrogated following a six-day break in continuous custody and a complete rights advisement where accused had a "real opportunity to seek legal advice" during his release. *See also United States v. Vaughters*, 44 M.J. 377 (C.A.A.F. 1996) (re-interrogating accused who had been released from custody for nineteen days provided meaningful opportunity to consult with counsel).

(2) *United States v. Faisca*, 46 M.J. 276 (C.A.A.F. 1997). During a CID custodial interrogation concerning the theft of government property, the accused invoked his right to counsel. The CID agents conducting the interrogation immediately ceased their questioning. Six months later, a CID agent initiated contact with the accused and arranged for another interrogation. During the later interrogation, the accused affirmatively waived his self-incrimination rights and made a statement. The court found no *Edwards* violation.

(3) *United States v. Young*, 49 M.J. 265 (C.A.A.F. 1998). A two-day release from custody after the accused invoked his right to counsel was a sufficient break to overcome the *Edwards* barrier. As such, it was not improper for the government investigator to re-interrogate the accused. The court stated that the two-day break afforded the accused the opportunity "to speak to his family and friends."

(4) *United States v. Mosley*, 52 M.J. 679 (A. Ct. Crim. App. 2000). A twenty-hour release from custody after the accused invoked his right to counsel was a sufficient break to overcome the *Edwards* barrier. Once the government demonstrates by a preponderance of the evidence that the accused had a reasonable break in custody, a presumption exists that during the break the accused had a meaningful opportunity to consult with counsel. The defense then has the burden to overcome the presumption.

(5) *Maryland v. Shatzer*, 130 S.Ct. 1213 (2010). The Supreme Court held that a fourteen-day period of time is sufficient to overcome the *Edwards* barrier, regardless of the availability of counsel. The Court also held that post-trial incarceration for an unrelated offense does not trigger "custody" for *Miranda*/*Edwards* purposes.

b. Re-initiation by the accused.

(1) *Edwards* does not foreclose finding a waiver of Fifth Amendment protection after counsel has been requested, provided the accused has initiated the conversation or discussions with the authorities. *Minnick v. Mississippi*, 498 U.S. 146 (1990).

(2) *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). Accused reinitiated communication with police "relating generally to the investigation" by asking, "What is going to happen to me now?" But routine requests for a drink of water or to use a telephone "cannot be fairly said to represent a desire [for] a more generalized discussion relating directly or indirectly to the investigation."

(3) *United States v. Bonilla*, 66 M.J. 654 (C.G. Ct. Crim. App. 2008). While in custody the accused invoked his Fifth Amendment right to counsel and to remain silent. Coast Guard Investigative Service (CGIS) agents later entered the interview room and discussed the case between themselves hoping that the accused would re-initiate conversations about the case. This tactic was successful. The CGCCA ruled this was not an interrogation or functional equivalent of an interrogation. No threats were made, there were no compelling pressure put on the appellant beyond custody, pleas to conscience, or other ploys the agents knew or were reasonably likely to elicit an incriminating response.

(4) *United States v. Watkins*, 32 M.J. 1054 (A.C.M.R. 1991), *aff'd*, 34 M.J. 344 (C.M.A. 1992). Accused reinitiated conversation by asking CID if he should get a civilian attorney and how much time the agent thought the accused might get.

(5) *United States v. McDavid*, 37 M.J. 861 (A.F.C.M.R. 1993). Despite previous invocation of his right to counsel, accused initiated the conversation with OSI agents by asking if he could explain something.

c. Waiver after re-initiation by the accused.

(1) *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). If initiation by the accused is found, then a separate inquiry must be made whether, on the totality of the circumstances, the accused voluntarily waived his rights.

(2) *United States v. McLaren*, 38 M.J. 112 (C.M.A. 1993). In reinitiating conversation with interrogators by answering a question asked before his rights invocation, accused impliedly waived previously invoked Fifth Amendment right to counsel.

d. Foreign Police Exception.

(1) *Edwards* protections are not triggered by request for counsel to a foreign official because there is an overseas exception to *Edwards* rule. In review of cases in this area, the CAAF has focused on the suspect's state of mind, just as the Supreme Court did in *Roberson*. A suspect may be willing to cooperate without counsel during a U.S. interview, while added intimidation in a foreign interview may make him unwilling to do so.

(2) *United States v. Coleman*, 26 M.J. 451 (C.M.A. 1988). U.S. investigators had actual knowledge that Coleman had requested counsel during questioning by the German police, but *Edwards* bar did not apply to initial interrogation by U.S. authorities. However, there must be a complete rights advisement and waiver before the U.S. interrogation.[15]

4. When are requests for counsel effective?

a. Premature invocations.

(1) The right to counsel arises upon initiation of custodial interrogation.

(2) But, where a suspect is in custody and requests counsel from a person in apparent authority shortly before initiation of the interrogation, "it is artificial to draw a distinction between the formal interview . . . and these events which led up to it."[16]

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[15] *See also United States v. Dock*, 40 M.J. 112 (C.M.A. 1994) (accused's pretrial statements to U.S. military investigators were admissible after he requested U.S. counsel while under German custody even though U.S. investigators were present when accused requested counsel during German interrogations); *United States v. Hinojosa*, 33 M.J. 353 (C.M.A. 1991).

[16] *United States v. Goodson*, 18 M.J. 243 (C.M.A. 1984), *vacated*, 471 U.S. 1063 (1985) (remanded "for further consideration in light of *Smith v. Illinois*, 469 U.S. 91 (1984)"), *rev'd per curiam*, 22 M.J. 22 (C.M.A. 1986), *modified*, 22 M.J. 247 (C.M.A. 1986), *on remand*, 22 M.J. 947 (A.C.M.R. 1986).

(3) *McNeil v. Wisconsin*, 501 U.S. 171 (1991). In dicta, Justice Scalia opines that peremptory counsel elections are invalid. "We have never held that a person can invoke his *Miranda* rights 'anticipatorily' in a context other than custodial interrogation."

(4) *United States v. Schroeder*, 39 M.J. 471 (C.M.A. 1994). Even though under arrest (civilian law enforcement agents), accused's request to speak to an attorney before non-consensual urinalysis was "too little and too early" to qualify as invocation of his *Miranda* right to counsel. Accused had not been read his *Miranda* warnings or subjected to custodial interrogation.

(5) *United States v. Kendig*, 36 M.J. 291 (C.M.A. 1993). Electing to consult counsel during Article 15 proceeding: 1) does not constitute invoking Fifth Amendment right to counsel; 2) does not invoke a Sixth Amendment right to counsel; and, 3) does not require notice to counsel under Mil. R. Evid. 305(e), since subsequent interview concerned unrelated offenses. *See also United States v. Thomas*, 39 M.J. 1094 (A.C.M.R. 1994) (advising interrogator of representation by civilian attorney on unrelated matter does not trigger *Edwards* requirements).

(6) *Montejo v. Louisiana*, 129 S.Ct. 2079 (2009). The majority, written by Justice Scalia, again asserts that "[w]e have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation.'" *McNeil*, 501 U.S. at 182, n.3.

b. Ambiguous request = equivocal request = no *Edwards* protection.

(1) Once a suspect initially waives his *Miranda* rights and agrees to submit to custodial interrogation without the assistance of counsel, only an unambiguous request for counsel will trigger the *Edwards* requirements.

(2) *United States v. Davis*, 36 M.J. 337 (C.M.A. 1993), *aff'd*, 512 U.S. 452 (1994). Following an initial waiver, Davis stated to Naval Investigative Service (NIS) agents: "Maybe I should talk to a lawyer." The CMA ruled this ambiguous comment failed to invoke Fifth Amendment right to counsel, and NIS agent properly clarified ambiguous comment before continuing. The Supreme Court ruled that clarification of ambiguous counsel requests is not legally required. The invocation of the *Miranda* right to counsel requires, at a minimum, some statement that can reasonably be construed as an expression of a desire for the assistance of an attorney. If a suspect makes a reference to an attorney that is ambiguous or equivocal, questioning need not be terminated. A request is ambiguous if a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel.[17]

[17] A statement either is an assertion of the right to counsel, or it is not. In *Smith v. Illinois*, 469 U.S. 91 (1984), the Court found that the following interchange contained a request for counsel, stating that "[a]n accused's post-request

(3) *United States v. Morgan*, 40 M.J. 389 (C.M.A. 1994). Following initial waiver of Article 31 and counsel rights, accused made statement, but then asked "[c]an I still have a lawyer or is it too late for that?" The CMA rules that the accused's statement was an equivocal or ambiguous request for counsel.

(4) *United States v. Vandewoestyne*, 41 M.J. 587 (A.F. Ct. Crim. App. 1994). Evidence established under a totality of the circumstances, that accused made a knowing and intelligent waiver of his right to counsel and the right to remain silent at the initiation of the interview. Accused asking investigators if they thought he needed a lawyer was not a sufficiently clear statement that could have been understood as a request for counsel. Investigators nevertheless clarified the request, and accused then waived his right to counsel.

(5) *United States v. Nadel*, 46 M.J. 682 (N-M. Ct. Crim. App. 1997). CID interrogated the accused about indecent acts he allegedly committed. After an initial valid waiver of Article 31(b) and *Miranda* counsel rights, the accused told CID agents that he would not like to discuss oral sodomy without first receiving advice from a lawyer, but would be willing to answer questions concerning anything else without assistance of counsel. CID did not question Nadel about sodomy but did question him about indecent assault. Thereafter, Nadel made a written confession of the indecent assault. The NMCCA found that the request for a lawyer was "not a clear assertion of the right to have counsel present during the interview." Since it was an ambiguous request for counsel, the CID agent had no duty to stop the interrogation or clarify Nadel's equivocal request. (*citing Davis v. United States*, 512 U.S. 452 (1994)).

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responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself."

Q: You have a right to a lawyer.

A: Uh, yeah, I'd like to do that.

Q: If unable to pay, one will be appointed. Do you want a lawyer?

A: Yeah and no, uh, I don't know what's, really.

(6) *United States v. Henderson*, 52 M.J. 14 (C.A.A.F. 1999). German police apprehended the accused as a suspect in a stabbing incident. While in custody, the German police advised the accused of his rights (under both German law and Article 31(b)), obtained a waiver, and interrogated the accused. The accused denied involvement in the stabbing and eventually asked to continue the interview in the morning. The German police immediately stopped the questioning. Shortly thereafter, while the accused remained in custody, the CID observer, who was present during the initial interview, spoke to the accused in private. He emphasized the importance of telling the truth and that the accused had "nothing to worry about." The accused indicated he wanted to "tell the truth," but wanted to talk to a lawyer. Eventually, the accused agreed to make a statement and talk to a lawyer the morning. During the interview, the accused admitted to stabbing one of the victims. Citing *Davis*, the CAAF held that the accused's request to talk to a lawyer in the morning was an ambiguous request for counsel and did not invoke the protections of *Miranda* and *Edwards*.

(7) *United States v. Ford*, 51 M.J. 445 (C.A.A.F. 1999). An explosive device was found in the accused's barracks room during an inspection. Without giving warnings, an investigator questioned the accused at the barracks. When the accused "asked to have a lawyer present, or to talk to a lawyer," the investigator stopped the questioning. The investigator transported the accused to the CID office and, after obtaining a waiver of rights, questioned the accused again. The accused eventually gave a written confession. During the interview, however, the accused said that he didn't want to talk and thought he should get a lawyer. The investigator sought clarification and the accused responded that he wanted a lawyer if the investigator continued accusing him of lying. After further clarification, the accused agreed to continue with the questioning. The CAAF found that the accused did not invoke his Fifth Amendment right to counsel during the barracks' questioning. Further, the court held that accused's comment about a lawyer during the CID office interrogation was an ambiguous request for a lawyer and did not invoke the *Miranda* or *Edwards* protections.

(8) *United States v. Delarosa*, 67 M.J. 318 (C.A.A.F. 2009). Accused was questioned by civilian law enforcement for homicide charges related to the death of his infant son. After repeatedly telling investigators that he wanted to talk to them, he signed "no" on the form next to the block that read, "I further state that I waive these rights and desire to make a statement." After investigators attempted to clarify, accused asked for a command representative. Investigators denied this request and left accused alone. Several hours later, accused asked to talk. He was re-advised of his rights and waived them. The CAAF found the first invocation to be ambiguous, but held that officers could continue to attempt clarify his initial ambiguous invocation and resume questioning at any time.

(9) Practice tip: Clarification of ambiguous requests is probably still a good idea. Clarification will preclude later disputes over whether request was ambiguous as a matter of law.

C. Sixth Amendment Counsel Rights. *Montejo v. Louisiana*, 129 S.Ct. 2079 (2009). The Court ruled that *Edwards* applies to the Sixth Amendment right to counsel.

1. Mil. R. Evid. 305(e)(2); 305(g)(2)(C).

2. *McNeil v. Wisconsin*, 501 U.S. 171 (1991). Sixth Amendment right to counsel is offense specific. Therefore, police may approach a suspect, who has counsel for a charged offense, about a different uncharged offense. Invocation of the Fifth Amendment right to counsel cannot be inferred from the invocation of the Sixth Amendment right in light of the differing purposes and effects of the two rights.

3. *United States v. Sager*, 36 M.J. 137 (C.M.A. 1992). Representation by civilian counsel on child sex abuse charges pending in civilian court did not constitute invocation of right to counsel with respect to later questioning by CID concerning unrelated child sex abuse offenses on a military installation.

4. *United States v. Kendig*, 36 M.J. 291 (C.M.A. 1993). Court held that exercising option to consult counsel during Article 15 proceeding: 1) did not constitute invoking Fifth Amendment right to counsel; 2) did not create a Sixth Amendment right to counsel; and, 3) did not require notice to counsel under Mil. R. Evid. 305(e) since subsequent interview concerned unrelated offenses.

5. *United States v. Hanes*, 34 M.J. 1168 (N.M.C.M.R. 1992). "[A] request for counsel at an RCM 305(i) hearing before charges have been preferred neither invokes a Sixth Amendment right to counsel because the hearing is not an adversarial proceeding nor invokes a Fifth Amendment right to counsel because the hearing is not the functional equivalent of a custodial interrogation."

VII. WAIVER OF RIGHTS

Before the government can introduce statements of the accused in its case in chief, it must prove a knowing, intelligent, and voluntary waiver of the accused's applicable rights.

A. Mil. R. Evid. 305(g).

B. Implied Waiver.

1. Although an express waiver is not required, courts generally will not presume a waiver from a subject's silence or subsequent confession alone. Implied waiver scenarios are rare and limited to the facts of the case.

2. If the right to counsel is not declined affirmatively, the "prosecution must demonstrate by a preponderance . . . that the individual waived the right to counsel." Mil. R. Evid. 305(g)(2).

3. *North Carolina v. Butler*, 441 U.S. 369 (1979). An express statement of waiver of the *Miranda* right to counsel is not invariably necessary. Waiver was established where accused was advised of rights, said he understood them, refused to sign waiver, but agreed to talk.[18]

[18] In *Butler*, the Court made a distinction between an express written or oral statement of waiver and a waiver clearly inferred from the actions and words of the person interrogated. However, both types of waiver were deemed sufficient for purposes of waiver of the right to counsel after appropriate advice.

4. *United States v. Vangelisti*, 30 M.J. 234 (C.M.A. 1990). "Mil. R. Evid. 305(g)(2) does not create an exception to the requirement that an accused must intentionally relinquish his right to counsel, rather it permits proof of the waiver by evidence other than the accused's own expression that he knows of his right to counsel, understands his right, and intentionally elects to relinquish that right." *Id.* at 241 (Cox. J., concurring).

5. *Berghuis v. Thompkins*, 130 S.Ct. 2250 (2010). The Supreme Court held that "a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police."

C. "Intelligent" and "knowing" waiver.

1. *Moran v. Burbine*, 475 U.S. 412 (1986). Neither the police failure to inform a suspect of an attorney's efforts to reach him, nor the police misinforming the attorney of their plans to interrogate the suspect undercuts an otherwise valid waiver by the suspect of his *Miranda* rights.

2. *Colorado v. Spring*, 479 U.S. 564 (1987). Accused was arrested for selling stolen firearms, was advised of his rights, which he waived, and questioned on the sales and also about a prior murder the police had not previously mentioned. "We hold that a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." "Spring's decision to waive his . . . privilege was voluntary. He alleges no 'coercion . . . by physical violence or other deliberate means calculated to break [his] will.'" His waiver was "knowingly and intelligently made: that is, that Spring understood that he had the right to remain silent and that anything he said could be used as evidence against him."

3. *Connecticut v. Barrett*, 479 U.S. 523 (1987). In response to rights warnings, accused stated he would not give a written statement unless his attorney was present, but he would give an oral statement. Held: waiver was effective; "[t]he fact that some might find Barrett's decision illogical is irrelevant, for we have never 'embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness.'"

4. *United States v. Thornton*, 22 M.J. 574 (A.C.M.R. 1986). Accused's consumption of 6 to 18 beers prior to interrogation did not invalidate otherwise proper rights waiver.

D. Voluntariness of waiver.

1. The government must prove by a preponderance of the evidence that a suspect waived his applicable rights. In order to prove a valid waiver, the government must show:

a. that the relinquishment of the defendant's rights was voluntary; and

b. that the defendant had a full awareness of the right being waived and of the consequences of waiving that right. *See Moran v. Burbine*, 475 U.S. 412 (1986).

E. Presence of Counsel as a Predicate to Waiver.

1. Custodial Interrogation [Mil. R. Evid. 305(e)(1)].[19] Absent a valid waiver of counsel under Mil. R. Evid. 305(g)(2)(B),[20] when an accused or person suspected of an offense is subjected to custodial interrogation under circumstances described under Mil. R. Evid. 305(d)(1)(A)[21] of this rule, and the accused or suspect requests counsel, counsel must be present before any subsequent custodial interrogation may proceed.

   United States v. Finch, 64 M.J. 118 (C.A.A.F. 2006). The *McOmber* rule requiring notification of counsel prior to questioning a suspect who has previously asserted his right to counsel under the Fifth Amendment is overruled. Mil. R. Evid. 305(e) provides for only two situations where counsel must be present, absent waiver: (1) custodial interrogations (e.g., *Edwards* rule); and (2) post-preferral interrogation (where the suspect's Sixth Amendment right to counsel has been invoked and the questions concern the offense(s) charged).

2. Post-preferral interrogation. Mil. R. Evid. 305(g)(2)(c) provides that if a person makes a valid request for counsel subsequent to the preferral of charges (e.g., Sixth Amendment request for counsel), any subsequent waiver of that right is invalid unless the prosecution can show that the accused initiated the communication leading to the waiver. *But see Montejo v. Louisiana*, 129 S.Ct. 2079 (2009).

   a. The rules concerning invocation of the Sixth Amendment right to counsel set limits on subsequent interrogation concerning the charged offense or offenses.

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[19] The present Mil. R. Evid. 305 essentially replaced the old notice to counsel provisions that sprang from *United States v. McOmber*, 1 M.J. 380 (C.M.A. 1976). Under *McOmber* (as implemented by the old Mil. R. Evid. 305(e)), when an investigator intended to question an accused regarding an offense and knew or reasonably should have known the accused had counsel with respect to that offense, counsel had to be notified and given a reasonable time in which to attend. This notice to counsel provision was viewed as totally non-waivable until the decision in *United States v. LeMasters*, 39 M.J. 490 (C.M.A. 1994).

In *LeMasters*, the court held that the *McOmber* rule was designed to protect the right to counsel when the police initiate the interrogation. Accordingly, if the suspect initiates discourse and prosecution can show the suspect was aware of his right to have his counsel notified and present, but that he affirmatively waived those rights, then a valid waiver can be found. This case left open the question of whether police initiated questioning was permitted in light of the Supreme Court decisions in *Minnick v. Mississippi*, 498 U.S. 146 (1990), *McNeil v. Wisconsin*, 501 U.S. 171 (1991), and the 1994 amendment of Mil. R. Evid. 305 that removed the language requiring notification of counsel whenever a represented suspect was questioned.

Finch put the *McOmber* notification rule to rest, presumably once and for all. Neither *McOmber*, *LeMasters*, nor the current Mil. R. Evid. 305(e) addresses the ethical implications of dealing with "represented" parties.

[20] If an accused or suspect is interrogated by a person required to give Article 31 warnings and the accused or suspect is in custody, or reasonably believes himself to be in custody, or is otherwise deprived of his freedom of action in any way, and requests counsel, any subsequent waiver of the right to counsel obtained during custodial interrogation concerning the same or different offense is invalid unless the prosecution can demonstrate by a preponderance of the evidence that: (1) the accused or suspect initiated the communication leading to waiver; or (2) the accused or suspect has not continuously had his or her freedom restricted by confinement, or other means, during the period between the request for counsel and the subsequent waiver.

[21] *Id*.

b. However, the Sixth Amendment right to counsel is "offense specific." Law enforcement may question a suspect on an offense that has not been preferred/indicted. The test to determine whether there are two different offenses is whether each provision requires proof of a fact that the other does not (i.e., the *Blockburger* test). *Texas v. Cobb*, 532 U.S. 162 (2001).

F. Waiver of PASI at trial.

1. "When an accused testifies voluntarily as a witness, the accused thereby waives the privilege against self-incrimination with respect to the matters concerning which he or she so testifies." Mil. R. Evid. 301(e).

2. By testifying on direct examination about an offense for which he is being tried, an accused does not, however, waive his privilege against self-incrimination with respect to uncharged misconduct at an entirely different time and place. *United States v. Castillo*, 29 M.J. 145 (C.M.A. 1989).

3. Claiming the privilege during cross-examination.

a. Mil. R. Evid. 301(f)(2): "If a witness asserts the privilege against self-incrimination on cross-examination, the military judge, upon motion, may strike the direct . . . , in whole or in part, unless the matters to which the witness refuses to testify are purely collateral."[22]

b. If matters to which the witness refuses to testify during cross-examination are purely collateral, there is no right to have the witness's direct testimony stricken. *United States v. Evans*, 33 M.J. 309 (C.M.A. 1991).

c. *United States v. Moore*, 36 M.J. 329 (C.M.A. 1993). Military judge was within his discretion to strike the entire direct testimony of a defense witness following assertion of right against self-incrimination on cross-examination.

d. *United States v. Lawless*, 13 M.J. 943 (A.F.C.M.R. 1982). A government witness testified he had assisted accused in weighing and packing marijuana but refused to testify about who had supplied the baggies and other packaging equipment. The military judge properly refused to strike the direct testimony since the information about the source of the equipment was collateral to the core of the direct.

4. Confessional stipulations. *United States v. Craig*, 48 M.J. 77 (C.A.A.F. 1998). Entering into a confessional stipulation does not waive the accused's constitutional rights against self-incrimination, to a trial of the facts, and to confront and cross-examine the witnesses against her.

5. The impact of a guilty plea on PASI.

[22] The Analysis to the rule describes collateral matters as "evidence of minimal importance" ("usually dealing with a rather distant fact solicited for impeachment").

a. Trial counsel are permitted to use a guilty plea to a lesser-included offense to establish elements common to both the greater and lesser crimes of a single specification. *United States v. Rivera*, 23 M.J. 89 (C.M.A. 1986); *see also* RCM 920(e). They may not, however, reach back to the providency inquiry to find evidence to condemn the accused from his own mouth on a separate offense. *United States v. Craig*, 63 M.J. 611 (A.F. Ct. Crim. App. 2006).

b. *Mitchell v. United States*, 526 U.S. 314 (1999). The Supreme Court held that in the federal criminal system, a guilty plea does not waive the self-incrimination privilege at sentencing. The Court found that the protection of the Fifth Amendment privilege applies equally to the sentencing phase of trial as it does to the guilt phase, and that negative inferences cannot be drawn by the accused's election to remain silent during the sentencing phase.

VIII. VOLUNTARINESS

The concept of voluntariness entails elements of the voluntariness doctrine, due process, and compliance with Article 31(d).[23] Whether or not *Miranda* is implicated, a confession must be voluntary to be valid. Thus, a confession deemed coerced must be suppressed despite a validly obtained waiver in the first instance. In determining whether a confession is voluntary, it is necessary to look at the totality of the circumstances concerning whether the accused's will was overborne and whether the confession was the product of an essentially free and unconstrained choice by its maker. Some factors to consider in assessing the totality of the circumstances include the age, education, and intelligence of the accused, whether the accused has been informed of his constitutional rights, the repeated and prolonged nature of the questioning, and the use of physical punishment, such as the deprivation of food or sleep.

A. The Test.

1. "The principles for determining whether a pretrial statement was [involuntary] is essentially the same whether the challenge is based on the Constitution, Article 31(d), or Mil. R. Evid. 304." *United States v. Bubonics*, 45 M.J. 93 (C.A.A.F. 1996).

2. "The necessary inquiry is whether the confession is the product of an essentially free and unconstrained choice by its maker. If, instead, the maker's will was overborne and his capacity for self-determination critically impaired, use of the confession would offend due process."[24]

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[23] *See generally* Captain Fredric I. Lederer, *The Law of Confessions — the Voluntariness Doctrine*, 74 Mil. L. Rev. 67 (1976).

Article 31(d) provides:

> No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

The Analysis to Mil. R. Evid. 304(c)(2) lists examples of involuntary statements as those resulting from: coercion, unlawful influence, and unlawful inducement, to include infliction of bodily harm, deprivation of food, sleep, or adequate clothing; threats of bodily harm; confinement or deprivation of privileges because a statement was not made, or threats thereof; promises of immunity or clemency; promises of reward or benefit, or threats of disadvantage.

[24] *Bubonics*, 45 M.J. at 95. In *Bubonics*, the court found that while "Mutt and Jeff" techniques and threat of civilian prosecution interrogation techniques do not amount to *per se* coercion, based on the facts of the case, the interrogators improperly coerced Bubonics' statement. *See also Ledbetter v. Edwards*, 35 F.3d 1062 (6th Cir. 1994)

3. In applying a totality of the circumstances test to determine if the government has shown by a preponderance of the evidence that the accused will was not overborne in the making of a confession, the court will consider: (1) the characteristics of the accused, (2) conditions of the interrogation, and (3) conduct of the law enforcement officials.[25]

4. *United States v. Freeman*, 65 M.J. 451 (C.A.A.F. 2008). Despite AFOSI agent conduct that included a ten-hour interview, two polygraphs, lies about the existence of the suspect's fingerprints at the crime scene and threats to turn the suspect over to civilian law enforcement if he did not confess, the subsequent confession was not involuntary under the totality of the circumstances.

5. *United States v. Lichtenhan*, 40 M.J. 466 (C.M.A. 1994). While a cleansing warning is not a requirement for admissibility, an earlier unwarned statement coupled with the lack of a cleansing warning before a subsequent statement are all part of the "totality of the circumstances" in determining if the subsequent statement was made voluntarily.

6. *United States v. Griffin*, 50 M.J. 278 (C.A.A.F. 1999). At trial, the prosecutor introduced a confession the accused made to Defense Investigative Service (DIS) agents during a security clearance update interview. The CAAF upheld the military judge's decision to admit the confession. In doing so, the court stated that "the voluntariness of a confession is determined by examining the totality of the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." The court also determined that the military judge's decision to exclude defense expert testimony about false confessions was proper.

7. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). In determining whether a confession has been elicited by means that are unconstitutional, it is necessary to look at the totality of the circumstances concerning "whether the defendant's will was overborne in a particular case." Factors to consider in assessing the totality of the circumstances include the age, education, and intelligence of the accused; whether the accused has been informed of his constitutional rights; the length of the questioning; the repeated and prolonged nature of the questioning; and the use of physical punishment, such as the deprivation of food or sleep.

8. *United States v. Henderson*, 52 M.J. 14 (C.A.A.F. 1999). In deciding that the confession was voluntary, the court gave significant weight to the fact that the accused couched his admissions in an exculpatory manner in the hopes of avoiding trouble.

(finding that the accused's confession was voluntary, the court considered the following factors: 1) no physical punishment or threats had been used; 2) no deprivation of physical necessities, such as food and drink or bathroom privileges; 3) short interrogation (3 hours); 4) informed of his *Miranda* warnings three different times; 5) clear indication Ledbetter understood his rights and did not appear under the influence of drugs or alcohol or otherwise unable to comprehend those rights; 6) did not express a reluctance to talk; and, 7) no request for the presence of an attorney).

[25] *United States v. Vandewoestyne*, 41 M.J. 587 (A.F. Ct. Crim. App. 1994) (totality of the circumstances established accused's confession was knowing and voluntary, even though he was ultimately persuaded to confess because of fear that a failure to cooperate might lead to deportation of his wife if her complicity in offenses was ever known to the INS); *see also United States v. Wheeler*, 22 M.J. 76 (C.M.A. 1986); *United States v. Norfleet*, 36 M.J. 129 (C.M.A. 1992); *United States v. Doucet*, 43 M.J. 656 (N-M. Ct. Crim. App. 1995); *United States v. Briggs*, 39 M.J. 600 (A.C.M.R. 1994); *United States v. Gill*, 37 M.J. 501 (A.F.C.M.R. 1993).

9. *United States v. Ford*, 51 M.J. 445 (C.A.A.F. 1999). Based on the totality of the circumstances, the CAAF held that the accused's written confession was voluntary, and was not tainted by an earlier unwarned, yet not coerced, interrogation.

B. Use of Deception.

1. *Miranda v. Arizona*, 384 U.S. 436 (1966). Any evidence that the accused was threatened, tricked, or cajoled into a waiver will show that the defendant did not voluntarily waive his privilege.

2. *United States v. Davis*, 6 M.J. 874 (A.C.M.R. 1979). After a proper waiver, deception is permissible in the interrogation process as long as the artifice is not likely to produce an untrue confession.

3. *United States v. Jones*, 34 M.J. 899 (N.M.C.M.R. 1992). NIS agent falsely stated that co-accused had "fingered" the accused as the sole perpetrator. This misrepresentation, though relevant to a determination of voluntariness, does not render an otherwise voluntary statement involuntary.

4. *United States v. Thrower*, 36 M.J. 613 (A.F.C.M.R. 1992). When accused continued to deny involvement in ATM card theft, another OSI agent was introduced as "Dr. Paul," a psychologist/psychic with a special power to know when he was being told a lie by looking into his crystal ball. Accused eventually made admissions to "Dr. Paul." The court considered the "cornball ruse" as nothing more than an adjuration to the accused to tell the truth and did not render confession involuntary.

5. *United States v. Sojfer*, 47 M.J. 425 (C.A.A.F. 1998). During an interrogation, the NCIS agent stated a proposition that he knew was false. In response, the accused corrected the agent with incriminating information. Applying a totality of the circumstance analysis, the CAAF denied the accused's claim that the statement was involuntary, i.e., the product of "fraud and trickery."

C. Due process/unlawful inducements.

1. *Colorado v. Connelly*, 479 U.S. 157 (1986). Official coercion is a necessary element in showing a violation of due process. In *Connelly*, the defendant, who was later diagnosed as mentally ill, approached a police officer and confessed to a murder. Despite testimony that his mental illness interfered with his free will, the Court found the confession was voluntary because there was no evidence of coercion by the police. The Court noted that the defendant's mental condition would be an important consideration when police use subtle psychological methods of coercion, but rejected the idea "that a defendant's mental condition, by itself and apart from it's relation to official coercion, should ever dispose of the inquiry into constitutional 'voluntariness.'"

2. *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992). To render an inducement unlawful under Article 31(d), "[the] inducement must be made by someone acting in a law enforcement capacity or in a position superior to the person making the confession." A promise of confidentiality from U.S. Intelligence agent (non-police agent) did not constitute unlawful inducement; therefore, the accused's confession was voluntary.

3. *United States v. Campos*, 48 M.J. 203 (C.A.A.F. 1998). Five weeks after a serious car accident, while the accused was medicated and in the hospital recovering from injuries, NCIS agents questioned him about wrongful use and distribution of methamphetamine. Prior to the questioning, the accused was advised of his rights under Article 31(b) and *Miranda*. The court held that the actions of the NCIS agents did not rise to "government overreaching," and that the accused's mental state was not such as to render the confessions involuntary. The court stated that the accused's mental state is just a factor in determining the voluntariness of a confession and is only considered if there is a governmental due process violation due to overreaching.

4. *United States v. Morris*, 49 M.J. 227 (C.A.A.F. 1998). An investigator telling the accused during an interrogation that "[i]f you help us, we will help you," did not amount to unlawful inducement.

5. *United States v. Oakley*, 33 M.J. 27 (C.M.A. 1991). Senior law enforcement noncommissioned officer's admonishments to cooperate did not overbear the suspect's freely drawn conclusion that it was in his own best interest to cooperate.

6. *United States v. Murphy*, 18 M.J. 220 (C.M.A. 1984). Trial counsel's advice that cooperation with Japanese police could result in a more lenient sentence merely provided the accused information with which to make an informed, tactical judgment as to his making a statement.

D. Coercion/Threats.

1. Mil. R. Evid. 304(c)(3) defines inadmissible involuntary statements as those obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment or Article 31 or though use of coercion, unlawful influence, or unlawful inducement. The drafters' analysis for this provision states:

> The language governing statements obtained through the use of "coercion, unlawful influence, and unlawful inducement," found in Article 31(d) makes it clear that a statement obtained by any person, regardless of status, that is the product of such conduct is involuntary. Although it is unlikely that a private citizen may run afoul of the prohibition of unlawful influence or inducement, such a person clearly may coerce a statement and such coercion will yield an involuntary statement.[26]

[26] Although written well before *Connelly*, the drafters' analysis is probably still a correct interpretation of the law. From the perspective of a due process analysis, statements are excluded as the result of governmental misconduct. The Supreme Court observed in *Connelly*, however, that even if a confession is constitutionally voluntary, due to the absence of government misconduct, it might still be proved unreliable as a matter of law. In this regard, the admissibility of a statement is governed by the evidentiary laws of the forum, and not by the Due Process Clause. As implemented by Mil. R. Evid. 304, the statutory protection of servicemembers under Article 31 clearly contemplates not only an analysis of due process voluntariness, but also consideration of voluntariness as a matter of fundamental reliability. Accordingly, statements coerced by private citizens may still be held inadmissible under Mil. R. Evid. 304.

2. *United States v. Ellis*, 57 M.J. 375 (C.A.A.F. 2002). The appellant was subjected to several hours of interrogation during which he was accused of killing his two-year-old child. During the interrogation, the appellant was told that there was enough evidence to arrest him and his wife (who was also being subjected to interrogation). He was also told that his children would be taken away and put in foster care if he and his wife were arrested. The appellant and his wife met for fifteen minutes; after the meeting the appellant confessed to slamming his son's head on the ground on two different occasions. The court concluded that although the detective's statement regarding the possible removal of appellant's children may have contributed to his confession, the statement was still the product of an essentially free and unconstrained choice by the appellant, and thus was voluntary. *See also United States v. Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005).

3. *Arizona v. Fulminante*, 499 U.S. 279 (1991). The accused was befriended by another inmate, an FBI informant, who promised to protect the accused from other inmates if he would tell what happened concerning the murder of the accused's 11-year-old daughter. Under "totality of the circumstances" the subsequent confession was involuntary. The Court found that a credible threat of physical violence existed unless the accused confessed. "Coercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition." Other factors that may have been relevant in determining whether the accused's will has been overborne include: accused's intelligence, physical stature, prior prison experiences, and relationship with the informant.

4. *United States v. Martinez*, 38 M.J. 82 (C.M.A. 1993). Confession during polygraph examination could be found involuntary as result of psychological coercion, even though accused had waived his rights and was free to leave motel room. Accused testified that his will was overborne. Coercive factors considered included duration of interrogation, the nature of the interrogation techniques, and the accused's frustrated attempts to obtain assistance of counsel during the investigation.

5. *United States v. Benner*, 57 M.J. 210 (C.A.A.F. 2002). Appellant's confession to CID was involuntary, since the appellant was faced with the "Hobson's choice" of either confessing on his own, or having the chaplain inform CID of his earlier admissions to child sexual abuse while seeking counseling from the chaplain.

6. *Haynes v. Washington*, 373 U.S. 503 (1963). Petitioner's written confession violated due process because it was obtained through the use of threats and isolation techniques by police. Failure to inform petitioner of his rights was another relevant factor in determining whether the confession was voluntary. The court further observed that the refusal to allow petitioner to communicate with his attorney or his wife was a misdemeanor under state law.

7. *United States v. O'Such*, 37 C.M.R. 157 (C.M.A. 1967). The fact that appellant was deprived of sleep, had threats made against his family during the interrogation, and was threatened with being charged with misprision of a felony if he continued to remain silent led to his coerced oral admissions.

8. *Ashcraft v. Tennessee*, 322 U.S. 143 (1944). A thirty-six hour interrogation was determined to be so "inherently coercive" as to render a resulting confession automatically involuntary. The Court seems to further indicate that the longer the interrogation, the less important the other factors become when evaluating the totality of the circumstances.

IX. ADMITTING CONFESSIONS MADE AFTER IMPROPER POLICE CONDUCT

Generally, a confession obtained after an illegal search, arrest, or prior confession is inadmissible, unless the government can show sufficient attenuation of the taint. If the prior illegality is a result of procedural defects, it will be easier for the government to show attenuation of the taint. If, however, the prior illegality resulted from a constitutional violation (i.e., coercion) then it is unlikely the government will prevail.

A. After an illegal arrest or search.

1. *Brown v. Illinois*, 422 U.S. 590 (1975). *Miranda* warnings alone are insufficient to cure taint of arrest made without probable cause or warrant. Factors to consider on attenuation of the taint: (1) *Miranda* warnings; (2) "temporal proximity" of the illegal arrest and the confession; (3) "intervening circumstances"; and, (4) "purpose and flagrancy of the official misconduct".

2. *Wong Sun v. United States*, 371 U.S. 471 (1963). Statements made by appellant in his bedroom at the time of his unlawful arrest were the fruits of the agents' unlawful action, and they should have been excluded from evidence. However, since the appellant was later lawfully arraigned and released on his own recognizance and had returned voluntarily several days later when he made his unsigned statement, the connection between his unlawful arrest and the making of this later statement was so attenuated that the unsigned statement was not the fruit of the unlawful arrest and, therefore, it was properly admitted in evidence.

3. *United States v. Washington*, 39 M.J. 1014 (A.C.M.R. 1994). Unlawful search tainted statements made by accused where first statement was taken immediately after search and discussed items found during search. While a rights warning is a relevant factor in attenuating a statement from prior official misconduct, a warning alone cannot always break the casual connection. *See also New York v. Harris*, 495 U.S. 14 (1990) (where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the use of a statement made by the defendant outside of his home, even though the statement is taken after an illegal warrantless arrest made in the home); *United States v. Khamsouk*, 57 M.J. 282 (C.A.A.F. 2002) (although appellant was seized during an illegal search, his continued custody at the police station was based on probable cause, therefore, his subsequent warned statement to police was properly admitted).

4. *United States v. Mitchell*, 31 M.J. 914 (A.F.C.M.R. 1990). *Harris* applied. Statement made to police who entered accused's motel room based on probable cause, but without a warrant or his consent should have been suppressed, but written statement given three days later was admissible.

5. *United States v. Campbell*, 41 M.J. 177 (C.M.A. 1994). Illegality of urinalysis precluded admission of accused's statements, where urinalysis results were delivered to accused on day he made his initial confession, accused was directed to bring form notifying him of positive results to the criminal investigative division office, and positive results of the challenged urinalysis were the sole basis for the accused's questioning by the military police. However, no cleansing warning was given.

B. After an inadmissible confession.

1. Question first tactic. *Missouri v. Seibert*, 542 U.S. 600 (2004). Police engaged in a common interrogation tactic of questioning the suspect. Once they obtained the confession, they would read the suspect her rights, get a waiver, and then obtain a second confession. The Supreme Court held that the warned confession was inadmissible, since the police's deliberate tactic of withholding *Miranda* warnings elicited an initial confession that was used to undermine the "comprehensibility and efficacy" of the subsequent *Miranda* warnings. Under the circumstances of the case, the Court concluded that it would have been reasonable for the suspect to regard the two phases of the interrogation as a continuum, especially since the officer referred back to the earlier admissions. The mere recital of *Miranda* warnings in the middle of this continuous interrogation was not sufficient to separate the two phases in suspect's mind. Therefore, she would have concluded that it would be unnatural for her not to repeat the same information she had just given. She would not have understood that she had a choice about continuing to talk.

2. *Oregon v. Elstad*, 470 U.S. 298 (1985). "A suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." "Administration of *Miranda* warnings serves to cure the condition that rendered the unwarned statement inadmissible." However, no cleansing warning required. *See also United States v. Lichtenhan*, 40 M.J. 466 (C.M.A. 1994).

3. *United States v. Phillips*, 32 M.J. 76 (C.M.A. 1991). An unwarned statement obtained without actual coercion does not presumptively taint a subsequent, warned statement. Government must prove by a preponderance of the evidence, however, that the warned statement was voluntary and was not obtained by using the earlier statement. If the initial statement is the product of actual coercion, duress, or inducement, it presumptively taints subsequent warned statements. Cleansing warnings, although not legally required, will help show voluntariness. *Cf. United States v. Torres*, 60 M.J. 559 (A.F. Ct. Crim. App. 2004).

4. *United States v. Steward*, 31 M.J. 259 (C.M.A. 1990). Mere "technical violations of Article 31(b)" do not presumptively taint subsequent warned statements. The appropriate legal inquiry in these types of cases is whether his subsequent confession was voluntary considering all the facts and circumstances of the case, including the earlier technical violation of Article 31(b).

5. *United States v. Brisbane*, 63 M.J. 106 (C.A.A.F. 2006). Where an earlier statement is "involuntary" only because the accused has not been properly warned of his Article 31(b) rights, the voluntariness of the second statement is determined by the totality of the circumstances. The earlier unwarned statement is a factor in this total picture, but it does not presumptively taint the subsequent statement. If a "cleansing warning" has been given — where the accused is advised that a previous statement cannot be used against him — that statement should be taken into consideration. If a cleansing statement is not given, however, its absence is not fatal to a finding of voluntariness.

6. *United States v. Gardinier*, 65 M.J. 60 (C.A.A.F. 2007), *rev'd on other grounds*, 67 M.J. 304 (C.A.A.F. 2009). Suspect provided two incriminating statements to civilian investigators following a proper *Miranda* rights warning. Immediately after making these statements, a CID agent entered the interview room, identified himself, and obtain a third incriminating statement without advising the suspect of his Article 31 rights. Four days later, the suspect was called to the CID office and advised that his prior statement was given with what "may not have been a proper rights advisement." The suspect was then asked whether he would be willing to make another statement. He did. While the court suppressed the first (unwarned) statement to CID, the second statement was found to be voluntary under the totality of the circumstances despite the fact the accused had not been specifically informed that his first statement to CID might be inadmissible.

7. *United States v. Young*, 49 M.J. 265 (C.A.A.F. 1998). A two-day period was enough to purge the taint from the previous inadmissible confession. *See also United States v. Ford*, 51 M.J. 445 (C.A.A.F. 1999); *United States v. Allen*, 59 M.J. 478 (C.A.A.F. 2004); *United States v. Cuento*, 60 M.J. 106 (C.A.A.F. 2004).

8. *Michigan v. Tucker*, 417 U.S. 433 (1974). Police failure to advise appellant of his right to appointed counsel did not require that the testimony of a witness identified in appellant's statement be suppressed.

X. THE EXCLUSIONARY RULE

No statement obtained in violation of Article 31,[27] *Miranda*,[28] Sixth Amendment,[29] or due process may be received in evidence in the case in chief in a trial by court-martial against the subject of the violation. Evidence resulting from "mere" procedural violations may be allowed to impeach the testimony of the accused. Rationale for allowing impeachment use is that in an impeachment situation, the search for the truth in a criminal case outweighs the deterrence value of the exclusionary rule. Coerced statements are inadmissible for all purposes, to include impeachment of the accused. Otherwise inadmissible statements may also be admissible in a later prosecution against the accused for perjury, false swearing, or making of a false official statement.

A. The general rule: Mil. R. Evid. 304(a).

> "[A]n involuntary statement or any derivative evidence therefrom may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this rule."

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[27] Mil. R. Evid. 304(b)(1): "Where the statement is involuntary only in terms of noncompliance with the requirements of Mil. R. Evid. 305(c) or (f), or the requirements concerning counsel under Mil. R. Evid. 305(d), 305(e), or 305(g), this rule does not prohibit use of the statement to impeach by contradiction the in-court testimony of the accused . . . ."

[28] *Harris v. New York*, 401 U.S. 222 (1971); *accord Oregon v. Hass*, 420 U.S. 714 (1975).

[29] *Kansas v. Ventris*, 129 S.Ct. 1841 (2009) (statement to informant, admittedly elicited in violation of the Sixth Amendment, was admissible to impeach defendant's inconsistent testimony at trial); *Michigan v. Harvey*, 494 U.S. 344 (1990) (statement given in response to police-initiated interrogation following attachment of accused's Sixth Amendment right to counsel, although not admissible in the prosecution's case-in-chief, may be used to impeach the defendant's testimony, at least when the defendant gives a knowing and voluntary waiver of his right to counsel); *United States v. Langer*, 41 M.J. 780 (A.F. Ct. Crim. App. 1995) (statements made by accused after preferral of drug charges against him to person recruited as drug informant by government agents were obtained in violation of accused's Sixth Amendment right to counsel and could not be used in government's case-on-chief. Although informant may have been intended to act as a passive listening post, person in fact initiated contact and conversations with accused for the express purpose of gathering information about illegal drug activity. Statements could be used in rebuttal if such information became relevant to impeach accused's testimony).

B. The inevitable discovery exception.

1. Mil. R. Evid. 304(b)(2) and (3) provide that:

a. Evidence that was obtained as a result of an involuntary statement may be used when the evidence would have been obtained even if the involuntary statement had not been made.

b. Evidence challenged as derivative evidence may be admitted against the accused if the military judge finds by a preponderance of the evidence that the statement was made voluntarily, that the evidence was not obtained by use of the statement, or that the evidence would have been obtained even if the statement had not been made.

2. *United States v. Kline*, 35 M.J. 329 (C.M.A. 1992). Accused, on his own initiative, contacted his commander and stated, "I have just turned myself in for sexually molesting my daughter." The court found admission was not inadmissible involuntary derivative evidence, despite suppression of a similar admission made to a military social worker hours earlier.

C. Statements incriminating others.

1. Exclusionary rule does not apply to coerced or unadvised witness statements that incriminate someone else. Instead, evidence of coercive or illegal investigatory tactics employed by the government to secure such evidence or subsequent testimony based thereon may be presented to the fact-finder for purposes of determining the weight to be afforded this evidence.

2. *United States v. McCoy*, 31 M.J. 323 (C.M.A. 1990). No due process violation where trial counsel deliberately advised CID agents not to advise suspects of their Article 31 rights, suspects later gave immunized testimony against accused, and accused had a full opportunity to present this improper conduct to the members through cross-examination, witnesses, and argument.

D. False Official Statement charge.

United States v. Swift, 53 M.J. 439 (C.A.A.F. 2000). The government may only use a statement taken in violation of Article 31 in a later prosecution for false official statement, where the accused has taken the stand in an earlier prosecution, thereby "open[ing] the door to consideration of the unwarned statement by his or her in-court testimony."

E. Derivative physical evidence (difference between Military Rules of Evidence and Supreme Court jurisprudence).

1. Mil. R. Evid. 304(a) states that "[A]n involuntary statement or any derivative evidence therefrom may not be received in evidence . . . ." Therefore, in the military, the fruit of the poisonous tree doctrine applies to evidence derived from inadmissible statements.

2. *But see United States v. Patane*, 542 U.S. 630 (2004). After arresting the defendant at his house and before completely giving him *Miranda* warnings, the police asked him where his pistol was. The defendant told the officers the location of the pistol, and then, per their request, gave the officers permission to enter and seize it. The Supreme Court held that the pistol was admissible. A plurality of the Court concluded that the Self-Incrimination Clause of the Fifth Amendment protects individuals from being compelled to testify against themselves in a criminal proceeding. Thus, the Clause cannot be violated by admitting nontestimonial evidence obtained through the use of unwarned, yet

voluntary statements. Creating a blanket suppression rule for such evidence does not serve the Fifth Amendment's goals of "assuring trustworthy evidence" or deterring police misconduct. Additionally, the protections of *Miranda* are not violated when officers fail to give warnings, regardless of whether the failure is negligent or intentional. Instead, *Miranda's* protections are violated when unwarned statements are admitted against the declarant at trial. Suppression of unwarned statements is a complete remedy to protect this fundamental "trial right." Therefore, the "fruit of the poisonous tree" doctrine does not apply to evidence derived from *Miranda* violations.

XI. MENTION OF INVOCATION AT TRIAL

A. Silence at trial.[30]

1. *Griffin v. California*, 380 U.S. 609 (1965). Comment by the prosecutor on the accused not testifying violates the Fifth Amendment and due process.

2. *Portuondo v. Agard*, 529 U.S. 61 (2000). A prosecutor's comments about the defendant's opportunity to watch other witnesses testify before he took the stand and to tailor his testimony accordingly, did not amount to a constitutional violation, but were instead a fair comment on factors effecting the defendant's credibility. The Supreme Court held that "when [a defendant] assumes the role of a witness, the rules that generally apply to other witness — rules that serve the truth-seeking function of the trial — are generally applicable to him as well."

3. *United States v. Robinson*, 485 U.S. 25 (1988). Where the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, *Griffin*, holds that the privilege against compulsory self-incrimination is violated. But where the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel, there is no violation of the privilege.

4. *United States v. Cook*, 48 M.J. 64 (C.A.A.F. 1998). During closing argument, trial counsel asked the members to consider the accused's yawning during trial as being indicative of his guilt. The CAAF held that it was improper for the trial counsel to comment about the courtroom demeanor of the accused, but found the error to be harmless. The Court determined that the accused's acts were non-testimonial and therefore not protected by the Fifth Amendment. Regardless, the acts were not relevant to the issue of guilt or innocence. *See also United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999).

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[30] Mil. R. Evid. 301(f) sets forth the general rule:

(1) "fact that a witness has asserted the privilege against self-incrimination in refusing to answer a question cannot be considered as raising any inference unfavorable to either the accused or the government."

* * *

(3) "fact that the accused during official questioning and in exercise of rights . . . remained silent, refused to answer . . . , requested counsel, or requested that the questioning be terminated is inadmissible against the accused."

5. *United States v. Mobley*, 34 M.J. 527 (A.F.C.M.R. 1991), *aff'd*, 36 M.J. 34 (C.M.A. 1992) (summary disposition). Trial counsel asked rhetorical questions directed to accused during argument on findings, and then answered them himself in manner calculated to bring the accused's silence to the members' attention. "[A] trial counsel may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense." Harmless error despite legally inappropriate comments.

6. *United States v. Kirks*, 34 M.J. 646 (A.C.M.R. 1992). Trial counsel improperly described non-testifying accused's demeanor as "[t]he iceman." Comments on a non-testifying accused's demeanor are objectionable on three grounds: 1) argues facts not in evidence; 2) violates Mil. R. Evid. 404(a) by using character evidence solely to prove guilt; and, 3) violates the Fifth Amendment. Defense counsel only objected on third ground, which was cured by an instruction. Other grounds were waived and not plain error. *See also United States v. Jackson*, 40 M.J. 820 (N.M.C.M.R. 1994) (trial counsel's argument on findings that accused's tears in court were tears of remorse and guilt was harmless error even though the accused's courtroom behavior off of the witness stand was legally irrelevant to the question of guilt).

7. *United States v. Carter*, 61 M.J. 30 (C.A.A.F. 2005). The CAAF held that the trial counsel's repeated comments about the "uncontroverted" and "uncontradicted" evidence during findings argument constituted an impermissible reference to the accused's exercise of his Fifth Amendment right not to testify. The trial counsel's comments on the defense's failure to present contradicting evidence were not tailored to address any weaknesses in the defense's cross-examination of the victim or the defense's efforts to impeach her; rather, since only the accused could controvert the victim, the trial counsel's comments in effect repeatedly drew the members' attention to the accused's failure to testify.

8. *United States v. Paige*, 67 M.J. 442 (C.A.A.F. 2009). The trial counsel, during closing arguments, argued that the evidence of the victim's condition was "uncontradicted." The trial counsel also incorrectly argued that Paige had to assert that his mistake was honest in order to qualify for the mistake of fact as to consent defense. The CAAF held that as to the uncontradicted comment, this was neither plain nor obvious error. Paige was not the only one with the information that could contradict the victim's condition because other witnesses saw her immediately before and during the rape. As to the mistake of fact defense comment, the error was plain and obvious, but it was harmless beyond a reasonable doubt.

9. *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009). During opening statements, the trial counsel told the members that Ashby never told anyone about the videotape of the incident. The trial counsel also told the members that when Ashby met with the Italian prosecutor, he was told that he had a right to remain silent, similar to American law, and that he invoked that right. The defense moved for a mistrial, which was denied. The trial counsel was required to redact her statement to the members. The defense was allowed to voir dire the members, which was declined. A curative instruction was given by the military judge. The CAAF found the comments made by the trial counsel were error, but that they were harmless beyond a reasonable doubt due to the curative efforts made by the military judge.

B. Silence after warnings.

1. *Doyle v. Ohio*, 426 U.S. 610 (1976). Use of accused's silence after *Miranda* warning to impeach later trial testimony as a fabrication violates due process.

2. *United States v. Riley*, 47 M.J. 276 (C.A.A.F. 1997). Under the circumstances of the case (no defense objection, no instruction to members regarding improper introduction of evidence, and weak evidence), admission of testimony by an investigator regarding the accused's invocation of the privilege against self-incrimination during questioning constituted plain error.

3. *United States v. Sidwell*, 51 M.J. 262 (C.A.A.F. 1999). When asked by the trial counsel what statements the accused made, the witness testified that the accused invoked "his rights." Defense counsel immediately objected and moved for a mistrial. Although the military judge denied the defense motion, he did strike the witnesses testimony, gave several curative instructions, and questioned the members to ensure they understood the instructions. The CAAF determined that error occurred, but considering the corrective action taken by the military judge and the facts of the case, the error was harmless. *Cf. United States v. Riley*, 47 M.J. 276 (C.A.A.F. 1997).

4. *United States v. Miller*, 48 M.J. 811 (N-M. Ct. Crim. App. 1998). Relying on *Riley*, the NMCCA held that the admission of the investigator's testimony that the accused terminated the interrogation materially prejudiced the substantial rights of the accused. The court also noted that the military judge failed to take the necessary steps to remedy the prejudice.

C. Silence before warnings.

1. Mil. R. Evid. 304(h)(3).

   "Certain admissions by silence. A person's failure to deny an accusation of wrongdoing [while] . . . under official investigation . . . does not support an inference of an admission of the truth of the accusation."

2. *United States v. Cook*, 48 M.J. 236 (C.A.A.F. 1998). After being arrested and questioned by OSI investigators about a rape allegation, the accused went to a friend's house. The friend asked the accused if he committed the rape. The accused did not respond. At trial, the prosecution introduced this evidence and argued that the accused's failure to deny the allegation indicated guilt. The CAAF held that this evidence was irrelevant under Mil. R. Evid. 304(h)(3), even when the one asking the questions was a friend who was inquiring out of personal curiosity. The CAAF also held that the start of the OSI investigation was the triggering event for the Mil. R. Evid. 304(h)(3) protections.

3. *United States v. Alameda*, 57 M.J. 190 (C.A.A.F. 2002). Appellant's silence upon being informed that he was being apprehended for an "alleged assault" was not relevant since appellant had a history of domestic violence, including an incident two weeks prior to the attempted murder incident, therefore his failure to deny one or more of the "alleged assaults" to the arresting officer does not support an inference of guilt and is therefore not relevant. Since the military judge's admission into evidence of the appellant's silence was error, trial counsel's use of it in his closing argument was also error. Additionally, the military judge's instructions to the panel were "off the mark," since they only dealt with the appellant's silence at trial, and may have actually exacerbated the problem by indicating to panel members, by omission, that they could draw an adverse inference from appellant's silence during his apprehension.

4. *United States v. Ruiz*, 50 M.J. 518 (A.F. Ct. Crim. App. 1999), *aff'd*, 54 M.J. 138 (C.A.A.F. 2000). During cross-examination of the accused, the trial counsel questioned him about his failure to proclaim his innocence when confronted by investigators. The AFCCA held that under the circumstances, the questioning by trial counsel did not violate Mil. R. Evid. 304(h), because it was designed to highlight the differences between the testimonies of the prosecution witnesses and of the accused.

5. Use of accused's pre-arrest, pre-*Miranda* warning silence to impeach later trial testimony on self-defense is permissible.[31]

6. Use of accused's post-arrest, pre-*Miranda* warning silence to impeach trial testimony on self-defense is permissible; rules of evidence may address. *See Fletcher v. Weir*, 455 U.S. 603 (1982).

D. Invoking the right to counsel.

United States v. Gilley, 56 M.J. 113 (C.A.A.F. 2001). The standard for determining whether mentioning an accused's invocation of his right to counsel is improper is the same standard used for mentioning an accused's invocation of his right to remain silent. Here, no reversible error where: 1) defense counsel first elicited evidence of his client's invocation on cross-examination and did not object to the witness's response; 2) defense's theory "invited response" from trial counsel about accused's invocation; and, 3) invocation was not used as substantive evidence against accused.

E. Remedy for impermissible comments at trial.

1. *United States v. Garrett*, 24 M.J. 413 (C.M.A. 1987). Trial counsel erred by eliciting testimony from CID agent that accused had terminated their interview and asked for an attorney, but a mistrial was properly denied and the error cured by the judge's instructions.[32]

2. *United States v. Palumbo*, 27 M.J. 565 (A.C.M.R. 1988). CID agent revealed to the court that accused asserted rights and declined to be interviewed. The military judge properly denied a mistrial and corrected the error by (1) immediately instructing members to disregard evidence and that accused had properly invoked rights; (2) obtaining affirmative response from court members that they understood and could follow instructions; (3) having defense counsel participate in drafting curative instruction; and, (4) finding trial counsel inadvertently introduced evidence.[33]

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[31] *Jenkins v. Anderson*, 447 U.S. 231 (1980) (accused failed to inform police about his self-defense claim for at least two weeks after murder. Prosecutor used this silence in his cross-examination of the defendant and in his closing argument); *Brecht v. Abrahamson*, 507 U.S. 619 (1993) (defendant failed to tell anyone that the victim's shooting was an accident prior to receipt of the warnings). *See also State v. Easter*, 922 P.2d 1285 (Wash. 1996) (finding that the accused's pre-arrest silence cannot be used against him). In *Easter*, the accused was questioned at the accident scene, but he refused to answer any questions (not a custodial interrogation). During trial, the prosecutor argued that the accused's silence indicated he was being evasive to avoid alcohol detection. The Washington Supreme Court held that an accused's pre-arrest silence cannot be used against him/her. The court found that the right to silence is derived from the Fifth Amendment and not *Miranda*, and applies before an accused is in custody or is the subject of an investigation.

[32] A good example of a curative instruction is contained in *United States v. Mobley*, 34 M.J. 527 (A.F.C.M.R. 1991).

[33] When defense does not request it, there is no need to reiterate instruction during final instructions. *See also United States v. Zaccheus*, 31 M.J. 766 (A.C.M.R. 1990).

F. The right extends through sentencing.

1. *Estelle v. Smith*, 451 U.S. 454 (1981). "We can discern no basis to distinguish between the guilt and penalty phases . . . so far as the protection of the Fifth Amendment privilege is concerned."

2. *United States v. Edwards*, 35 M.J. 351 (C.M.A. 1992). "We must emphasize that trial counsel can only argue that an accused lacks remorse when that inference can be fairly derived from evidence before the court-martial. It cannot arise solely from an accused's exercise of his or her rights."

XII. PROCEDURE

A. Discovery.

Mil. R. Evid. 304(d)(1): "*Disclosure*. Prior to arraignment, the prosecution shall disclose to the defense the contents of all statements, oral or written, made by the accused that are relevant to the case, known to the trial counsel, and within the control of the armed forces."

Mil. R. Evid. 304(d)(2)(B): If not disclosed, judge may make such orders as required in the "interests of justice."

B. Litigating the issues.

1. General Procedure.

a. Motions and objections. Defense must raise the motion prior to the plea or the motion is waived; good cause must be shown for an exception. Mil. R. Evid. 304(d)(2)(A).

b. Specificity. Judge may require defense to specify the grounds. Mil. R. Evid. 304(d)(3)

c. Evidence. The defense may present evidence to support its motion, including the testimony of the accused for the limited purpose of the motion. The accused may be cross-examined only on the matter to which he testified. Nothing said by the accused, either in direct or cross-examination, may be used against him for any purpose other than in a prosecution for perjury, false swearing, or false official statement. Mil. R. Evid. 304(f).

d. Burden. Once a motion or objection is raised by the defense, the prosecution has the burden of proving that the statement was voluntary by a preponderance of the evidence. Mil. R. Evid. 304(e).

e. If a statement is admitted into evidence, the defense shall be allowed to present evidence as to the voluntariness of the statement in an attempt to reduce the weight that the fact finder will give to it. Mil. R. Evid. 304(e)(2).

f. Rulings. Shall be ruled on prior to plea, unless good cause. Judge shall state essential findings of fact.[34]

g. Guilty plea waives all objections to the admission of the statements.

[34] Although the timing of essential findings is not specified by the MCM, they "should be" entered contemporaneously with a ruling on a suppression motion. *United States v. Doucet*, 43 M.J. 656 (N-M. Ct. Crim. App. 1995).

2. Standing to challenge self-incrimination issues. *United States v. Jones*, 52 M.J. 60 (C.A.A.F. 1999). To perfect its case against the accused, the government negotiated with three "minor offenders" to testify against the accused. These witnesses did not have a formal grant of immunity. The unwritten agreement was that the government would not prosecute them if they accepted Article 15 punishment, paid restitution, and testified against the accused. On appeal, the accused argued that the government violated the witness's self-incrimination rights, and therefore, their testimony should not have been admissible. The CAAF held that the accused did not have standing to challenge procedural violations of the self-incrimination rights of the witnesses, but may challenge statements that are involuntary due to "coercion and unlawful influence." The court further determined that the even though the government's actions "smelled bad" and resulted in *de facto* immunity, they did not constitute the requisite showing of prejudice.

3. Warnings and waivers at trial.

   a. Mil. R. Evid. 301(b)(2): The military judge should advise a witness of the right to decline to make an answer if the witness appears likely to incriminate himself.

   b. Right against self-incrimination is a "fundamental constitutionally-mandated procedural right that can be waived only by an accused on the record." Waiver will not be presumed by a silent or inadequate record.[35]

4. Burden of proof.

   Mil. R. Evid. 304(e): The burden of proof is on the prosecution by a preponderance of the evidence. It extends only to grounds raised.

5. Defense evidence on motions.

   Mil. R. Evid. 304(f): Accused may testify for limited purpose.

6. Corroboration.

   a. Mil. R. Evid. 304(g): "An admission or a confession . . . may be considered as evidence . . . only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted sufficiently to justify an inference of their truth. . . ." "If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence . . . only with respect to those essential facts . . . that are corroborated . . . ."

   b. Procedure.

   Corroborating evidence is usually introduced before the confession or admission is introduced, but the military judge may admit evidence subject to later corroboration.

[35] *United States v. Adams*, 28 M.J. 576 (A.C.M.R. 1989) (judge's failure to advise accused of his constitutional rights rendered guilty plea improvident).

c. *United States v. Rounds*, 30 M.J. 76 (C.M.A. 1990). Independent evidence of each and every element of the confessed offense is not required as a matter of military law. Generally speaking, it must "establish the trustworthiness of the" confession. Confession was sufficiently corroborated without independent evidence of ingestion of drugs when independent evidence showed accused had access and opportunity to ingest drugs at time and place where he confessed to using drugs.[36]

d. *United States v. Duvall*, 47 M.J 189 (C.A.A.F. 1997). A conviction cannot be based solely on a confession. Rather, some corroborative evidence must be introduced to the trier of fact pursuant to Mil. R. Evid. 304(g).

e. *United States v. Hall*, 50 M.J. 247 (C.A.A.F. 1999). In a military judge alone trial, the trial counsel did not offer the same corroborating evidence on the merits that he did during proceedings on a defense motion to suppress the accused's confession. In affirming its holding in *Duvall* (corroborating evidence must be submitted to the trier-of-fact), the CAAF found that the government satisfied Mil. R. Evid. 304(g) and the confession was sufficiently corroborated, since the judge acknowledged that he considered the corroborating evidence for both the motion and the merits.

f. *United States v. Swenson*, 51 M.J. 522 (A.F. Ct. Crim. App. 1999). Members convicted the accused of attempting to use LSD. The conviction was based upon a confession that was corroborated by a previous admission of LSD use. The AFCCA held that corroborating the accused's confession with a prior admission was proper so long as the prior admission was a statement of anticipated future conduct and not an admission of past criminal conduct. A statement of future criminal misconduct does not need to be corroborated; it can be used to corroborate a confession.

g. *United States v. Cottrill*, 45 M.J. 485 (C.A.A.F. 1997). The corroborating evidence must raise only an inference of truth as to the essential facts admitted, which must be shown by a preponderance of the evidence. In *Cottrill*, there was sufficient independent physical evidence to corroborate the accused's pretrial admissions that he sexually assaulted his daughter. *See also United States v. O'Rourke*, 57 M.J. 636 (A. Ct. Crim. App. 2002)

h. *United States v. Howe*, 37 M.J. 1062 (N.M.C.M.R. 1993), *overruled on other grounds*, *United States v. Driver*, 57 M.J. 760 (N-M. Ct. Crim. App. 2002). Trial counsel has a duty to withdraw charge based on uncorroborated admission or else inform military judge there is insufficient evidence to support it.

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[36] *See also United States v. Lawrence*, 43 M.J. 677 (A.F. Ct. Crim. App. 1995) (confession to cocaine use of four occasions sufficiently corroborated by recent urinalysis); *United States v. Maio*, 34 M.J. 215 (C.M.A. 1992); *United States v. Williams*, 36 M.J. 785 (A.C.M.R. 1993).

i. *United States v. McCastle*, 40 M.J. 763 (A.F.C.M.R. 1994), *aff'd*, 43 M.J. 438 (C.A.A.F. 1996), *as modified on reconsideration*, 44 M.J. 77 (C.A.A.F. 1996). Corroboration was enough where the place the accused admitted to purchasing drugs was a well-known trafficking location, accused's description of the dealer matched the description of a known dealer at that location, and the dealer was frequently observed by authorities using the described vehicle to conduct drug sales.

j. *United States v. Baldwin*, 54 M.J. 464 (C.A.A.F. 2001). In the confession, the appellant stated that his wife had walked in on him while he was assaulting his daughter (although she did not see anything) and that he immediately sought professional help through the chaplain and a therapist. In finding adequate corroboration, the court relied on the following facts: the appellant's wife saw the appellant in their daughter's room on the night he confessed to sexually assaulting her; the appellant gave his wife "a strange look that she had never seen before;" the appellant left the bedroom and went in the living room where he began crying and talking about his own history of being sexually abused; and, two days after being caught, the appellant went to the chaplain and then to a therapist. It was not necessary to provide independent evidence of all the elements of the offense. The court also emphasized that the government only had to establish an inference of truth as to the essential facts by a preponderance of the evidence.

7. Defense Evidence on Voluntariness.

a. *Crane v. Kentucky*, 476 U.S. 683 (1986). Due process and Sixth Amendment concerns require that the accused be permitted to challenge the reliability of a statement before the fact-finder, even though the judge may have found the statement "voluntary."

b. *United States v. Miller*, 31 M.J. 247 (C.M.A. 1990). Mil. R. Evid. 304(e) adopts the orthodox rule for determining the voluntariness of confessions. The judge alone determines the admissibility of confessions and that ruling is final. Although the members must consider the confession in determining guilt or innocence, the accused is free to argue the confession was involuntary in order to reduce the weight the members give it. Judge must hold a hearing and make findings as to voluntariness only if the defense raises the issue by a motion to suppress or a timely objection at trial. The Constitution does not require a voluntariness hearing unless use of the confession is challenged.

8. Joint trials: redaction of confessions.

Gray v. Maryland, 523 U.S. 185 (1998). A co-defendant's confession that substituted either a blank space or the word "deleted" in place of the accused's name was inadmissible in a joint trial. As redacted, the Court held that the jury would clearly infer the confession refers to the accused. The Court opined that there were other acceptable ways to redact the accused's name from the confession. *See also Bruton v. United States*, 391 U.S. 123 (1968); Mil. R. Evid. 306.

XIII. IMMUNITY

A grant of immunity overcomes the privilege against self-incrimination by removing the consequences of a criminal penalty. If a servicemember is given immunity, the government can compel him to make a statement, but cannot use that compelled statement against him in trial. The statement can, however, be used if the servicemember commits perjury, false statement, or false swearing. Only the General Court-Martial Convening Authority (GCMCA) can grant immunity. There are circumstances in which immunity may be implied (*de facto* immunity), even though the GCMCA did not grant immunity.

A. Types of immunity.

1. Transactional. Immunity from trial by court-martial for one or more offenses under the code.

2. Testimonial. "Use immunity" for testimony and any derivative evidence. Mil. R. Evid. 301(c)(1) and *Kastigar v. United States*, 406 U.S. 441 (1972).

3. RCM 704 & Mil. R. Evid. 301.

B. Authority to grant immunity.

1. General rule: only the GCMCA can grant immunity.

2. To whom:

a. Persons subject to the UCMJ.

(1) Must relate to court-martial, not federal district court prosecution. RCM 704(c)(1).

(2) Insure DOJ has no interest in the case. AR 27-10, para. 2-4 and 2-7.

b. Persons not subject to the UCMJ.

(1) GCMCA can grant only with approval of U.S. Attorney General. RCM 704(c)(2).

(2) Procedures. AR 27-10, para. 2-4.

c. Delegation of authority not permitted. RCM 704(c)(3).

C. Procedure.

1. Decision to grant immunity.

a. Unless limited by superior competent authority, the decision to grant immunity is a matter within the sole discretion of the GCMCA.

b. If a defense request to grant immunity has been improperly denied, the military judge may, upon motion by the defense, grant appropriate relief by directing that the proceedings against the accused be abated.

c. RCM 704(e): The military judge may grant such a motion upon findings that:

(1) The witness intends to invoke the right against self-incrimination . . . if called to testify; and

(2) The government has engaged in discriminatory use of immunity to obtain a tactical advantage, or the government through its own overreaching, has forced the witness to invoke the privilege . . .; and,

(3) The witness' testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source, and does more than merely affect the credibility of other witnesses.

d. *United States v. Richter*, 51 M.J. 213 (C.A.A.F. 1999). The accused was one of many actors in a larceny scheme. Prior to trial, the defense asked the convening authority to grant immunity to a defense witness. The convening authority denied the defense request, but granted immunity to five prosecution witnesses. The CAAF held that the military judge did not abuse his discretion when he denied the defense motion to abate the court-martial. The court relied on the three-prong test under RCM 704(e) in reaching its decision. Specifically, the court stated that the three prongs must be read in the conjunctive. Since the defense witness was a prosecution target, the second prong of the rule was not met.

2. Order to testify/grant of immunity.

a. RCM 704(d).

b. AR 27-10, Military Justice, Chapter 2 (Procedures for Coordination with DoJ).

D. Notice to the accused.

1. Mil. R. Evid. 301(c)(2). Written grant shall be served on accused prior to arraignment or within a reasonable time before witness testifies.

2. Remedy: continuance, prohibit or strike testimony, or other order as required.

3. *United States v. Tuscan*, 67 M.J. 592 (C.G. Ct. Crim. App. 2009). Trial counsel notified defense of government witness immunized testimony the morning of trial. Witness did not testify until after lunch on the second day of trial. Defense did not ask for a continuance. The CGCCA held that this was a reasonable time before the witness testified and therefore the testimony was properly allowed. However, the CGCCA expresses concern that the government was potentially "hiding the ball." *Id*. at 595.

E. Scope of the immunity.

1. Prosecution after testimonial immunity.

a. Independent evidence.

(1) Government must show that evidence used to prosecute accused is completely independent of immunized testimony. Tips to avoid problems: (1) screen all immunized data from the trial team; (2) catalogue or seal all data to provide a paper trail; and, (3) personnel who had access to the immunized testimony should have no contact with the prosecution team. *See United States v. England*, 30 M.J. 1030 (A.F.C.M.R. 1990), *aff'd*, 33 M.J. 37 (C.M.A. 1991).

(2) Government can use neither the immunized testimony nor its fruits, to include any investigatory leads. It is a question of fact whether the government has a legitimate, independent source for its evidence. In *United States v. Boyd*, 27 M.J. 82 (C.M.A. 1988), the findings and sentence were set aside and charges dismissed because testimony of a witness (Wills) against the accused was derived from the prior immunized testimony of the accused against Wills. government did not meet its burden of showing that the accused's testimony did not contribute to Wills' decision to make a statement against the accused. *See also United States v. Mapes*, 59 M.J. 60 (C.A.A.F. 2003); *but see United States v. McGeeney*, 44 M.J. 418 (C.A.A.F. 1996).

b. Non-evidentiary use of immunized statements.

(1) *United States v. Kastigar*, 406 U.S. 441 (1972). The Supreme Court held that prosecutorial authorities are prohibited from using testimony that is compelled by grants of immunity. In *United States v. Kimble*, 33 M.J. 284 (C.M.A. 1991), the CMA held that immunity protection described in *Kastigar* also extend to "non-evidentiary uses" of immunized statements, such as the decision to prosecute. *See also United States v. Mapes*, 59 M.J. 60 (C.A.A.F. 2003).

(2) Accordingly, the impact of testimonial immunity goes beyond the admissibility of certain statements. The government must show by preponderance of the evidence that the decision to prosecute was untainted by evidence received as a result of immunity grant. *See United States v. McGeeney*, 41 M.J. 544 (N-M. Ct. Crim. App. 1994); *see also Cunningham v. Gilevich*, 36 M.J. 94 (C.M.A. 1992).

(3) If the government cannot show that the decision to prosecute the accused was made before immunized statements were provided by accused, the government may not prosecute unless it can show, by a preponderance of the evidence, that the prosecutorial decision was untainted by the immunized testimony. *See United States v. Olivero*, 39 M.J. 264 (C.M.A. 1994).

(4) *United States v. Olivero*, 39 M.J. 246 (C.M.A. 1994). The convening authority gave appellant testimonial immunity regarding his knowledge of other airman's (TSgt S) drug use. Government did not certify, seal, or memorialize any evidence of appellant's own drug use prior to this grant. Contrary to his oral, unsworn statement initially provided after immunity grant, the appellant testified at TSgt S's Article 32 hearing that he had never used drugs with TSgt S. Four days later, Olivero was charged with drug use and perjury. At trial, Olivero moved to dismiss claiming the decision to prosecute was wrongly based on his immunized statements. The CMA agreed. Conviction set aside.

Two practice points should be taken from *Olivero*:

(a) If possible, prior to providing a grant of immunity, any evidence that will be used in a subsequent prosecution of the grantee should be segregated and sealed to foreclose later issues regarding improper non-evidentiary use of immunized statements; and,

(b) Trial and defense counsel and military judges should make distinctions in their arguments, motions, and rulings between evidentiary and non-evidentiary uses of disputed immunized statements.

(5) *Olivero* is consistent with *Cunningham v. Gilevich*, 36 M.J. 94 (C.M.A. 1992), where the CMA ruled that prosecutions may not "result from" statements taken in violation of Article 31(d).

(6) *United States v. Youngman*, 48 M.J. 123 (C.A.A.F. 1998). In response to a defense motion, the military judge dismissed only those charges derived directly from the accused's immunized statement. The CAAF held that the military judge abused his discretion by not determining if the accused's immunized statement and evidence derived therefrom played "any role" in the decision to prosecute all of the offenses.

2. Immunity does not supplant the attorney-client privilege. A witness, testifying under a grant of immunity can still assert an attorney-client privilege. Further, disclosure of attorney-client confidences while testifying under a grant of immunity does not constitute a voluntary waiver of the attorney-client privilege. *See United States v. Romano*, 46 M.J. 269 (C.A.A.F. 1997).

F. Use of immunized testimony "against" the witness.

1. Impeachment. Immunized testimony from prior court-martial cannot be used to impeach an accused in later court-martial. *United States v. Daley*, 3 M.J. 541 (A.C.M.R. 1977).

2. Post-Trial Matters. Immunized testimony can be used by an SJA to refute claims in a clemency petition that the terms of the immunity agreement were breached. The CMA termed these "matters . . . collateral to a criminal trial." *United States v. Vith*, 34 M.J. 277 (C.M.A. 1992) (Judge Gierke, concurring in the result, disagreed, finding this limited use violated the Fifth Amendment).

3. Subsequent Prosecutions. Neither type of immunity bars prosecution for perjury, false swearing, false official statement, or failure to comply with an order to testify. RCM 704(b); Mil. R. Evid. 301(c)(1).

G. Standing to object to immunity grants.

United States v. Martinez, 19 M.J. 744 (A.C.M.R. 1984). Unless the accused is denied due process or a fair trial, he is without standing to challenge a grant of immunity to those who testify against him.

H. Inadvertent immunity.

1. *De facto* immunity.

a. A person other than GCMCA may create a situation of *de facto* immunity when he or she:

(1) manifests apparent authority to grant immunity;

(2) makes a representation that causes the accused to honestly and reasonably believe that he will not be prosecuted if he fulfills a certain condition;

(3) has at least the tacit approval of the GCMCA; and,

(4) the accused relies to his or her detriment on the representations. An accused may complete the creation of a *de facto* grant of immunity when he relies on the representation to his detriment by actually fulfilling the condition suggested by the government.

b. Analysis.

(1) Where an accused honestly and reasonably believes that an official has promised him transactional immunity and that official has the lawful authority to do so, then the promise is the functional equivalent of a grant of immunity.[37]

(2) However, statements by an official will not provide a foundation for a claim of *de facto* immunity absent some measure of detrimental reliance by the accused.[38]

(3) Despite a showing of detrimental reliance, remedial measures by the military judge at trial may still permit prosecution.[39]

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[37] *Samples v. Vest*, 38 M.J. 482, 487 (C.M.A. 1994); *see also Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982) (SJA oral promise of immunity to officer suspected of espionage enforced on grounds of due process); *United States v. Wagner*, 35 M.J. 721 (A.F.C.M.R. 1992) (unit commander's agreement not to prosecute accused if he refrained from further child sex abuse and got treatment created *de facto* immunity that was not breached even though accused discontinued counseling after 15 months); *United States v. Jones*, 52 M.J. 60 (C.A.A.F. 1999) (*de facto* transactional immunity resulted when the Chief of Military Justice and DSJA entered into an unwritten agreement with three co-accused that the government would not court-martial them if they accepted Article 15 punishment, paid restitution, and testified against the accused.)

An early discussion of *de facto* immunity was set forth in *United States v. Churnovic*, 22 M.J. 401 (C.M.A. 1986). Representations by a ship's senior NCO that ship's XO had promised no adverse action would be taken against person who gave information about or turned in drugs was an unlawful inducement that rendered the accused's statements and all derivative evidence inadmissible under Article 31(d). In dicta, Chief Judge Everett's lead opinion stated that "No reason exists why a promise of immunity cannot be enforced if it was made with express or tacit authorization from the ship's captain, who would convene special court-martial to try members of his crew." The defense in *Churnovic* failed to meet burden of showing immunity was in fact promised. Note: RCM 704(c) discussion indicates "equitable immunity" is possible.

[38] *United States v. Conklan*, 41 M.J. 800 (A. Ct. Crim. App. 1995). Representations by a battalion commander, indicating that the Army would not prosecute accused for carnal knowledge offense, did not constitute offer of *de facto* transactional immunity, in light of commander's failure to call upon accused to fulfill any condition in exchange for whatever benefit was conferred. Representation was merely gratuitous statement of present intent subject to change in sole discretion of the convening authority. The accused's reenlistment after commander's statement was not sufficient detrimental reliance to give rise to *de facto* immunity; reenlistment was not bargained for or otherwise contemplated as a condition of government's initial decision not to prosecute.

[39] *United States v. McKeel*, 63 M.J. 81 (C.A.A.F. 2006). Accused admitted to a military investigator that he engaged in sexual intercourse with a female shipmate when she was too intoxicated to consent. When the investigative report was forwarded to the chief petty officer who served as the ship's senior enlisted person responsible for military justice matters he promised the accused that if he accepted nonjudicial punishment and waived his right to an administrative discharge board there would no court-martial and the accused would be administratively separated from the military. The accused agreed and pled guilty to various charges, including rape, during a nonjudicial punishment proceeding. He was then processed for administrative separation and he waived his right to a separation

2. Unlawful inducement - Article 31(d).

a. A situation akin to equitable testimonial immunity arises following violations of Article 31(d).

b. To be an unlawful inducement under Article 31(d), the improper action must be undertaken by someone acting in a law enforcement capacity or in a position superior to the person making the confession.[40]

3. Regulatory Immunity. DoD and DA Family advocacy regulations generally do not create a bar to prosecution against self-referred child abusers. Further, consideration and adherence to regulatory policies and criteria set out in these regulations are not conditions precedent to disposition by courts-martial. Although DoD and DA policy may be internally inconsistent in that they both encourage and deter self-referral, they do not infringe on any rights recognized by the Constitution, the UCMJ, or the CAAF decision.[41]

XIV. CONCLUSION

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board. When the administrative separation packet was received by the GCMCA, who had no prior knowledge of the charges against the accused, the GCMCA declined to approve the separation, and initiated proceedings that resulted in the accused's GCM.

At trial, the defense moved to dismiss the charges based upon a promise of immunity. The trial judge denied the motion, but ruled that (1) the statements made by the accused during the NJP proceeding could not be admitted, (2) the prosecution could not introduce evidence of the accused's decision to waive his right to a board or other matters related to his administrative separation, and (3) that the accused would receive full sentence credit under *Pierce* for punishment received as a result of the earlier NJP proceedings. The CAAF upheld the conviction because the accused had not demonstrated detrimental reliance in the face of the remedial actions taken at trial.

[40] *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992) (civilian U.S. government intelligence agents interviewed the accused. Their interviews were not subject to an unlawful inducement analysis under Article 31(d)).

On the other hand, a USMC Commander's (O-6) assurances to two accused that "they had done nothing wrong and should provide testimony before an investigative board" did amount to unlawful inducement in *Cunningham v. Gilevich*, 36 M.J. 94 (C.M.A. 1992). The accused's subsequent waivers were found to be without effect. The action by the Colonel rendered the accused's statements, and all evidence derived therefrom, inadmissible.

[41] *United States v. Corcoran*, 40 M.J. 478 (C.M.A. 1994); s*ee also United States v. Martindale*, 40 M.J. 348 (C.M.A. 1994) (evidence of accused incriminating statements not barred by SecNavInst 1752.3, The Family Advocacy Program); *but see United States v. Bell*, 30 M.J. 168 (C.M.A. 1990) (directive language of USMC policy regarding rehabilitation and retention of sexual offenders necessitated documented pretrial diversion consideration).

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TAB M

SIXTH AMENDMENT – CONFRONTATION

TABLE OF CONTENTS

I. INTRODUCTION 1
- A. General 1
- B. Organization of Outline 1

II. SATISFYING THE CONFRONTATION CLAUSE THROUGH OPPORTUNITY TO CROSS-EXAMINE, WAIVER, AND FORFEITURE 1
- A. Opportunity to Cross Examine. 1
- B. Waiver. 2
- C. Forfeiture by Wrongdoing. 3

III. RESTRICTIONS ON CONFRONTATION IMPOSED BY LAW 3
- A. Limitations on Cross-Examination 4
- B. Limits on Face-To-Face Confrontation (Remote/ Screened Testimony) 6
- C. Right To Be Present at Trial 11
- D. Comment on Exercising Sixth Amendment Rights 12

IV. LITERAL CONFRONTATION: THE ADMISSIBILITY OF OUT-OF-COURT STATEMENTS 13
- A. Introduction 13
- B. What Statements are "Testimonial"? 13
- C. Nontestimonial Statements and the Confrontation Clause 23

V. APPELLATE REVIEW 27
- A. Standard of Review 27
- B. Retroactive Effect of *Crawford v. Washington.* 28

VI. CONFRONTATION CLAUSE ANALYSIS CHART 29

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JANUARY 2011

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SIXTH AMENDMENT - CONFRONTATION

I. INTRODUCTION

A. General

1. The Sixth Amendment to the Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him…." U.S. CONST. amend. VI.

2. The protections of the Sixth Amendment's Confrontation Clause apply in prosecutions of members of the armed forces. *United States v. Jacoby*, 29 C.M.R. 244, 246-247 (C.M.A. 1960) (Overruling *United States v. Sutton*, 11 C.M.R.220 (C.M.A. 1953) and *United States v. Parrish*, 22 C.M.R. 127 (C.M.A. 1956)

B. Organization of Outline

1. Part II discusses satisfying the Confrontation Clause through witness production, waiver, and forfeiture by wrongdoing.

2. Parts III and IV discuss two broad categories of Confrontation Clause cases. **Part III** discusses the law involving **restrictions imposed by law** or by a court on the scope of cross-examination. **Part IV** discusses the law involving the **admissibility of out-of-court statements** and reflecting the right to **literally confront** a witness at trial. [Note: the classification of cases in Part IV is modeled in part on the organizing principles of the National District Attorney Association's "*Crawford* Outline."]

3. Part V discusses the appellate review issues for Confrontation Clause cases.

4. Part VI is a Confrontation Clause analysis chart.

II. SATISFYING THE CONFRONTATION CLAUSE THROUGH OPPORTUNITY TO CROSS-EXAMINE, WAIVER, AND FORFEITURE

A. Opportunity to Cross Examine.

1. Producing the witness will satisfy the Confrontation Clause even if the witness cannot be cross-examined effectively. The Confrontation Clause guarantees only an *opportunity* to cross-examine witnesses. There is no right to meaningful cross-examination. Generally speaking, an opportunity to cross-examine a forgetful or recalcitrant witness satisfies the confrontation clause.

2. *Delaware v. Fensterer*, 474 U.S. 15 (1985) (per curiam). The Court held that an expert witness' inability to recall what scientific test he had used did not violate the Confrontation Clause even though it frustrated the defense counsel's attempt to cross-examine him. "[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the fact finder the reasons for giving scant weight to the witness' testimony."

3. *United States v. Owens*, 484 U.S. 554 (1988). While in the hospital, the victim identified the accused to an FBI agent. At trial, due to his injuries, which affected his memory, the victim could only remember that he earlier

identified the accused, but not the reason for the identification. The victim was under oath and subject to cross-examination; the Confrontation Clause was satisfied.

4. *United States v. Rhodes*, 61 M.J. 445 (2005). Witness against accused testified but claimed a lack of memory. The previous confession of the witness, implicating accused, was admitted against appellant with certain conditions. The defense argued that the appellant's confrontation rights were violated because the witness did not "defend or explain" his statement as required by *Crawford v. Washington*. The court ruled that the Supreme Court's previous case of *United States v. Owens* was not overruled by *Crawford*. By presenting the witness, the government met the confrontational requirements of the Sixth Amendment.

5. *United States v. Gans*, 32 M.J. 412 (C.M.A. 1991). The military judge admitted a sexual abuse victim's statement given thirty months earlier to MPs as past recollection recorded (MRE 803(5)). At trial, victim could not remember details of sexual abuse incidents. Appellant claimed that because the daughter's recollection was limited, his opportunity to cross-examine was also limited. The Court of Military Appeals disagreed, relying on the *Fensterer* and *Owens* decisions that there is no right to meaningful cross-examination**.**

B. Waiver.

1. Affirmative waiver of confrontation by the accused will satisfy the Sixth Amendment. Waiver cases generally arise when the defense makes a tactical decision not to cross-examine a witness, then asserts a Confrontation Clause violation.

2. *United States v. Martindale*, 40 M.J. 348 (C.M.A. 1994). During a deposition and again at an Article 39(a) session, a 12-year-old boy could not or would not remember acts of alleged sexual abuse. The military judge specifically offered the defense the opportunity to put the boy on the stand, but defense declined. Confrontation was waived and the boy's out-of-court statements were admissible.

3. *United States v. McGrath*, 39 M.J. 158 (C.M.A. 1994). Government produced the 14-year-old daughter of the accused in a child sex abuse case. The girl refused to answer the trial counsel's initial questions, but conceded that she had made a previous statement and had not lied in the previous statement. The military judge questioned the witness, and the defense declined cross-examination. The judge did not err in admitting this prior statement as residual hearsay.

4. *United States v. Bridges*, 55 M.J. 60 (2001). The Court of Appeals for the Armed Forces (CAAF) held that the Confrontation Clause was satisfied when the declarant took the stand, refused to answer questions, and was never cross-examined by defense counsel. The military judge admitted the declarant's hearsay statements into evidence. While a true effort by the defense counsel to cross-examine the declarant may have resulted in a different issue, the defense's clear waiver of cross-examination in this case satisfied the Confrontation Clause. Once the Clause was satisfied, it was appropriate for the military judge to consider factors outside the making of

the statement to establish its reliability and to admit it during the government case-in-chief under the residual hearsay exception.

C. Forfeiture by Wrongdoing.

1. An accused may forfeit his right to confront a witness if he engaged in wrongdoing that was intended to, and did, procure the unavailability of the witness.

2. *Crawford v. Washington*, 541 U.S. 36, 62 (2004). "[T]he rule of forfeiture by wrongdoing…extinguishes confrontation claims on essentially equitable grounds."

3. *Giles v. California*, 128 S. Ct. 2678 (2008). The doctrine of forfeiture by wrongdoing requires the government to show that the accused intended to make the witness unavailable when he committed the act that rendered the witness unavailable. This is consistent with the Federal and identical Military Rule of Evidence 804(b)(6). It is not enough to simply show that the accused's conduct caused the unavailability.

4. *United States v. Clark*, 35 M.J. 98 (C.M.A. 1992). Accused's misconduct in concealing the location of the victim and her mother waived any constitutional right the accused had to object to the military judge's ruling that the victim was "unavailable" as a witness.

5. Forfeiture of hearsay rights versus confrontation rights. The constitutional doctrine of forfeiture and the codification of that doctrine in the evidentiary hearsay rules are related, but functionally separate, concepts.

a. Military Rule of Evidence 804(b)(6) provides that "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness" is not excluded by the hearsay rule if the declarant is unavailable. The overwhelming majority of federal courts apply a preponderance of the evidence standard to determine whether an accused engaged or acquiesced in wrongdoing. 2 STEPHEN A. SALTZBURG, LEE D. SCHINASI, AND DAVID A. SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL 804.05[3][f] (2003).

b. *Giles v. California*, 128 S. Ct. 2678, 2686 (2008). "No case or treatise that we have found…suggested that a defendant who committed wrongdoing forfeited his confrontation rights but not his hearsay rights."

c. *United States v. Marchesano*, 67 M.J. 535 (Army Ct. Crim. App. 2008). Indicates that an accused could forfeit his hearsay rights under MRE 804(b)(6) through wrongdoing *by acquiescence* but perhaps not his confrontation rights (confrontation forfeiture requires some intent or design on the behalf of the accused).

d. Standard of proof at trial for judge's determination of forfeiture: Preponderance of evidence. *United States v. Marchesano*, 67 M.J. 535, 544 (Army Ct. Crim. App. 2008).

III. RESTRICTIONS ON CONFRONTATION IMPOSED BY LAW

A. Limitations on Cross-Examination

1. Cross-examination is an important part of the right to confront witnesses. The right to confrontation, however, is not absolute. The courts balance the competing state interest(s) inherent in rules limiting cross-examination with the accused's right to confrontation.

   a) "The right of cross-examination is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.'" *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

   b) Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

   c) "[W]e have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability – even if the defendant would prefer to see that evidence admitted." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

   d) "[T]he right to confront and cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers*, 410 U.S. at 295.

   e) "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

   f) Although a criminal defendant waived his rights under the Confrontation Clause to object to the admission of hearsay statements because of his misconduct in intimidating a witness, he did not also forfeit his right to cross-examine that same witness. *Cotto v. Herbert*, 331 F.3d 217 (2d Cir. 2003).

2. **Juvenile Convictions of Key Prosecution Witness.** *Davis v. Alaska*, 415 U.S. 308 (1974). The exposure of a witness's motivation is a proper and important function of cross-examination, notwithstanding state statutory policy of protecting the anonymity of juvenile offenders.

3. **Voucher Rule.** *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). The defendant was deprived of a fair trial when he was not allowed to cross-examine a witness who had confessed on numerous occasions that he committed the murder. The Court observed that "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. But its denial or significant diminution calls into question the ultimate 'integrity of

the fact-finding process' and requires that the competing interest be closely examined (citations omitted).

4. **Ability to remember.** *United States v. Williams*, 40 M.J. 216 (C.M.A. 1994). Judge erred in precluding defense from cross-examining government witness (and accomplice) to robbery about drug use the night of the robbery.

5. **Bias**.

   a) *United States v. George*, 40 M.J. 540 (A.C.M.R. 1994). Judge improperly restricted defense cross-examination of government toxicology expert who owned stock in the lab that tested accused's urine sample pursuant to a government contract. Questions about the expert's salary were relevant to explore bias. Judge also erred in preventing defense from asking the defense expert about possible sources of contamination of the urine sample.

   b) *United States v. Gray*, 40 M.J. 77 (C.M.A. 1994). Accused was charged with indecent acts with nine-year-old daughter of SGT M and sodomy and adultery with SGT M's wife. Evidence that DHS had investigated the "victim's" family was improperly excluded. Mrs. M. could have accused Gray of the offenses to divert attention away from her dysfunctional family and the evidence would have corroborated Gray's claim that he visited Mrs. M's home in response to requests for help. This violated accused's right to present a defense.

6. **Motive to lie.** *United States. v. Everett*, 41 M.J. 847 (A.F.C.M.R. 1994). The military judge improperly prevented the defense counsel from cross-examining a rape victim about her husband's infidelity and his physical abuse of her.

7. **Discrepancy in Laboratory Tests**. *United States v. Israel*, 60 M.J. 485 (2005). In a urinalysis case, the military judge limited the defense ability to cross-examine witnesses regarding the possibility of error in the testing process by precluding the defense from confronting expert witnesses with material impeachment evidence. The CAAF held that the military judge abused his discretion in limiting the ability of the defense to cross-exam the government experts, and that the error was not harmless beyond a reasonable doubt.

8. **M.R.E. 403**.

   a) *United States v. Carruthers*, 64 M.J. 340 (2007). Appellant was convicted of stealing over a million dollars worth of military property from the Defense Reutilization and Marketing Office (DRMO) at Fort Bragg over a three year period. At trial, one of his coconspirators, SFC Rafferty, testified for the government in return for an agreement to plead guilty in federal court to one count of larceny of government property valued over one thousand dollars. Appellant's civilian defense counsel cross-examined SFC Rafferty at length about his agreement with the government, however the government objected when the defense counsel attempted to delve further into the possible punishments SFC Raferty might receive at his federal trial. The military judge sustained the objection. The

issue was whether appellant was denied his Sixth Amendment right to confrontation when the military judge limited cross-examination of a key government witness regarding the possible sentence under the witness's plea agreement. (There were two issues granted, the other involved instructions given by the military judge) The holding was: No, sufficient cross-examination was permitted, and the military judge properly identified and weighed the danger of misleading the members under M.R.E. 403. The military judge in this case had already allowed plenty of inquiry into the witness's bias as a result of his agreement with the government, and merely limited the defense from further questioning on another aspect of the agreement. Since sufficient cross-examination into bias as a result of the plea agreement was permitted, appellant's Sixth Amendment right to Confrontation was not violated by the military judge's limitation.

b) *United States v. James*, 61 M.J. 132 (2005). Before members, appellant pleaded guilty to using and distributing ecstasy. During the sentencing phase of the trial, appellant sought to cross-exam a witness whom the appellant argued had convinced him to try ecstasy. Specifically, appellant sought to cross-examine the witness concerning the specific terms of the witness' pretrial agreement with the government. The purpose of the cross-examination into the quantum of the agreement would be to establish that the friend had a reason to lie given the benefit of the deal afforded to him (his agreement was for eighteen months confinement from a maximum of fifty-two years). The military judge precluded cross-examination of the specifics of the agreement, but allowed the defense to cross-examine the witness on the existence and general nature of the agreement, the order by the convening authority to the witness to testify, the grant of immunity to the witness, and the considerations of pending clemency. The court found that that military judge did not err by reasonably limiting the scope of cross-examination to avoid the confusion of the issues.

9. **Rule 412.**

a) *United States v. Banker*, 60 M.J. 216 (C.A.A.F. 2004). Evidence proffered under the constitutionally required exception to M.R.E. 412(a) is admissible only if the evidence is 1) relevant; 2) material; and 3) favorable to the defense. Evidence is 1) "relevant" if it is logically relevant under M.R.E. 401; 2) "material" if the judge determines it is so after considering it's importance in relation to other issues in the case, the extent to which the issue is disputed, and the nature of other evidence concerning the issue; and 3) "favorable" if its probative value outweighs the danger of unfair prejudice to the victim's privacy. *See also, United States v. Roberts*, 69 M.J. 23 (C.A.A.F. 2010)

b) *United States v. Roberts*, 69 M.J. 23 (C.A.A.F. 2010). In a marital rape and assault case, the CAAF held that the trial judge's exclusion of evidence of an alleged sexual relationship between the Accused's wife and another man did not violate the accused's constitutional

right to confrontation. *See also, United States v. Smith*, 68 M.J. 445 (C.A.A.F. 2010)

c) Recent C.A.A.F. Grants Involving M.R.E. 412 and Confrontation. The C.A.A.F. has recently granted review in three cases involving M.R.E. 412(b)(1)(C), which may indicate that the C.A.A.F. is reconsidering the propriety of the balancing test articulated in *Banker*. See, *United States v. Gaddis*, CCA 20080150, No. 10-0512/AR (September 27, 2010); *United States v. Ellerbrock*, CCA 20070925, No. 10-0483/AR (September 24, 2010); *United States v. Savala*, CCA 200800818, No. 10-0317/NA (July 8, 2010).

B. Limits on Face-To-Face Confrontation (Remote & Screened Testimony)

1. The issue in remote and screened testimony is balancing confrontation rights against state's interest in protecting certain witnesses. Arguably, this section could also fit under the category of "Literal Confrontation: The Admissibilty of Out-of-Court Statements"at Part IV, *Supra*. *See*, *Maryland v. Craig*, 497 U.S. 836 (1990) (Scalia, J. , joined by Brennan, J., Marshall, J., and Stevens, J., dissenting).

2. The Supreme Court.

a) *Maryland v. Craig*, 497 U.S. 836 (1990). The child victim testified by one-way closed circuit television with a defense counsel and a prosecutor present. The testimony was seen in the courtroom by the accused, jury, judge, and other counsel.

(1) The preference for face-to-face confrontation may give way if it is necessary to further an important public policy, but only where the reliability of the testimony can otherwise be assured.

(2) Necessity. Before allowing a child victim to testify in the absence of face-to-face confrontation with the accused, the government must make a case specific showing that:

(a) the procedure proposed is necessary to protect the child victim,

(b) The child victim would be traumatized by the presence of the accused, and

(c) the emotional distress would be more than de minimus. What does de minimus mean? What's the constitutional minimum required? See *Marx v. Texas*, 987 S.W.2d 577 (Tex.). See also *United States v. McCollum*, 58 M.J. 323 (2003).

(3) Important Public Policy. The state's interest in "protecting child witnesses from the trauma of testifying in a child abuse case" is an important state interest.

(4) Reliability Assured. The Court stated that confrontation has four component parts that assure reliability. You preserve reliability by preserving as many of these component parts as possible in the proposed procedure.

(a) Physical presence;

(b) Oath;

(c) Cross-examination;

(d) Observation of the witness by the fact finder.

3. Military Cases.

a) *United States v. Pack*, 65 M.J. 381 (2008). Remote live testimony by a child victim witness. The CAAF held that the Supreme Court opinion in *Crawford* did not effect its earlier opinion in *Maryland v. Craig*, which laid out the standards for remote live testimony of child abuse victims. In so holding, the CAAF acknowledged that *Crawford* appeared inconsistent with *Craig*, but, because the Supreme Court did not expressly overrule *Craig*, the CAAF would continue to apply the *Craig* standard.

b) *United States v. Anderson*, 51 M.J. 145 (1999). The court approved the government's repositioning of two child victims such that they did not face the accused and the government's use of a screen and closed circuit television. Closed circuit television was used so the military judge, counsel, and the reporter could all see the testimony.

c) *United States v. McCollum*, 58 M.J. 323 (2003). The CAAF approved the military judge's decision to permit a 12-year-old child victim to testify via two-way closed circuit television after finding the witness would be traumatized if required to testify in open court in the presence of the accused and that the witness would be unable to testify in open court in the accused's presence because of her fear that the accused would beat her. Accused absented from the courtroom himself UP R.C.M. 804(c). The military judge found that the victim would be unable to testify in the accused's presence because of both fear and trauma, linking the two concepts. CAAF noted that MIL. R. EVID. 611(d)(3)(A) and (B) are sufficient independent of each of each other, meaning that military judge must find that a witness will be unable to testify reasonably because of fear or trauma caused by the accused's presence. Further, as long as the finding of necessity is based on the fear or trauma caused by the accused's presence alone, "it is irrelevant whether the child would also suffer some fear or trauma from testifying generally." The CAAF also determined that a military judge is not required under the Sixth Amendment nor MIL. R. EVID. 611(d) to interview or observe a child witness before making a necessity ruling. Further, the fear of a witness need not be fear of imminent harm nor need it be reasonable. Rather, the fear required under the rule must "be of such a nature that it prevents the child from being able to testify in the accused's presence."

4. Options. Several ways have been tried and approved by courts. They include:

a) One-way closed circuit television. *Maryland v. Craig*, 497 U.S. 836 (1990); *U.S. v. Longstreath*, 45 M.J. 366 (1996).

b) Two-way closed circuit television. R.C.M. 914A; 18 U.S.C. § 3509.

c) A partition. *United States v. Batten*, 31 M.J. 205 (C.M.A. 1990). An elaborate courtroom arrangement to protect the child victim, which included screens and closed circuit television. Testimony by a psychologist to show the impact conventional testimony would have on the witness. Special findings by the military judge (judge alone trial) that he relied on the child's excited utterance and not on her courtroom testimony. Harmless error analysis by CMA as allowed by US Supreme Court in *Coy* and *Craig*. Case affirmed.

d) Witness testifying with her back to the accused but facing the judge, and counsel. *United States v. Thompson*, 31 M.J. 168 (C.M.A. 1990). The child victims testified at a judge alone court-martial with their backs to the accused. The military judge, defense counsel, and trial counsel could see them. A psychologist testified for the government in support of the courtroom arrangement.

e) Profile to the accused. *United States v. Williams*, 37 M.J. 289 (C.M.A. 1993). Child victim testified from a chair in the center of the courtroom, facing the military judge with the defense table to the immediate left of her chair. The accused was not deprived of his right to confrontation even though he could not look into the witness' eyes. The witness testified in the accused's presence and he could see her face and demeanor.

f) Whisper Method. *United States v. Romey*, 32 M.J. 180 (C.M.A.). The child victim whispered her answers to her mother who repeated the answers in open court. The mother was certified as an interpreter. *Craig* was satisfied when "[t]he judge impliedly made a necessity finding in this case" (emphasis added). The military judge relied on representations made about the Article 32 testimony; trial counsel's pretrial discussions with the child witness; and the military judge's observations of the child at an Article 39(a) session in the accused's presence. The Court also held that the child victim was available for cross-examination, and the accused's due process rights were not violated.

5. Article 32 Investigation. *United States v. Bramel*, 29 M.J. 958 (A.C.M.R. 1990). The child victim testified behind a partition at the Article 32 ivestigation. Accused could hear but not see the victim, but the defense counsel cross-examined him. The child testified at the court-martial without the partition. Held: (1) right to face-to-face confrontation is a trial right; (2) Article 32, UCMJ, only provides for the right of cross-examination, not confrontation; (3) an Article 32 investigation is not a critical stage of the trial; (4) *Bramel* is comparable to *Kentucky v. Stincer*, 482 U.S. 730 (1987) (defendant excluded from competency hearing of child witness); and (5) the accused did not have the right to proceed pro se at the Article 32 investigation.

6. Do not remove the accused from courtroom. See *United States v. Daulton*, 45 M.J. 212 (1996) (accused watched testimony of daughter over closed circuit television; confrontation rights violated); *United States v. Rembert*, 43 M.J. 837 (Army Ct. Crim. App. 1996) (accused watched testimony of 13-

year-old carnal knowledge victim via two-way television in the deliberation room; without ruling on Sixth Amendment, the Army court agreed that accused's due process rights were violated). The accused may, under R.C.M. 804(c), voluntarily leave the courtroom to preclude the use of the procedures outlined in R.C.M. 914A.

7. Can witnesses who are not victims use remote procedures? Yes. Federal courts have interpreted 18 U.S.C. § 3509 to allow non-victim child witnesses to testify remotely. *United States v. Moses*, 137 F.3d 894 (6th Cir. 1998); *United States v. Quintero*, 21 F.3d 885 (9th Cir. 1994). Both cases interpret *Maryland v. Craig*. Both cases focus on the Court's approval of the state interest: "the state interest in protecting child witnesses from the trauma of testifying in a child abuse case." The courts do not comment on the fact that the four witnesses in *Craig* who testified remotely were all victims.

8. Other issues in remote testimony.

   a) *United States v. Yates*, 2006 U.S. App. LEXIS 3433 (11th Cir. 2006). Prosecution witnesses living in Australia declined to travel to the United States for trial. The witnesses testified at trial via live, two-way video conference. The Eleventh Circuit, following an en banc hearing, held that this arrangement violated the defendants' Sixth Amendment right to confront witnesses against them. Citing to *Maryland v. Craig* as the controlling case, the court found that the prosecutor's need for the video conference testimony to make a case and expeditiously resolve it were not the type of public policies that were important enough to outweigh defendants' rights to confront their accusers face-to-face. The court further found that the prosecution had failed to establish the necessity for the use of remote testimony when another viable option, deposition under the Federal Rules for Criminal Procedure, was available to the government.

   b) *Harrell v. Butterworth*, 251 F.3d 926 (11th Cir. 2001). Appellant was convicted of robbing an Argentinean couple. At trial, the victims were unavailable to testify in person because of illness and unwillingness to return to the United States. The trial judge agreed to allow testimony via satellite over defense objection. Citing to *Maryland v. Craig*, the Florida Supreme Court pointed out that the Confrontation Clause does not guarantee an absolute right to a face-to-face meeting between a defendant and witnesses; rather, the underlying purpose is to ensure the reliability of trial testimony. In this case, *Maryland v. Craig* was satisfied because (1) public policy considerations justified an exception to face-to-face confrontation, given the state interest "to expeditiously and justly resolve criminal matters that are pending in the state court system;" (2) the remote testimony was necessary, given the fact that the witnesses were absolutely essential to the government case and lived beyond the court's subpoena power; and (3) the testimony was reliable because the witnesses were able to see the jury and the defendant, they were sworn by the clerk of court, the jury and the defendant were able to observe the witnesses testifying, and they were subject to cross-examination. On habeas review, the 11th Circuit concluded that Florida Supreme Court's decision was not contrary to, or an

unreasonable application of, clearly established federal law as determined by the Supreme Court.

c) *United States. v. McDonald*, 55 M.J. 173 (2001). Shortly before the presentencing portion of the court-martial, the government's only witness was notified of a unit deployment to the Middle East. He was at Fort Stewart, some distance from the trial location and was scheduled to report to the terminal at midnight that night for a departure at 0600 hours the next morning. Over defense objection, the military judge allowed the witness to testify by telephone. On appeal, the issue was whether the Sixth Amendment's Confrontation Clause applies to the presentencing portion of a court-martial. Agreeing with the Navy-Marine Corps Court of Criminal Appeals, the CAAF held that the Confrontation Clause does not apply to non-capital presentencing proceedings. However, the Due Process Clause of the Fifth Amendment requires that the evidence introduced in sentencing meet minimum standards of reliability. The Court pointed out that while the safeguards in the rules of evidence applied to the prosecution's sentencing evidence, the language of RCM 1001(e)(2)(D) allowed relaxation of the evidence rules and did not specifically prohibit telephonic testimony. The CAAF also emphasized that this was an unusual situation causing the military judge to "craft a creative solution," lest the testimony be temporarily lost.

d) *United States v. Shabazz*, 52 M.J. 585 (N-M. Ct. Crim. App. 1999). The military judge allowed a government witness to testify via video teleconference (VTC). The trial was in Japan; the witness testified from California. The Navy-Marine Corps Court found a violation of the right to confrontation because the trial judge did not do enough to control the remote location.

e) *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999). The U.S. government asserted that Gigante was the boss of the Genovese crime family and supervised its criminal activity. Gigante was convicted of racketeering, criminal conspiracy under the RICO statute, conspiracy to commit murder, and a labor payoff conspiracy. The government proved its case with six former members of the Mafia, including Peter Savino. Savino was allowed to testify via closed circuit television because he was in the Federal Witness Protection Program and was in the final stages of an inoperable, fatal cancer. The Court held the trial judge did not violate Gigante's right to confront Savino. See also *Minnesota v. Sewell*, 595 N.W.2d 207 (Minn. App. 1999).

9. Testimony in disguise. *Romero v. State*, 136 S.W.3d 680 (Tex. Ct. App. 2004). A state's witness testified wearing dark sunglasses, a baseball cap pulled low over his eyes, and a jacket with an upturned collar, leaving visible only his ears. The trial court made no finding of necessity to justify the witness's appearance. The court held that the defendant's right to confrontation was violated.

C. Right To Be Present at Trial

1. General Rule. The accused has a right "to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Snyder v. Commonwealth*, 291 U.S. 97, 105-6 (1933).

2. Disruptive Accused.

   a) In *Illinois v. Allen*, 397 U.S. 337 (1970), the Court held that a disruptive defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can be reclaimed if the defendant is willing to conduct himself consistently with the decorum and respect inherent in judicial proceedings.

   b) RCM 804. A military judge faced with a disorderly and disruptive accused has 3 constitutionally permissible responses:

      (1) bind and gag the accused as a last resort, thereby keeping him present;

      (2) cite the accused for criminal contempt;

      (3) remove the accused from the courtroom until he promises to conduct himself properly.

3. Intentionally absent accused. Trial may continue in the absence of the accused when the accused voluntarily absents himself from trial. R.C.M. 804(b) and *United States v McCollum*, 56 M.J. 837 (A.F. Ct. Crim. App. 2002), *aff'd*, 58 M.J. 323, (2003) (accused voluntarily absented himself so that child-victim could testify in the courtroom).

D. Comment on Exercising Sixth Amendment Rights

1. *United States v. Kirt*, 52 M.J. 699 (N-M. Ct. Crim. App. 2000). The accused testified at trial and was asked during cross-examination, "Do you admit here today that you are the only witness in this court who has heard the testimony of every other witness?" On appeal, the accused argued that this question improperly invited the members to infer guilt from the appellant's exercise of his constitutional right to testify and confront the witnesses against him. The Court held that the question did not constitute error, but if it did, it was waived and did not constitute plain error.

2. *Portuondo v. Agard*, 529 U.S. 61 (2000). In summation, the prosecutor commented that the defendant had the benefit of getting to listen to all other witnesses before testifying, giving the defendant a "big advantage." The defendant argued that the prosecutor's comments on his presence and ability to fabricate unlawfully burdened his Sixth Amendment right to be present at trial and to be confronted with witnesses against him and his Fifth and Sixth Amendment right to testify on his own behalf. The Court rejected the defendant's arguments distinguishing comments that suggest exercise of a right is evidence of guilt and comments that concern credibility as a witness.

IV. LITERAL FACE-TO-FACE CONFRONTATION: THE ADMISSIBILITY OF OUT-OF-COURT STATEMENTS

A. Introduction

1. **The *Crawford* Rule**: Under *Crawford v. Washington*, 541 U.S. 36 (2004) **"testimonial" statements are admissible only if the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant**. *Crawford* overturned the *Ohio v. Roberts*, 448 U.S. 56 (1980) decision, under which judges determined the substantive reliability of out-of-court statements. *Crawford* returned to the historical roots of the Confrontation Clause, which is a procedural guarantee "not that evidence be reliable, but that reliability be assessed in a particular manner; by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61.

2. **What is Testimonial?** The *Crawford* Court declined to provide a comprehensive definition of "testimonial." The definition has been the subject of thousands of judicial decisions since the Court decided *Crawford*, and is discussed in Part IV.B., below.

3. Witness Present at Trial. "[W]hen the declarant appears for cross-examination at trial the Confrontation Clause places no constraints at all on the use of his prior testimonial statements….The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Crawford*, 541 U.S. at 59.

4. **Hearsay and the Confrontation Clause.**

   a) It is important to remember that issues regarding evidentiary hearsay rules and issues regarding Confrontation Clause are separate and require a **separate analysis**. "Although the hearsay rules and the Confrontation Clause are generally designed to protect similar values, they do not completely overlap. Thus, a statement properly admitted under a hearsay exception may violate confrontational rights. Similarly, a violation of the hearsay rules may not infringe upon the Sixth Amendment." *United States v. Russell*, 66 M.J. 597, 602 (A.Ct.Crim.App. 2008) (internal quotations omitted).

   b) Application of the Confrontation Clause to Non-Hearsay. "The Clause…does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford*, 541 U.S. at 59.

5. **Problem-solving**. A Confrontation Clause analysis chart is provided at Part VI., below.

B. What Statements are "Testimonial"?

1. U.S. Supreme Court Cases.

   a) *Crawford v. Washington*, 541 U.S. 36 (2004).

      (1) Articulated **three categories of testimonial statements** that defined the Confrontation Clause's "coverage at various levels of abstraction." The Court held that statements that fell within one or more of these three categories were testimonial. These categories, or "formulations," were

(a) "**Ex parte in-court testimony or its functional equivalent**—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially…"

(b) "**Extrajudicial statements** . . . contained in **formalized** testimonial materials, such as affidavits, depositions, prior testimony, or confessions…"

(c) "Statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

(2) At a minimum, the term "testimonial" applies to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *But see*, *Davis v. Washington*, 547 U.S. 813 (2006) (statement given in response to police interrogation is nontestimonial where primary purpose of police is meeting an ongoing emergency).

b) *Davis v. Washington*, 547 U.S. 813 (2006) (companion case with *Hammon v. Indiana*, 547 U.S. 813 (2006)).

(1) *Davis* and *Hammon* are cases that dealt with statements made to government officials after domestic violence situations. The Court held that statements made to the police at the scene of a domestic dispute, but after the actual incident, were testimonial and could not be admitted where the victim did not testify at trial, but that statements made in response to questions from a 911 operator immediately after the domestic assault occurred (and assailant had just left the premises) were nontestimonial, and thus could be admitted at trial even though the victim did not testify.

(2) "Statements are **nontestimonial** when made in the course of **police interrogation** under circumstances objectively indicating that the **primary purpose** of the interrogation is to enable police assistance to meet an **ongoing emergency**. They are **testimonial** when the circumstances objectively indicate that there is no such ongoing emergency and that the **primary purpose** of the interrogation is to **establish or prove past events** potentially relevant to later criminal prosecution."

c) *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009).

(1) Facts. Accused was convicted on drug charges. Police sent cocaine connected to the accused to state forensic lab for analysis. The lab analysts issued three sworn "certificates of analysis" attesting to the results of their analysis. In accordance with state law, the certificates were introduced at

trial as "prima facie evidence of the composition, quality, and the net weight of the narcotic…analyzed." The analysts who wrote the statements did not testify at trial. Melendez-Diaz objected to the admission of the statements as a violation of his right of confrontation, citing *Crawford*.

(2) Procedural History. The Appeals Court of Massachusetts affirmed the conviction, rejecting Melendez-Diaz's Sixth Amendment claim under *Crawford*. In doing so the court relied on the Massachusetts Supreme Judicial Court's decision in *Commonwealth v. Verde*. The *Verde* court concluded that a drug analysis certificate is "akin to a business or official record" and was thus not testimonial under *Crawford*. After the Massachusetts Supreme Judicial Court denied review without comment, Melendez-Diaz appealed to the U.S. Supreme Court, arguing that the *Verde* holding was in conflict with the *Crawford* decision. The Supreme Court granted certiorari and the case was argued in November 2008.

(3) Issue. Whether affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to a defendant was cocaine were "testimonial," rendering the affiants "witnesses" subject to the defendant's right of confrontation under the Sixth Amendment.

(4) Holding. Justice Scalia, writing for the majority and joined by Justices Stevens, Souter, Thomas, and Ginsberg, held: The affidavits were "testimonial" statements, and the affiants were "witnesses" for purposes of the Sixth Amendment; admission of the affidavits violated the defendant's right to confrontation.

(5) Analysis.

(a) The Court found that the affidavits fell within the "core class of testimonial statements" under *Crawford.* Noting that its description of the core class mentioned affidavits twice, the Court found that a "certificate of analysis" was an "affidavit," because it was a "'solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" (Citing *Crawford*, 541 U.S. at 51 (quoting 2 N. Webster, An American Dictionary of the English Language (1828))).

(b) In addition to being "affidavits", the Court found that the certificates of analysis were also "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" (Citing *Crawford*, 541 U.S. at 52). As evidence, the Court pointed out that, according to Massachusetts law, the "*sole purpose*" of the certificates was to provide

"prima facie evidence" about the tested substance. The Court surmised that the analysts who prepared the certificates must have been aware of this purpose, as it was reprinted on the certificates.

(6) Chain of custody evidence. The Court, in a footnote, made clear that it did not hold "that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device must appear in person." The Court reasoned that "gaps in the chain of custody go to weight, not admissibility" but also held that any chain of custody evidence presented must be presented live.

d) *Briscoe v. Virginia*, 130 S.Ct. 1316 (2010). In accordance with Virginia law, the prosecution introduced a certificate of a forensic laboratory analysis without presenting the testimony of the analyst who prepared the certificate. Under the law, the accused has a right to call the analyst as his own witness. In a per curiam opinion, the Court vacated the judgment of the Virginia Supreme Court and remanded the case (along with a companion case, Cypress) for further proceedings not inconsistent with the U.S. Supreme Court's opinion in *Melendez-Diaz v. Massachusetts*, 557 U.S. ----, 129 S.Ct. 2527 (2009).

e) *People v. Bryant*, 483 Mich. 132 (Mich. 2009). *Cert. granted*, *Michigan v. Bryant*, 130 S.Ct. 1685 (March 1, 2010), 2010 WL 680519 (2010). This case that may further refine what is sometimes referred to as the "emergency exception" to the *Crawford* holding, first articulated in *Davis v. Washington*, 547 U.S. 813 (2006). The issue for the Supreme Court to decide is: Whether preliminary inquiries of a wounded citizen concerning the perpetrator and circumstances of the shooting are nontestimonial because they were "made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," including not only aid to a wounded victim, but also the prompt identification and apprehension of an apparently violent and dangerous individual?

f) *State v. Bullcoming*, 147 N.M. 487 (NM 2010). *Cert. granted*, *Bullcoming v. New Mexico*, 131 S.Ct. 62, (September 28, 2010). Appellant was convicted of DUI based in part on a blood alcohol test. The trial court admitted a two page report of the test result which included chain of custody information, assertions by lab personnel that certain procedures were followed, and the results of the test. None of the lab personnel who participated in the testing process testified. An expert witness for the State who was not personally involved in the test testified about the results, the process, and the scientific basis of the test. The New Mexico Supreme Court held: "Although the blood alcohol report was testimonial, we conclude that its admission did not violate the Confrontation Clause, because the analyst who prepared the report was a mere scrivener who simply transcribed the results generated by a gas chromatograph

machine and, therefore, the live, in-court testimony of another qualified analyst was sufficient to satisfy Defendant's right to confrontation."

2. Military Cases

a) **Tests for Determining if a Statement is "Testimonial".** *United States v. Rankin*, 64 M.J. 348 (C.A.A.F. 2007).Military courts use the following analytical framework to analyze statements falling within the *Crawford* third category of potential testimonial statements (the "objective witness" category): "First, was the statement at issue elicited by or made in response to a law enforcement or prosecutorial inquiry? Second, did the "statement" involve more than a routine and objective cataloging of unambiguous factual matters? Finally, was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial?" *See also*, *United States v. Foerster*, 65 M.J. 120 (C.A.A.F. 2007); *United States v. Gardinier*, 65 M.J. 60 (C.A.A.F. 2007).

b) **Affidavits**. *United States v. Foerster*, 65 M.J. 120 (2007). SGT Porter was deployed when he discovered somebody was using his identity to cash checks in his name. When he returned to home station he went to the bank and filled out a "forgery affidavit" containing the facts of his situation. Specifically, the sworn affidavit contained the check numbers and amounts he believed were false. This document was required by the bank in order for SGT Porter to get his money back. When the time came for trial, SGT Porter was already deployed again, and thus not available to testify. The government admitted the affidavit over defense objection in the place of SGT Porter's live witness testimony. The granted issue was whether an affidavit filled out by a victim of check fraud pursuant to internal bank procedures and without law enforcement involvement in the creation of the document is admissible as a nontestionial business record in light of *Crawford v. Washington* and *Washington v. Davis*. The court held that the affidavit was nontestimonial and properly admissible under the business records exception. The CAAF used the three factors previously identified in *Rankin* to analyze whether the bank affidavit in this case was testimonial. First, was the statement at issue elicited by or made in response to law enforcement or prosecutorial inquiry? Here there was no governmental involvement in the making of the affidavit at all. The affidavit was made out before appellant had even been identified as the forger, long before there was any request aimed at preparation for trial. Second, did the "statement" involve more than a routine and objective cataloging of unambiguous factual matters? The information contained in the affidavit merely cataloged objective facts, specifically the check numbers and amounts, and SGT Porter's signature. Finally, was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial? Looking at the context in which the affidavit was made, it is clear that the purpose of the document was to protect the bank from being defrauded by an account holder. The CAAF acknowledged that the

Supreme Court opinion in *Crawford* uses the term "affidavit" several times to describe documents considered testimonial hearsay, however the CAAF does not believe the Court intended for every document titled affidavit to be considered testimonial. If there is no governmental involvement in the making of a statement, then it is unlikely to be considered testimonial.

c) **Statements made to a Sexual Assault Nurse Examiner (SANE).** *United States v. Gardinier*, 65 M.J. 60 (2007). Appellant was convicted of indecent acts and indecent liberties with a child under age 16 and the convening authority approved the sentence to a BCD, three years confinement, and reduction to E-1. The victim was appellant's five-year-old daughter, KG. KG received a medical exam the day she reported the acts. She was then interviewed a couple days later by a detective and a social worker, followed by a second interview with a sexual assault nurse examiner (SANE). The military judge admitted the "forensic medical form" completed by the SANE and also allowed her to testify about what KG had told her during the exam. The granted issue was whether statements KG made to the SANE were testimonial under *Crawford*. (There were three granted issues, but only this one implicated the Confrontation Clause. Of the other two issues, one involved Article 31 rights and the other admission of a videotaped statement.) The CAAF held KG's statements to the SANE were testimonial hearsay and their admission into evidence at the court-martial was error. The CAAF used the three factors previously identified in its opinion in *United States v. Rankin*, 64 M.J. 348 (2007) for distinguishing between testimonial and nontestimonial hearsay to analyze the statements KG made to the SANE. Taking the first and third *Rankin* factors together, the CAAF reasoned that on balance the statements were made in response to government questioning designed to produce evidence for trial. The SANE testified at trial that she conducts examinations for treatment, however the form itself is called a "forensic" medical examination form. She also asked questions beyond what might be necessary for mere treatment, including questions about what KG had told the police investigators. Also, the examination was arranged and paid for by the local sheriff's department. The totality of the circumstances indicated the statements made to the SANE were testimonial.

d) Alcohol, Urine and Drug Analysis Results

(1) Physical Evidence Sent to Lab Post-Arrest. *United States v. Williamson*, 65 M.J. 706 (Army Ct. Crim. App. 2007). Appellant was convicted of wrongful possession with intent to distribute over three pounds of marijuana, based on his possession of a FedEx package containing three bundles of marijuana he mailed to himself on leave in New Orleans. He mailed the package from El Paso, where it was detected by DEA agents using a drug dog. Agents effected a controlled delivery to the address on the package in New Orleans, and executed a search warrant fifteen minutes later. After

seizing the package, it was sent to the United States Army Criminal Investigation Laboratory (USACIL), where the substance contained in the three bundles was confirmed to be marijuana. At trial, the government admitted the lab report over defense objection. The military judge admitted the lab report under the business records exception to the hearsay rules. The issue was whether the forensic lab report produced by USACIL at the request of the government after appellant had been arrested constitutes testimonial hearsay. The holding was: Yes, the forensic lab report does constitute testimonial hearsay where the lab report was requested after local police had arrested appellant. The court first briefly reviewed Supreme Court and CAAF caselaw on the Confrontation right since *Crawford*, before analyzing the facts of this case primarily using the three factors the CAAF enunciated in *Rankin*. First, was the statement at issue elicited by or made in response to law enforcement or prosecutorial inquiry? Second, did the "statement" involve more than a routine and objective cataloging of unambiguous factual matters? Finally, was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial? Clearly the testing was done and the report produced in response to a specific request by law enforcement. The lab report was limited to the identity and amount of the tested substance, however, the purpose of the testing was to produce incriminating evidence for use at trial. The court pointed out that this circumstance was described by the CAAF in *Magyari* as a situation where a lab report would likely be considered testimonial, i.e. prepared at the request of the government, while appellant was already under investigation, for the purpose of discovering incriminating evidence. Critical to the court's reasoning was the fact that the testing was done after appellant had been arrested and charges had been preferred.

(2) **Physical Evidence Sent to Lab Post-Arrest.** *United States v. Harcrow*, 66 M.J. 154 (2008). Appellant was found guilty of use and manufacture of various illegal drugs among other offenses. NCIS and local law enforcement officials arrested him at his house in Stafford County, Virginia, pursuant to a warrant issued on probable cause that he was manufacturing methamphetamine at his residence. While searching the house, plastic bags and metal spoons were seized as evidence consistent with the manufacture of methamphetamine. The plastic bags and spoons were subsequently tested by the Virginia forensic science lab and found to contain heroin and cocaine residue. The government introduced the lab reports against appellant at trial. The Confrontation issue was whether the forensic lab reports constituted testimonial hearsay prohibited by the

Sixth Amendment. CAAF used its three factors from *Rankin* along with its reasoning in *Magyari* to conclude the lab reports were testimonial. The case is important as the first CAAF case to find a lab report inadmissible as a testimonial statement rather than admissible as a nontestimonial business record.

(3) **Urinalysis.** *United States v. Blazier (Blazier I)*, 68 M.J. 439 (C.A.A.F. 2010).

(a) Accused convicted of wrongful use of controlled substances based on a random and a consent urinalysis. The command requested "the drug testing reports and specimen bottles" from the lab, stating that they "needed for court-martial use." The lab sent the command two Drug Testing Reports (DTR) consisting of 1) a cover memo that described and summarized the tests and the results; 2) attached records that included, among other things, the underlying testing data, chain of custody documents, and some handwritten annotations of employees of the lab. The cover memos were signed by the "Results Reporting Assistants" and contained a signed, sworn declaration by Dr. Vincent Papa, the lab's forensic toxicologist and "Laboratory Certifying Official." Dr. Papa's declaration confirmed the authenticity of the records and stated that they were "made and kept in the course of the regular conducted activity" at the lab.

(b) Held: The portions of the drug testing report cover memoranda which summarized and set forth the "accusation" that certain substances were confirmed present in Blazier's urine at concentrations above the DOD cutoff level were testimonial.

(c) The court declined to decide the entire question before it, and instead ordered additional briefings from the parties on the following issues not previously raised by the parties: While the record establishes that the drug testing reports, as introduced into evidence by the prosecution, contained testimonial evidence (the cover memoranda of August 16), and the defense did not have the opportunity at trial to cross-examine the declarants of such testimonial evidence, (a) was the Confrontation Clause nevertheless satisfied by testimony from Dr. Papa?; or (b) if Dr. Papa's testimony did not itself satisfy the Confrontation Clause, was the introduction of testimonial evidence

nevertheless harmless beyond a reasonable doubt under the circumstances of this case if he was qualified as, and testified as, an expert under M.R.E. 703 (noting that "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data [upon which the expert relied] need not be admissible in evidence in order for the opinion or inference to be admitted")? *See, Blazier II, infra.*

(4) **Urinalysis.** *United States v. Blazier (Blazier II)*, 69 M.J. 218 (C.A.A.F. 2010).

(a) Held: "Cross-examination of Dr. Papa was not sufficient to satisfy the right to confront [the lab personnel who prepared the testimonial portions of the cover memoranda], and the introduction of their testimonial statements as prosecution exhibits violated the Confrontation Clause."

(b) Held: "[W]here testimonial hearsay is admitted, the Confrontation Clause is satisfied only if the declarant of that hearsay is either (1) subject to cross-examination at trial, or (2) unavailable and subject to previous cross examination. We further hold that an expert may, consistent with the Confrontation Clause and the rules of evidence, (1) <u>rely on</u>, <u>repeat</u>, or <u>interpret</u> admissible and nonhearsay machine-generated printouts of machine-generated data…, and/or (2) <u>rely on</u>, <u>but not repeat</u>, testimonial hearsay that is otherwise an appropriate basis for an expert opinion, so long as the expert opinion arrived at is the expert's own…. However, the Confrontation Clause may not be circumvented by an expert's repetition of otherwise inadmissible testimonial hearsay of another."

(c) The court reversed the Air Force court's decision and remanded the case for the lower court to conduct a harmlessness analysis.

(5) **Random Urinalysis.** *United States v. Magyari*, 63 M.J. 123 (2006). Draftsman First Class (E-6) Magyari was convicted against his pleas of wrongful use of methamphetamine. The CAAF granted on the following issue: Whether, in light of

Crawford v. Washington, appellant was denied his Sixth Amendment right to confront the witnesses against him where the government's case consisted solely of appellant's positive urinalysis. Holding: "in the context of random urinalysis screening, where the lab technicians do not equate specific samples with particular individuals or outcomes, and the sample is not tested in furtherance of a particular law enforcement investigation, the data entries of the technicians are not "testimonial" in nature." *U.S. v. Magyari*, 63 M.J. 123, 124 (2006). ***But see, Blazier I & II, supra.***

(6) **Urinalysis Based on Individualized Suspicion.** *United States v. Harris*, 65 M.J. 594 (N-M Ct. Crim. App. 2007). Appellant was arrested for trespassing by local police after he was discovered digging in his neighbor's yard in the pouring rain, wearing only a pair of muddy shorts. One of his explanations for his unusual behavior was that he was "digging for diamonds." After he admitted to using crystal methamphetamine, he was ordered to undergo a command directed urinalysis based on probable cause. His urinalysis result came back positive, and was introduced against him at trial. The issue was whether the Navy Drug Lab Report on a command directed urinalysis admitted against appellant testimonial hearsay. (There were five assignments of error, however only one implicated the Sixth Amendment.) The holding was: No, the lab report was nontestimonial, and its admission did not violate appellant's Confrontation rights under the Sixth Amendment. Although the CAAF opinion in *Magyari* was limited to cases of random urinalysis, the result is the same here in the case of a command directed urinalysis because the lab procedures are the same regardless of the origin of the sample. More specifically, urinalysis samples are processed by the Navy lab in batches of 100, and given a separate identification number, such that there is no way for any lab technician to know which sample is being tested. The lab employees don't know whether prosecution is anticipated or whether the sample is from a random urinalysis. Therefore, urinalysis lab reports from testing processed in the way it is done at the Navy lab, are nontestimonial hearsay admissible under the business records exception. ***But see, Blazier I & II, supra.***

e) Casual Remarks / Statements to Family, Friends, Co-Workers, or Fellow Prisoners

(1) **Statements by child to parents.** *United States v. Coulter*, 62 M.J. 520 (N-M. Ct. Crim. App. 2005). Two-year old sex abuse victim tells parents that "he touched me here" pointing to vaginal area. Statement admitted under residual hearsay exception (with an alternative theory of present sense impression). Agreeing with trial court, the Navy-Marine Corps court found the statement was nontestimonial as there

was no expectation that the statement would be use prosecutorially nor was there any government involvement.

(2) **Statements to co-workers.** United States v. Scheurer, 62 M.J. 100 (2005). The accused and his wife were charged with various drug related offenses. Prior to the charges and over a period of months, the accused's wife engaged in a number of conversations in which she told her friend about the drug use of both herself and the accused. The friend eventually contacted OSI who in turn asked the friend to wear a wire and engage the wife in further conversations about the accused's drug use. Several inculpatory statements were obtained, some of which implicated the wife, some the accused, and some both the accused and the wife. At the accused's trial, the wife invoked spousal privilege and was thus declared unavailable. The trial court then admitted the statements of wife to her friend against the accused. Citing *United States v. Hicks*, 395 F.3d 173 (3d Cir. 2005), the court first determined that the statements taken covertly were not "testimonial" in nature. Such statements, the court reasoned, did not implicate the specified definitions of testimonial as enumerated in *Crawford*. Further, the court found that such statements would be nontestimonial when the declarant did not contemplate the use of those statements at a later trial.

f) **Personnel Records.** *United States v. Rankin*, 64 M.J. 348 (2007). The CAAF affirmed the lower court holding that service record entries for a period of unauthorized absences were not testimonial for the purposes of the Confrontation Clause. The CAAF found that three of the four documents introduced by the government were nontestimonial, and that although the fourth may have qualified as testimonial, the information it contained was cumulative with information in the other three. In analyzing the four documents, **the CAAF conducted a three factor analysis, looking first at prosecution involvement in the making of the statement. Second, the court asked whether the reports merely catalogued unambiguous factual matters. And third, the court used a primary purpose analysis derived from *Davis v. Washington*.** After using the three steps to find that three of the four documents were nontestimonial, the court went on to conduct the confrontation analysis in *Roberts v. Ohio* and conclude that the documents were properly admitted under the business records exception to the hearsay rules.

C. What Constitutes "Unavailability"?

1. A witness who is present in the witness box and responds (provides responsive answers) to questions is available for Confrontation Clause purposes, regardless of the content of the witness's answers. A witness will usually be considered "unavailable" for Confrontation Clause purposes if the witness is unavailable under M.R.E. 804(a), except regarding lack of

memory (M.R.E. 804(a)(3)). *See, e.g, United States v. Owens*, 484 U.S. 554 (1988), *supra at* II.A.

2. *United States v. Lyons*, 36 M.J. 183 (C.M.A. 1992). Appellant convicted of raping the deaf, mute, mentally retarded, 17-year-old daughter of another service member. The victim appeared at trial, but her responses during her testimony were "largely substantively unintelligible" because of her infirmities. In light of her inability, the government moved to admit a videotaped re-enactment by the victim of the crime. The military judge admitted the videotape as residual hearsay over defense objection. Appellant asserted that his right to confrontation was denied because the daughter's disabilities prevented him from effectively cross-examining her. The lead opinion assumed that the victim was unavailable and decided the case on the basis of the admission of a videotaped re-enactment. Chief Judge Sullivan, Judges Cox and Crawford did not perceive a confrontation clause issue because the victim testified. *See also, United States v. Russell*, 66 M.J. 597, 601-602 (Army Ct.Crim.App. 2008) (implicitly accepting trial judge's ruling that a child victim who was "too young and too frightened to be subject to a thorough direct or cross-examination" was unavailable).

3. The Government must first make a "good faith" effort to produce a witness in order for that witness to be "unavailable" for Sixth Amendment purposes. *United States v. Cabrera-Frattini*, 65 M.J. 241, 245-246 (C.A.A.F. 2007). *See also, Ohio v. Roberts*, 448 U.S. 56, 74-75 ("The law does not require the doing of a futile act….[b]ut if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation."); *United States v. Crockett*, 21 M.J. 423 (C.M.A. 1986) (good faith does not extend to changing venue from Germany to Florida).

D. Nontestimonial Statements and the Confrontation Clause

1. Does the Confrontation Clause Apply to Nontestimonial Statements?

a) Generally

(1) It is uncertain whether military courts are required to apply a Confrontation Clause analysis to nontestimonial statements. Unless and until the CAAF clarifies the law in this regard, prudent practitioners should apply the *Ohio v. Roberts* test to nontestimonial statements.

(2) The *Crawford* Court did not decide whether the Confrontation Clause was implicated by nontestimonial statements, stating "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to affor the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Crawford*, 541 U.S. at 68. Three years later, however, the Court unambiguously held that the admission of nontestimonial statements do not violate an accused's Sixth Amendment right to confrontation. *Whorton v. Bockting*, 127 S.Ct. 1173 (2007). [Note: Military courts

are not necessarily bound by this Supreme Court precedent. *See*, H.F. "Sparky" Gierke, *The Use of Article III Case Law in Military Jurisprudence*, Army Lawyer, Aug. 2005.]

(3) It seems likely that military courts will align their holdings with the Supreme Court regarding nontestimonial statements. As a logical proposition, it does not make sense to apply the Confrontation Clause to nontestimonial statements given the *Crawford* Court's explanation that the phrase "witnesses" in the Sixth Amendment only describes those who "bear testimony." In other words, a person is only a witness if he makes a "testimonial" statement.

b) Supreme Court Cases

(1) *Whorton v. Bockting*, 127 S. Ct. 1173 (2007). "Under *Roberts*, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability."

(2) *Davis v. Washington*, 547 U.S. 813, 823-824 (2006). "We must decide, therefore, whether the Confrontation Clause applies only to testimonial hearsay; and, if so, whether the recording of a 911 call qualifies. The answer to the first question was suggested in *Crawford*, even if not explicitly held: "The text of the Confrontation Clause reflects this focus [on testimonial hearsay]. It applies to 'witnesses' against the accused—in other words, those who 'bear testimony.' 'Testimony,' in turn, is typically 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.' An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its 'core,' but its perimeter."

c) Military Cases

(1) *United States v. Rankin*, 64 M.J. 348 (2007). "The *Ohio v. Roberts* requirement for particularized guarantees of trustworthiness continues to govern confrontation analysis for nontestimonial statements." (Citing *United States v. Scheurer*, 62 M.J. 100, 106 (2005)). *But see*, *United States v. Czachorowski*, 66 M.J. 432 at n.3 (C.A.A.F. 2008) (citing, in dicta, *Whorton v. Bockting* for the proposition that "…the Confrontation Clause has no application to [nontestimonial] statements and therefore permits their admission even if they lack indicia of reliability…."); *United States v. Cucuzzella*, 66 M.J. 57 (C.A.A.F. 2008) (the Confrontation Clause is not implicated by nontestimonial statements) (Stucky, J.,

(2) *United States v. Russell*, 66 M.J. 597, 604 (Army Ct. Crim. App. 2008). Held that the admission of nontestimonial statements do not violate a military accused's confrontation rights. However, the court applied a constitutional standard for determining prejudice because of **"the continuing uncertainty regarding the application of *Ohio v. Roberts.*"**See also, *United States v. Crudup*, 65 M.J. 907, 909 (Army Ct. Crim. App. 2008); *United States v. Diamond*, 65 M.J. 876, 883 (Army Ct. Crim. App. 2007).

2. Application of *Ohio v. Roberts* to Nontestimonial Statements

a) Under *Roberts*, a nontestimonial hearsay statement can be admitted if the proponent can show that it possessed adequate indicia of reliability. Indicia of reliability can be shown in one of two ways. First, if the statement fits within a firmly rooted hearsay exception, it satisfies the Confrontation Clause. If it doesn't fit within a firmly rooted hearsay exception, it can nevertheless satisfy the Confrontation Clause and be admitted if it possessed particularized guarantees of trustworthiness.

b) Particularized guarantees of trustworthiness could be shown using a nonexclusive list of factors such as mental state or motive of the declarant, consistent repetition, or use of inappropriate terminology. *See, e.g., Idaho v. Wright*, 497 U.S. 805, 821 (1990) (providing factors for use in analyzing the reliability of hearsay statements made by child witnesses in child sexual abuse cases); *United States v. Ureta*, 44 M.J. 290, 296 (1996) (giving examples of factors to consider when looking at the circumstances surrounding the making of a hearsay statement when the declarant is unavailable).

c) When analyzing particularized guarantees of trustworthiness, the proponent is limited to considering only the circumstances surrounding the making of the statement, i.e. extrinsic evidence was not permitted. *Idaho v. Wright*, 497 U.S. 805, 819-24 (1990). This can be confusing, since this limit on extrinsic evidence only applied to the Confrontation Clause analysis. Once a statement meets the Confrontation Clause hurdle, extrinsic evidence is perfectly acceptable for analysis under the hearsay rules. Another source of confusion in military caselaw is the fact that the CAAF has stretched the meaning of circumstances surrounding the making of the statement to include statements made close in time, yet before the

actual making of a particular statement in at least one case. *See United States v. Ureta*, 44 M.J. 290 (1996).

d) *Idaho v. Wright*, 497 U.S. 805, 821 (1990). "Because evidence possessing 'particularized guarantees of trustworthiness' must be **at least as reliable as evidence admitted under a firmly rooted hearsay exception**, . . . we think that evidence admitted under the former requirement must similarly be so trustworthy that adversarial testing would add little to its reliability."

e) The Confrontation Clause analysis chart at Part VI, below, provides a list of hearsay exceptions that are generally considered to be "firmly rooted".

V. APPELLATE REVIEW

A. Standard of Review

1. Appellate courts review a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. Clayton*, 67 M.J. 283, 286 (C.A.A.F. 2009).

2. When an error is not objected to at trial, appellate courts apply a plain error analysis. If the accused meets his burden to show plain error, "the burden shifts to the Government to prove that any constitutional error was harmless beyond a reasonable doubt." *United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006)

3. Whether statements are testimonial under *Crawford* is a question of law that is reviewed *de novo*. *United States v. Clayton*, 67 M.J. 283, 286 (C.A.A.F. 2009).

4. Availability of witnesses and the "good faith" of government efforts to procure witnesses is reviewed for an abuse of discretion. *United States v. Cabrera-Frattini*, 65 M.J. 241, 245 (C.A.A.F. 2007).

5. Harmlessness analysis

a) Any evidence admitted in violation of the Confrontation Clause is reversible unless it is harmless beyond a reasonable doubt. *United States v. Gardinier*, 67 M.J. 304, 306 (C.A.A.F. 2009)

b) "In assessing harmlessness in the constitutional context…[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *United States v. Gardinier*, 67 M.J. 304, 306 (C.A.A.F. 2009) (*citing Chapman v. California*, 386 U.S. 18 (1967)).

c) The C.A.A.F. "frequently looks to the factors set forth in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), to assess whether an error is harmless beyond a reasonable doubt." *United States v. Gardinier*, 67 M.J. 304, 306 (C.A.A.F. 2009).

d) The *Van Arsdall* factors include: "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and…the overall

strength of the prosecution's case." *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)

B. Retroactive Effect of *Crawford v. Washington*.

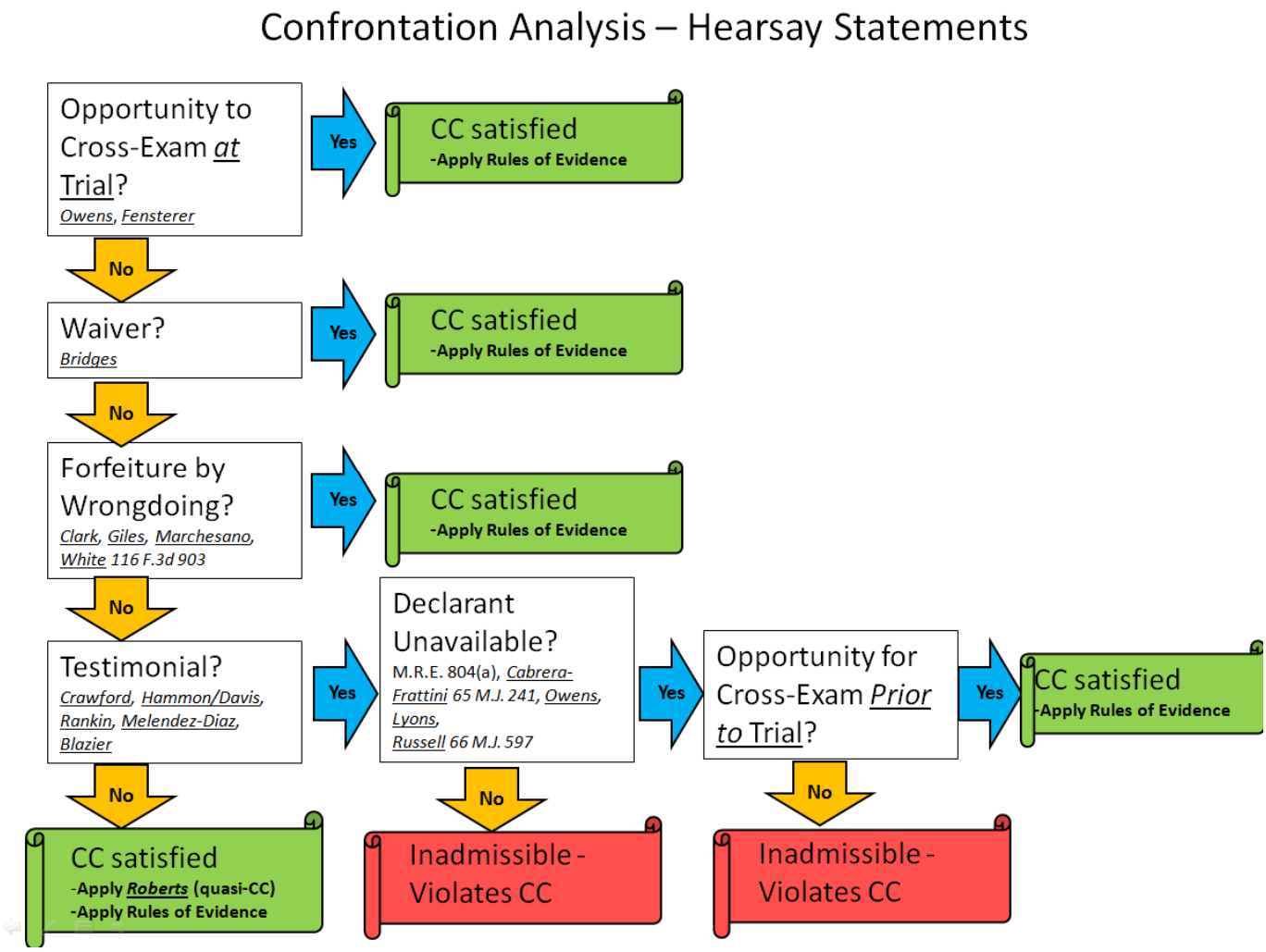
1. *Crawford* is a "new rule of law" for the conduct of criminal prosecutions and must be applied retroactively for all cases that are still pending on direct review. *United States v. Cabrera-Frattini*, 65 M.J. 241, 245 (C.A.A.F. 2007).

2. *Whorton v. Bockting*, 127 S. Ct. 1173 (2007).

a) Issue: Whether the decision in *Crawford* is retroactive to cases already final on direct review (in other words, can *Crawford* be used to collaterally attack cases already final after direct review).

b) Held: *Crawford* is not retroactive to cases already final on direct review because its impact on criminal procedure is equivocal. *Crawford* results in the admission of fewer testimonial statements, while exempting nontestimonial statements from confrontation analysis entirely. Thus, it is not clear that in the absence of *Crawford* the likelihood of an accurate conviction was seriously diminished under the *Roberts* analysis. Since the *Crawford* rule did not significantly alter the fundamental fairness of criminal proceedings, it is not a watershed rule requiring retroactive effect on cases already final on direct review.

VI. CONFRONTATION CLAUSE ANALYSIS CHART



Ohio v. Roberts "Quasi-Confrontation" Analysis – **Nontestimonial** Statements

Is the Hearsay Exception "Firmly Rooted"?

See, 4 Federal Evidence § 8:31 (3d ed.)

Firmly rooted (generally):

- 801(d)(2)(E) – Co-conspirator statement
- 803(1) – Present sense impression
- 803(2) - Excited utterance
- 803(3) – Then existing mental, emotional, or physical condition
- 803(4) - Medical diagnosis & treatment
- 803(5) – Recorded recollection
- 803(6) – Records of regularly conducted activity*
- 803(8) – Public records and reports*
- 804(b)(1) – Former testimony
- 804(b)(2) – Statement under belief of impending death

Not firmly rooted:

- 804(b)(3) – Statement against interest
- 807 – Residual exception

Yes → "CC" satisfied

No ↓

Does the Statement Show "Particularized Guarantees of Trustworthiness?

[Shown from the totality of circumstances surrounding the making of the statement *Idaho v. Wright, 497 U.S. 805 (1990)]*

Yes → "CC" satisfied

No ↓

Inadmissible - Violates "CC"

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TAB N

MILITARY RULES OF EVIDENCE

Table of Contents

I. GENERAL PROVISIONS. 1

A. Rule 101..... 1

B. Rule 103. Rulings on Evidence. 1

C. Rule 105. Limited Admissibility. 3

D. Rule 106. Remainder of or Related Writings or Recorded Statements.3

II. RELEVANCY AND ITS LIMITS 4

A. Rule 401: Definition of "Relevant Evidence" 4

B. Relationship of Rules 401 and 104..... 6

C. Relationship of Rules 401 and 402..... 7

D. Relationship of Rules 401 and 403..... 8

III. CHARACTER EVIDENCE 11

A. Rule 404. Character Evidence. 11

B. Permissible Propensity Inference 12

IV. UNCHARGED MISCONDUCT 15

A. Rule 404(b). Uncharged Misconduct. 15

B. *Reynolds* 3-Part Test for Admissibility of Rule 404(b) Evidence.... 19

MAJ Tyesha L. Smith
January 2011

C. The *Reynolds'* Analysis 20

D. Limiting the Admissibility of 404(b) Evidence 22

V. METHODS OF PROVING CHARACTER 23

A. Rule 405. Form of proof. 24

B. Rule 405. Methods of Proving Character. 24

VI. RULE 410. INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS. 27

VII. THE "RAPE SHIELD" – RULE 412 29

A. Rule 412. Background History. 29

B. Rule 412. Requirements for admission. 32

VIII. EVIDENCE OF SIMILAR CRIMES IN SEXUAL ASSAULT CASES AND CHILD MOLESTATION CASES 34

A. Rule 413/414. 34

B. Rule 413/414. Scope of the Rule. 35

IX. RULES 501-513. PRIVILEGES. 40

A. Privileges generally. 40

B. Rule 501. 41

C. Rule 502. Lawyer-Client Privilege. 41

D. Rule 503. Communications to Clergy. 42

E. Rule 504. Husband-Wife Privilege. 42

F. Rule 513. Psychotherapist Patient Privilege. 44

X. WITNESSES. 45

A. Rule 601. Competency. 45

B. Rule 602. Personal Knowledge. 45

C. Rule 605. The military judge. 46

D. Rule 607. Who May Impeach. 46

E. Methods of Impeachment. 46

F. Rule 608. Untruthful Character. 47

G. Rule 608. Bias. 49

H. Rule 609. Impeachment with a Prior Conviction. 50

I. Rule 613. Impeachment with Prior Statements. 51

J. Rule 611. Mode and Order of Interrogation and Presentation 52

K. Rule 612. Refreshing Recollection. 53

XI. EXPERTS AND SCIENTIFIC EVIDENCE 54

A. Rule 702. Expert Witnesses 54

B. Rule 702. The Expert's Qualification to Form an Opinion. 56

C. Proper Subject Matter ("Will Assist") 57

D. Form of the Opinion. 57

E. Rule 703. Basis For the Expert's Testimony. 59

F. Relevance. 61

G. Reliability. 61

H. Probative Value 62

XII. HEARSAY. 63

A. The Rule Against Hearsay. 63

B. The Necessary Definitions. 63

C. Exemptions From Hearsay. 63

D. Common Hearsay Exceptions. 65

E. Rule 804. Common Hearsay Exceptions - Unavailability 73

F. Rule 804(b). Former Testimony. 74

G. Rule 804(b)(3). Statement Against Pecuniary, Proprietary, or Penal Interests. 75

H. Rule 804(b)(6). Forfeiture by wrongdoing. 75

I. Rule 805 and 806. Hearsay within Hearsay; Attacking and Supporting Credibility of Declarant. 75

XIII. MISCELLANEOUS RULES. 76

A. Rule 1101. Applicability of Rules. 76

B. Rule 1102. Amendments. 77

XIV. CONCLUSION 77

MILITARY RULES OF EVIDENCE

Outline of Instruction

I. GENERAL PROVISIONS.

A. Rule 101.

1. Scope. The Military Rules of Evidence are applicable to courts-martial, including summary courts-martial, to the extent and exceptions stated in Rule 1101.

2. Rule 1101.

Rule 1101. Applicability of rules

(a) Rules applicable. Except as otherwise provided in this Manual, these rules apply generally to all courts-martial, including summary courts-martial; to proceedings pursuant to Article 39(a); to limited fact-finding proceedings ordered on review; to proceedings in revision; and to contempt proceedings except those in which the judge may act summarily.

(b) Rules of privilege. The rules with respect to privileges in Section III and V apply to all stages of all actions, cases, and proceedings.

(c) Rules relaxed. The application of these rules may be relaxed in sentencing proceedings as provided under R.C.M. 1001 and otherwise as provided in this manual.

(d) Rules inapplicable. These rules (other than with respect to privileges and MRE 412) do not apply in investigative hearings pursuant to Article 32; proceedings for vacation of suspension of sentence pursuant to Article 72; proceedings for search authorizations; proceedings involving pretrial restraint; and in other proceedings authorized under the code or this Manual and not listed in subdivision (a).

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3. Secondary Sources. Rule 101 (b). If not otherwise prescribed in the Manual or rules, courts-martial will first apply the rules of evidence recognized in the trial of criminal cases in the United States district courts; and secondly, the rules of evidence at common law. *United States v. Toy*, 65 M.J. 405, 410 (2008).

B. Rule 103. Rulings on Evidence.

1. Rulings on Evidence. This rule imposes significant responsibility on counsel to raise and preserve evidentiary questions for review.

Rule 103. Ruling on Evidence

(a) Effect of Erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling materially prejudices a substantial right of a party, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record; stating the specific ground of objection, if the specific ground was not apparent from the context;

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the military judge by offer or was apparent from the context within which questions were asked. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. The standard provided in this subdivision does not apply to errors involving requirements imposed by the Constitution of the United Sates as applied to members of the armed forces except insofar as the error arises under these rules and this subdivision provides a standard that is more advantageous to the accused than the constitutional standard

(d) Plain error. Nothing in these rules precludes taking notice of plain errors that materially prejudice substantial rights although they were not brought to the attention of the military judge.

2. Objections to evidence. Rule 103(a)(1): Failure to make specific (correct), timely (meaning at the earliest possible time) objection at trial waives issue for appeal, absent a "plain error;"

3. Preserving Issues. Counsel are not required to cite evidentiary rules by number in order to adequately preserve objections for later appellate review. So long as counsel makes sufficient arguments to make the issue known to the military judge, the issue will be preserved. *United States v. Datz*, 61 M.J. 37 (2005). While MRE 103 does not require the moving party to present every argument in support of an objection, it does require argument sufficient to make the military judge aware of the specific ground for objection. MRE 103 should be applied in a practical rather than a formulaic manner. *United States v. Reynoso*, 66 M.J. 208 (2008).

4. Where the witness' answer is objectionable, but it has been heard by the panel, the opponent must seek a curative instruction (to disregard the testimony) or a mistrial. Declaration of a mistrial lies within the sound discretion of the judge, *United States v. McGeeney*, 41 M.J. 544 (N-M. Ct. Crim. App. 1994), and should only be granted where circumstances demonstrate the necessity to prevent a manifest injustice to the accused. *United States v. Dancy*, 38 M.J. 1 (C.M.A. 1993).

5. Offer of Proof. Rule 103(a)(2): If the military judge sustains an objection to the tender of evidence, the proponent generally must make an offer to preserve the issue for appeal. The offer should include the substance of the proffered evidence, the affected issue, and how the issue is affected by the judge's ruling. *United States v. Means*, 24 M.J. 160 (C.M.A. 1987) and *United States v. Viola*, 26 M.J. 822 (A.C.M.R. 1988).

6. Repeating Objections. Counsel do not have to repeat objections during trial if they first obtain unconditional, unfavorable ruling from the military judge in out-

of-court session. *United States v. Sheridan*, 43 M.J. 682 (A.F. Ct. Crim. App. 1995). However, a preliminary, tentative ruling may require a subsequent objection to preserve the issue for appeal. *United States v. Jones*, 43 M.J. 708 (A.F. Ct. Crim. App. 1995). Rule 103 also applies at sentencing to the admission of documents from the accused's personnel records. *See United States v. Kahmann*, 59 M.J. 309 (2004) (holding that where defense counsel failed to object, the military judge did not commit plain error in admitting a summary court-martial conviction record that did not indicate on its face whether the accused had received *Booker* counseling or whether mandatory review of the conviction had taken place under Art. 64).

C. Rule 105. Limited Admissibility.

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the military judge, upon request, shall restrict the evidence to its proper scope and instruct the members accordingly.

1. A limiting instruction may be an appropriate alternative to exclusion of evidence. *See, e.g., United States v. Dorsey*, 16 M.J. 1 (C.M.A. 1983) (exclusion of Rule 412 evidence); *United States v. Ureta*, 44 M.J. 290 (1996), *cert. denied*, 117 S. Ct. 692 (1997) (prior inconsistent statements offered for impeachment); *United States v. Barrow*, 42 M.J. 655 (A.F. Ct. Crim. App. 1995) (uncharged misconduct).

2. The rule embodies the view that, as a general rule, evidence should be received if it is admissible for any purpose. The rule places the major responsibility for the limiting instruction upon counsel. Counsel should state the grounds for limiting the evidence outside the hearing of the members. Counsel should offer, and the court may request, the specific language to use. The limiting instruction may be given at the time the evidence is received or as part of the general instructions, or at both times.

D. Rule 106. Remainder of or Related Writings or Recorded Statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require that party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

1. In *United States v. Rodriquez*, 56 M.J. 336 (2002), the CAAF held that in the military there are two distinct rules of completeness, Rule 106 and Rule 304(h)(2). CAAF held that Rule 106 applies when fairness demands that the rest of the evidence be considered contemporaneously with the portions of the evidence offered by the opposing side. They adopted a standard regarding Rule 304(h)(2) that allows for admissibility of statements made by the accused when the defense introduces the remainder of a statement or statements that are explanatory or relevant to the confession or admission of the accused previously offered by the government. This is allowed even if the statements the defense seeks to admit are

otherwise inadmissible hearsay. CAAF requires a case-by-case determination when the defense attempts to admit a series of statements as part of the original confession or admission in order to determine if they are part of an ongoing statement or a separate transaction or course of action.

2. In the context of a confession or an admission, read this rule in connection with Rule 304(h)(2) (where only part of the alleged admission or confession is introduced, the defense may introduce other portions). Other portions admitted by the defense do not need to overcome a hearsay objection. *United States v. Benton*, 54 M.J. 717 (A. Ct. Crim. App. 2001). However, note that this has the potential to open the door to an accused's character – the *Goldwire* trap. In *United States v. Goldwire*, 55 M.J. 139 (2001), the CAAF held that when defense counsel uses the rule of completeness to admit portions of their client's statements into evidence through cross examination of a government witness they open the door to reputation and opinion testimony regarding the truthfulness of the accused. CAAF analyzed the potential application of the rule of completeness under both the federal and military rules, as well as the common law doctrine of completeness.

3. Supplementary Statements. In *United States v. Foisy*, 69 M.J. 562 (N.M. Ct. Crim. App. 2010), the accused gave a sworn statement to an NCIS agents admitting that he had sex with the victim, but insisting that it was consensual. He also described his interactions with the victim which led him to believe that it was consensual. Another NCIS agent took a second statement from the accused which was labeled as a "supplementary statement." The facts in supplementary statement began immediately before appellant penetrated the victim. At trial, the government admitted only the supplementary statement. The defense attempted to admit the first statement under the rule of completeness. The government objected and the military judge sustained the objection. The Navy-Marine Court of Criminal Appeals held that under MRE 304(h)(2), "where the Government links two statements by constructing them as a statement and a 'supplement' to that statement, the Government may not deconstruct those statements for the purposes of trial where the admission of the second statement standing alone would create a misimpression on the part of the fact finder as to an accused's actual admissions." The military judge erred in not allowing the defense to introduce the first statement.

II. RELEVANCY AND ITS LIMITS

A. Rule 401: Definition of "Relevant Evidence"

Rule 401. Definition of "Relevant Evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

1. Establishing Relevancy - A basic tenet of American jurisprudence is that finders of fact may consider only relevant evidence. Military Rule of Evidence 401 is taken without change from the Federal Rule and adopts a logical approach to relevance. Rule 401 permits both circumstantial and direct evidence to satisfy the relevancy criteria. The logical starting place when evaluating any issue at trial is the concept of relevance. Almost every issue in evidence law involves the idea of relevance. In fact, a relevancy objection, although often overlooked, is frequently the most valid objection available to counsel. Military courts have used Rule 401 to expand the amount of information available to the members. *See*, e.g., *United States v. Tomlinson*, 20 M.J. 897 (A.C.M.R. 1985) (Rule 401 was "intended to broaden the admissibility" of most evidence.)

2. Requirements of Counsel. When a counsel seeks to have evidence admitted, she must be able to specify what issue it relates to and show how it rationally advances the inquiry about that issue. Counsel should be prepared to articulate why certain requested evidence is relevant by doing the following:

   a) describe the evidence;

   b) explain its nexus to the consequential issue in the case; and

   c) indicate how the offered evidence will establish the fact in question.

3. Standard of "Any Tendency" – is the lowest possible standard for relevancy. This standard shifts the emphasis from admissibility to weight. The test for logical relevance (as opposed to legal relevance discussed later in this outline) is whether the item of evidence has any tendency whatsoever to affect the balance of probabilities of the existence of a fact of consequence.

   a) *United States v. Huet-Vaughn*, 43 M.J. 105 (1995). Army reserve physician's motives and reasons for refusing to support Desert Shield and views about the lawfulness of her deployment orders irrelevant to charge of desertion with intent to avoid hazardous duty.

   b) *United States v. Schlamer*, 52 M.J. 80 (1999). Accused was charged with the premeditated murder of a female. Victim was found with her throat cut. At trial, the government introduced pictures and writings seized from the accused. In these documents, the accused set out in graphic detail his desires to kill women and have sex with them and commit other violent acts. These writings did not mirror the actual crime, and defense claimed that they were not relevant. The military judge admitted the evidence over the defense objection. The CAAF held Rule 401 is a low standard and since the defense was trying to portray the accused as a docile person, this evidence had some tendency to show the darker side that was consistent with his confession.

c) *United States v. Berry*, 61 M.J. 91 (2005) Relevant evidence under Rule 401 is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Evidence of a prior uncharged sexual assault by an accused involving a younger victim satisfied the relevance prong of the threshold test for the admission of uncharged sexual assault in a case where the accused was charged with forcible sodomy of a victim who was drunk, as it has some tendency to make it more probable that the accused committed a nonconsensual act against a vulnerable person.

4. Relationship between Rule 401 and the Due Process Clause. In *United States v. Brewer*, 61 M.J. 425 (2005), the CAAF held that in a urinalysis case, the defense was entitled to introduce a "mosaic alibi" defense to counter the permissive inference of wrongful use, even though such evidence would violate Rules 404 and 405.

5. The Main Relevancy Provisions

a) The Military Rules of Evidence have three main relevance provisions: Rules 401, 402, and 403. Rule 401 defines what is relevant. Rule 402 require that evidence be relevant in order to be admitted and that irrelevant evidence be excluded. Finally, Rule 403 allows the military judge to use discretion to avoid admitting otherwise relevant evidence due to concerns about unfair prejudice, confusion of issues, misleading the panel, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

b) Justification for the Main Relevancy Provisions: Relevancy requirements help save time, narrow the topics the parties have to develop in preparation for trial, and increase the perceived legitimacy of courts-martial by ensuring that outcomes will be based on information most people would believe have something to do with the issues at trial.

c) Discussion of Rule 402 and 403: A more detailed discussion of Rules 402 and 403 are contained within this outline.

B. Relationship of Rules 401 and 104.

1. Preliminary Questions. The military judge decides questions of admissibility of evidence under Rule 104. They are determined solely by the military judge, not the "court" and the judge is not bound by the rules of evidence, except those with respect to privileges. Because relevancy is a condition for admissibility, it is one of the issues the military judge is intended to decide.

2. When faced with deciding a relevancy objection, the military judge has four basic choices with respect to ruling on the issue:

a) exclude the evidence;

b) admit all the evidence;

c) admit all the evidence subject to a limiting instruction; or

d) admit part of the evidence and exclude part.

3. Threshold. Although the primary responsibility for showing the relevancy of a particular piece of evidence rests with the proponent, it is a very low hurdle to overcome. All that the military judge is required to determine in order to rule a piece of evidence is relevant, is that a rational member could be influenced by the evidence in deciding the existence of a fact of consequence. The evidence only has to be capable of making determination of the fact more or less probable than it would be without the evidence.

4. Relevancy Conditioned Upon Proof of a Predicate Fact. Rule 104(b) deals with the situation where the relevancy of a piece of evidence is conditioned upon proof of a predicate fact. *United States v. Bins*, 43 M.J. 79 (1995). The military judge's responsibility in these cases is not to decide whether she believes the evidence or she believes the government has proven the predicate fact. Instead, the judge only decides whether counsel has introduced enough evidence so that the panel could reasonably conclude the existence of the conditional fact. In other words, the judge decides only if there is a sufficient factual predicate for admissibility of the evidence; weight and credibility of the evidence are matters for the members. *United States v. Kelly*, 45 M.J. 275 (1996). *Huddleston v. United States*, 485 U.S. 681 (1988) (holding that neither FRE 104 nor 404(b) requires the trial judge to determine by a preponderance of the evidence that a 'similar act' was committed; the trial judge is only required to consider all of the evidence offered and decide whether the jury could reasonably find the similar act was committed).

a) The military judge should ask the following questions:

(1) Will the members find it helpful in deciding the case accurately? If NO, then the judge excludes the evidence. If YES, then the judge asks another question;

(2) Is there sufficient evidence to warrant a reasonable member in believing the evidence? If NO, then the judge excludes the evidence. If YES, then the judge admits the evidence.

C. Relationship of Rules 401 and 402.

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States as applied to members of the armed forces, the code, these rules, this Manual, or any Act of Congress applicable to members of the armed forces. Evidence which is not relevant is not admissible.

1. Exclusion of relevant evidence:

   a) The Rule states all relevant evidence is admissible except evidence which falls into any one of the following five categories:

      (1) evidence that violates the Constitution;

      (2) evidence that violates the Uniform Code of Military Justice;

      (3) evidence that violates the Manual for Courts-Martial;

      (4) evidence that violates the Military Rules of Evidence; and

      (5) evidence that violates any Congressional limitation which might specifically concern courts-martial.

   b) Other relevant evidence may be excluded under Rule 403.

2. Applying Rule 402. Irrelevant evidence is never admissible. It is not admissible because it does not assist the trier of fact in reaching an accurate and fair result. The Rule requires the court to address three separate questions before admitting evidence.

   a) Does the evidence qualify under Rule 401's definition?

   b) Does the evidence violate any of the five prohibitions listed in Rule 402?

   c) Does the evidence satisfy any provision requiring a Rule 403 related judicial assessment of the probative value of the evidence? See, e.g., Rules 403, 412, 413, 414, 803(6), 804(b)(5), 807, and 1003.

D. Relationship of Rules 401 and 403.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

1. Unfair Prejudice. Evidence is subject to exclusion if the opposing counsel can successfully convince the military judge that the risk of unfair prejudice substantially outweighs it probative value. Rule 403 is one of the most often cited rules by counsel. The rule is particularly important in the law of evidence since it is a rule that empowers the military judge to exclude probative evidence if it can be said to be unfairly prejudicial.

a) Standard. In a sense, all evidence that either the government or defense seeks to introduce is intended to prejudice the opponent. If it didn't prejudice the opponent, one could reasonably question the value of seeking to admit the evidence. The question under Rule 403 is really one that addresses how the factfinder will view the evidence. It is only when a factfinder might react to the proffered evidence in a way (usually emotional) that is not supposed to be part of the evaluative process that the reaction is considered unfairly prejudicial. *United States v. Owens*, 16 M.J. 999 (A.C.M.R. 1983) (describing unfair prejudice as existing "if the evidence is used for something other than its logical, probative force").

(1) PROPER PREJUDICE EXAMPLE: SPC Smiffy is charged with assault upon PVT Jones. The government seeks to introduce evidence from CPT Honest who will testify he heard SPC Smiffy say "the next time I see PVT Jones he is a dead man." The defense might try to keep the testimony out under a number of justifications, but under Rule 403, although the evidence is prejudicial and a member may use it to determine that SPC Smiffy likely assaulted PVT Jones, this type of prejudice is proper because it comes from the member's belief that the accused committed the charged offense.

(2) IMPROPER PREJUDICE EXAMPLE: Same facts as above except CPT Honest is going to testify he heard SPC Smiffy say "the next time I see PVT Jones he is a dead man, because I belong to the "bare knuckles gang" that encourages members to beat people up." Under Rule 403, the defense would have a much better argument to keep out the portion of the statement regarding SPC Smiffy's gang membership. The risk of admitting the entire statement is that the members may develop a negative feeling about SPC Smiffy based upon their feelings about individuals that belong to a gang. Those impressions would be an example of unfair prejudice since they are unrelated to the probative value the gang information has with respect to the charged offense. Instead, they flow from the members' reactions to information about the accused that would cause loathing whether or not it was linked to the events of the alleged offense. The risk of the members believing the accused is a wretch that deserves punishment no matter what the evidence is regarding the assault is an example of unfair prejudice under Rule 403.

b) Legal Relevance. The probative value of any evidence cannot be substantially outweighed by any attendant or incidental probative dangers. Among the factors specifically mentioned in the rule are "the danger of unfair prejudice, confusion of the issues, or misleading the members." To determine whether the risk of unfair prejudice substantially outweighs the probative value of evidence, the military judge is required to do some kind of weighing. Although there is not a clear test for the military judge to follow, some factors the military judge might consider include:

(1) the strength of the probative value of the evidence (i.e., a high degree of similarity);

(2) the importance of the fact to be proven;

(3) whether there are alternative means of accomplishing the same evidentiary goal (consider in connection with defense concessions to 404(b) uncharged misconduct); and

(4) the ability of the panel to adhere to a limiting instruction.

(5) Berry Factors - *United States v. Berry*, 61 M.J. 91 (2005). When conducting a Rule 403 balancing test, a military judge should consider the following factors: the strength of the proof of the prior act; the probative weight of the evidence; the potential to present less prejudicial evidence; the possible distraction of the factfinder; the time needed to prove the prior conduct; the temporal proximity of the prior event; the frequency of the acts; the presence of any intervening circumstances; and the relationship between the parties.

c) Rule 403 favors admissibility. A military judge will exclude evidence on a legal relevance theory only when the probative values is "substantially outweighed" by the accompanying probative dangers. *United States v. Teeter*, 12 M.J. 716 (A.C.M.R. 1981) (stating that striking a balance between probative value and prejudicial effect is left to the trial judge and that the balance "should be struck in favor of admission"). The passive voice suggests that it is the opponent who must persuade that the prejudicial dangers overcome the probative value. *United States v. Leiker*, 37 M.J. 418 (C.M.A. 1993) (cautioning defense counsel that failure to make a satisfactory offer of proof prohibits an appellate court from weighing the evidence's probative value against its possibility for causing undue delay or waste of time).

d) Rule 403 codifies judicial discretion. It is the rule by which the legal relevance is ascertained. Saltzburg, Schinasi & Schleuter state that while Rule 403 has broad application throughout the Military Rules of Evidence, "its greatest value may be in resolving Rule 404(b) issues"

because of the low threshold of proof required to establish extrinsic events. *See* Editorial Comment, Rule 403, Military Rules of Evidence at Section 403.03[7], at 4-30 (5th ed. 2003).

e) Rule 403 and special findings. The military judge should always make special findings when resolving a Rule 403 objection, even without a request to do so by counsel. *United States v. Bins*, 43 M.J. 79 (1995) (criticizing the military judge for stating that he had performed the balancing test required by Rule 403, when all he really did was recite the Rule's language). Special findings are beneficial for at least two reasons:

(1) Appellate courts will be able to evaluate the criteria and thought process used by the military judge. This will reduced the likelihood of reversal for abuse of discretion. *United States v. Hursey*, 55 M.J. 34 (2001) (describing that when a military judge conducts a proper Rule 403 balancing test, the evidence ruling will not be overturned unless there is a clear abuse of discretion).

(2) Special findings provide counsel with an opportunity to correct erroneous determinations by the military judge at the trial level, instead of waiting months or years later to do the same on appeal.

III. CHARACTER EVIDENCE

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes

(a) *Character evidence generally*. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of the accused*. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a pertinent trait of character of the alleged victim of the crime is offered by an accused and admitted under Mil. R. Evid. 404(a)(2), evidence of the same trait of character, if relevant, of the accused offered by the prosecution.

(2) *Character of the alleged victim*. Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide or assault case to rebut evidence that the alleged victim was an aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in Mil. R. Evid. 607, 608, and 609.

A. Rule 404. Character Evidence.

1. Common Sense: If you wanted to hire someone to clean your house, would you pay attention to information about the person's trustworthiness? If you knew an applicant had a conviction for theft, selling stolen items, or burglary, would that affect your hiring decision?

2. Basic Rule: Evidence of a person's character may NOT be introduced to support an inference that the person acted on a specific occasion in conformity with that character.

3. "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt…. The State may not show the defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime." *Michelson v. United States*, 335 U.S. 469, 475 (1948) (footnotes omitted) (citation omitted).

4. Prohibited Propensity Inference – you cannot use a person's character to suggest that the person did something because of a propensity to do such things. PROHIBITED: SPC Smiffy has sold stolen items in the past — therefore he must have sold stolen items in the current court-martial. Rule 404(a).

B. Permissible Propensity Inference

1. In certain situations you can use propensity evidence to show a person acted in conformity with their character. It is important to master these exceptions in order to avoid confusion.

a) Pertinent Character Traits Offered by the Accused – the accused may offer any pertinent character trait which makes it unlikely that she committed the charged offense (Rule 404(a)(1)). In other words, this is circumstantial evidence of conduct. "Pertinent" in 404(a) means the same thing as "relevant" as that term is defined in 401.

(1) When submitting the request for reputation or opinion witnesses, the proffer should include the following foundational elements: the name of the witness, whether the witness belongs to the same community or unit as the accused, how long the witness has known the accused, whether he knows him in a professional or social capacity, the character trait known, and a summary of the expected testimony. *United States v. Breeding*, 44 M.J. 345 (1996).

(2) The formula could be applied in the following scenarios:

Offense	**Pertinent Character Trait**
Larceny	Trustworthiness or Honesty
Drunkenness	Sobriety

(3) An accused's general good military character is a pertinent character trait if there is a nexus, however strained or slight, between the crime circumstances and the military. The defense, in virtually every case, and certainly in every "military" offense prosecution, may attempt a "good soldier defense" by presenting the accused's good military character evidence. *United States v. Wilson*, 28 M.J. 48 (C.M.A. 1989). Consider the impact of *United States v. Foster*, 40 M.J. 140 (C.M.A. 1994) (service discrediting behavior or conduct prejudicial to good order inherent in all enumerated offenses).

(4) Rebuttal by Government of Good Character of Accused – if an accused introduces good character evidence (or any other pertinent character trait), the government is allowed to rebut this with bad character evidence to suggest that the accused is guilty. NOTE: If a defense counsel loses a motion in limine to preclude the government from cross-examining character witnesses regarding accused's bad acts, a tactical election not to present good character case probably will bar review. *United States v. Gee*, 39 M.J. 311 (C.M.A. 1994).

(5) Rebuttal by the government is proper when the accused claims that he or she is not the sort of person who would do such a thing. "The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." *Michelson v. United States*, 335 U.S. 469, 479 (1948); *United States v. Johnson*, 46 M.J. 8 (1997).

(a) But see, *United States v. Trimper*, 28 M.J. 460 (C.M.A.) cert. denied, 493 U.S. 965 (1989). Even if the accused opens the door to uncharged misconduct (here by claiming to have never used cocaine), the judge must decide whether the unfair prejudicial effect of the rebuttal evidence substantially outweighs its probative value. Rule 403. See also, *United States v. Graham*, 50 M.J. 56 (1999). CAAF held it was reversible error to allow trial counsel to question accused about prior positive urinalysis, even though the accused testified he was surprised when he tested positive for THC.

(b) *United States v. Goldwire*, 55 M.J. 139 (2001), the CAAF held that when defense counsel attempt to develop their theory of the case through the cross examination of government witnesses, they may open the door to reputation and opinion testimony regarding truthfulness of the accused. In *Goldwire*, the trial defense counsel cross-examined the CID agent on exculpatory statements

made by the accused during the interview conducted by the CID agent. The appellant argued on appeal that this cross-examination was allowed under the rule of completeness and that it did not open the door to reputation and opinion testimony concerning the accused. The CAAF disagreed.

(6) Accused's Sexual Propensities – proof of an accused's sexual propensities in sex offense courts-martial is specifically allowed. Rules 413 and 414 (treated in greater detail later in this outline).

b) Character of Victim – an accused is allowed to offer evidence of a pertinent character trait of an alleged victim in order to show that it makes it likely the victim acted in a certain way on a specific occasion. Rule 404(a)(1) and (2). For example, the accused is permitted, when relevant, to show that the victim was the aggressor by introducing evidence of the victim's character for violence. *United States v. Rodriguez*, 28 M.J. 1016 (A.F.C.M.R. 1989).

(1) Rebuttal by Government of Character of Victim – the government is allowed to rebut with character evidence about the victim in any of the following situations:

(2) In situations where the accused offers a pertinent character trait of the alleged victim, the government may rebut the accused's evidence with their own character evidence of the victim. Rule 404(a)(2).

(3) Additionally, in situations where the accused offers a pertinent character trait of the alleged victim, that opens the door for the government to offer evidence of the same character trait, if relevant, of the accused (even without the accused first bringing his or her character into evidence). Rule 404(a)(1). (June 2002 Amendment)

(4) ALSO, in homicide and assault cases, the government may introduce character evidence to prove the peaceful character of the victim in order to rebut a claim made in any way that the victim was an aggressor. Rule 404(a)(2), *United States v. Pearson*, 13 M.J. 922 (N.M.C.M.R. 1992) (victim's character for peacefulness relevant after accused introduces evidence that victim was the aggressor).

c) Impeachment of a Witness – when an issue is whether a witness testified truthfully, evidence about that witness's character for truth-telling is permitted to support an inference that the witness has acted at trial in

conformity with the witness's usual respect for truth. Rules 405(a) and 608.

2. Character Evidence for Nonpropensity Purpose – If the evidence has relevance independent of propensity, it may be admissible. For example, evidence that someone charged with an offense has committed similar offenses in the past could lead a trier of fact to conclude the person is a bad person and criminally inclined. If this were the only purpose for the evidence given by the government, it would not be a permissible use of character evidence. If, however, the evidence were offered to prove the accused possessed the knowledge necessary to commit the charged offense in the current court-martial, then admissibility would be possible. Rule 404(b) (treated in greater detail later in this outline).

IV. UNCHARGED MISCONDUCT

Rule 404(b). Other crimes, wrongs, or acts

Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution shall provide reasonable notice in advance of trial or during trial if the military judge excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

A. Rule 404(b). Uncharged Misconduct.

1. Understanding the Rule: Although proof of an individual's character through evidence of other crimes, wrongs, or acts to show action in conformity (propensity) with that character on a specific occasion is not allowed (except in sexual offense cases and certain other limited circumstances), it can be admitted if it is introduced for a nonpropensity purpose. Nonpropensity evidence (uncharged misconduct) is not offered to prove that an individual acted in conformity with that individual's character on a particular occasion. Nonpropensity evidence is offered to prove such things as **K**nowledge, **I**ntent, **P**lan, **P**reparation, **O**pportunity, **M**otive, **I**dentity, and **A**bsence of Mistake (KIPPOMIA). The list in Rule 404(b) is NOT exhaustive: The "sole test" for admissibility of uncharged misconduct is whether the evidence of the misconduct is offered for some purpose other than to demonstrate the accused's predisposition to crime and therefore to suggest that the factfinder infer that he is guilty, as charged, because he is predisposed to commit similar offenses. It is unnecessary that relevant evidence fit snugly into a pigeon hole provided by Rule 404(b). *United States v. Castillo*, 29 M.J. 145, 150 (C.M.A. 1989).

2. Two Main justifications for the prohibition on propensity:

a) Propensity evidence may lead to the wrong outcome in a court-martial.

b) Propensity evidence almost always carries a significant risk of unfair prejudice.

3. Rule 404(b) is an "inclusive rule" which permits admission of extrinsic evidence unless the sole purpose is to show criminal disposition. If the proponent can articulate a nonpropensity theory of logical relevance for the uncharged misconduct evidence, the military judge will have discretion to admit or exclude the evidence.

4. Some Nonpropensity Theories of Relevance.

a) Motive. Motive supplies the reason that nudges the will and prods the mind to indulge in criminal intent. Such evidence may be offered to prove that the act was committed, or to prove the identity of the actor, or to prove the requisite mental state.

(1) Two inferences are required: first, the act(s) must support an inference of some mental state AND second, the mental state must be causally related to an issue in the case. This is an area which is difficult to distinguish, analytically, from propensity.

(2) Some examples:

(a) *United States v. Watkins*, 21 M.J. 224, 225 (C.M.A. 1986) (motive evidence relevant to show a person's action as an outlet for emotions. Prior acts of conduct must be of a type which reasonably could be viewed as the expression and effect of the existing internal emotion, and same motive must exist at time of subsequently charged acts).

(b) *United States v. Phillips*, 52 M.J. 268 (2000). Accused charged with BAQ fraud and entering into a sham marriage in order to collect BAQ payments. Court held that evidence of the accused's homosexual relationship was admissible under Rule 404(b) to show motive and intent.

b) Intent: Negates accident, inadvertence or casualty. Intent differs from other named Rule 404(b) exceptions because, typically, it is an ultimate issue in the case. When considering whether uncharged misconduct constitutes admissible evidence of intent under Rule 404(b), a military judge should consider "whether … [the accused's] state of mind in the commission of both the charged and uncharged acts was sufficiently similar to make the evidence of the prior acts relevant on the intent element of the charged offenses." *United States v. McDonald*, 59 M.J.

426, 430 (2004). According to the CAAF, the relevancy of the other crime is derived from the accused's possession of the same state of mind in the commission of both offenses. The state of mind does not have to be identical, but must be sufficiently similar to make the evidence of the prior acts relevant on the intent element of the charged offenses. The link between the charged and uncharged misconduct must permit meaningful comparison.

(1) The "doctrine of chances." *United States v. Merriweather*, 22 M.J. 657, 661 (A.C.M.R. 1986) ("[T]he sheer number of injuries suffered by the victim over a relatively short period of time would have led common persons to conclude that the charged injury was less likely to have been accidental, thus rebutting the inference of possible accident which arose from the testimony elicited by the defense counsel").

(2) *United States v. Sweeny*, 48 M.J. 117 (1998). Accused charged with stalking his current wife. Court allowed evidence that accused stalked former wife in a similar manner. Court said uncharged misconduct was probative of intent to inflict emotional distress.

(3) *United States v. Henry*, 53 M.J. 108 (2000). At his trial for rape of his stepdaughters, evidence was introduced that the accused made her watch pornographic videos with him. No videos were found in the home, but magazines containing video order forms were found and introduced at trial under Rule 404(b). The CAAF affirmed holding that this evidence was relevant to show intent and that the accused may have groomed his victim. The court also said this evidence was relevant to impeach the victim's in-court testimony because she was now recanting her allegations of rape.

(4) *United States v. Hays*, 62 M.J. 158 (2005), the CAAF affirmed a military judge's decision to admit the appellant's uncharged acts as evidence of intent. The appellant was charged with solicitation to commit the rape of a minor, and the government introduced numerous items of child pornography and explicit e-mails from the appellant's computer to demonstrate intent to commit the offense.

(5) *United States v. Harrow*, 65 M.J. 190 (2007). Appellant was charged with the unpremeditated murder of her five-month-old daughter. The military judge permitted three witnesses to testify about previous incidents where the appellant was abusive to her daughter. The military judge correctly applied the three-part test found in *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A.

1989) to determine admissibility of previous incidents of flicking, thumping, and biting reflected a state of mind indicating that the appellant responded to her daughter's irritating, yet normal, behavior with deliberate, inappropriate physical force under M.R.E. 404(b).[1] The CAAF determined that the evidence was relevant to show both absence of mistake and intent. Although the appellant did not argue accident, evidence produced at trial by the appellant supported an argument that the injuries might have been accidentally inflicted. The government was entitled to rebut this argument. Likewise, although the appellant did not defend on the ground of either lack of requisite intent or accident, the CAAF held that "evidence of intent and lack of accident may be admitted regardless of whether a defendant argues lack of intent because every element of a crime must be proven by the prosecution." *Id*. at 202.

c) Plan: Connotes a prior mental resolve to commit a criminal act, and implies preparation, and working out the particulars (time, place, manner, means, and so forth). Plan may prove identity, intent or the actual criminal act. Evidence of plan must actually establish a plan. The CAAF will examine the relationship between the victims and the appellant, ages of victims, nature of the acts, situs of the acts, circumstances of the acts, and time span. If the CAAF finds the dissimilarities too great to support a common plan theory, it will not support admitting the uncharged misconduct.

(1) Some decisions have been quite liberal in admitting uncharged misconduct evidence under the rubric of plan. See, *United States v. Munoz*, 32 M.J. 359 (C.M.A.), cert. denied, 502 U.S. 967 (1991) (where the "age of the victim, the situs of the offense, the circumstances surrounding their commission, and the fondling nature of the misconduct" were similar to sexual misconduct of the accused 12 years earlier, the evidence was admissible to show a plan to sexually abuse his children (per Judge Sullivan).

(2) The CAAF may be applying the brakes to the practice of using old acts of uncharged misconduct to prove plan under Rule 404(b). See, *United States v. McDonald*, 59 M.J. 426, 430 (2004) (holding that a military judge abused his discretion in admitting 20-year-old acts of uncharged misconduct committed when the appellant was 13 years old to establish a common plan to commit charged acts of sexual misconduct against the appellant's daughter.

[1] The three-part test of *Reynolds* is: (1) Does the evidence reasonably support a finding by the court members that the appellant committed the prior crimes, wrongs, or acts?; (2) What fact of consequence is made more or less probable by the existence of this evidence?; AND (3) Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice?

d) Identity: The government may use modus operandi evidence to establish the identity of the accused.

(1) A high degree of similarity between the extrinsic act and the charged offense is required, so similar as to constitute "a signature marking the offense as the handiwork of the accused." *United States v. Gamble*, 27 M.J. 298, 305 (C.M.A. 1988).

e) Consciousness of Guilt. In *United States v. Rhodes*, 61 M.J. 445 (2005), the military judge admitted evidence of a meeting between a key government witness and the appellant to show the appellant's consciousness of guilt. Shortly after the meeting, the witness manifested a sudden memory loss pertaining to his potential testimony. The CAAF held that the evidence could have been admitted to evaluate the truthfulness of the witness's claim of memory loss, but not to show appellant's consciousness of guilt. But see *United States v. Staton*, 68 M.J. 569 (A.F. Ct. Crim. App. 2010) (holding that evidence of the accused's attempt to intimidate a former trial counsel by driving his car at at her at a high rate of speed could be admitted under 404(b) as evidence of his consciousness of guilt in his trial for assault consummated by battery upon a child under 16 years of age).

B. *Reynolds* 3-Part Test for Admissibility of Rule 404(b) Evidence.

1. The CAAF follows the 3-pronged test set out in *United States v Reynolds* when reviewing whether a military judge abused her discretion in admitting uncharged acts under Rule 404(b). 29 M.J. 105 (C.M.A. 1989). FIRST: ***Does the evidence reasonably support a finding that the appellant committed the prior crimes, wrongs, or acts?***

a) Identify the "other act" and show who did it. This is a question of conditional relevancy, and governed by Rule 104(b). The judge is required only to consider the evidence offered and decide whether the panel reasonably could find that the "similar act" was committed by the accused.

b) In determining whether the government has introduced enough evidence, the trial court neither weighs credibility nor makes a finding that the government has proven the conditional fact by a preponderance of the evidence.The court simply examines all the evidence in the case and decides whether the panel members could reasonably find the conditional fact. See, *Huddleston v. United States*, 485 U.S. 681 (1988) (preliminary finding by the court that the government has proven the act by a preponderance of the evidence is not required by FRE 104(a); *United States v. Castillo*, 29 M.J. 145, 151 (C.M.A. 1989).

2. ***Does the evidence make a fact of consequence in the case more or less probable?*** What inferences and conclusions can be drawn from the evidence? If the inference intended includes one's character as a necessary link, the past bad act evidence is excluded.

3. ***Is the evidence's probative value substantially outweighed by the danger of unfair prejudice?***

C. The *Reynolds'* Analysis

1. In *United States v. Diaz*, 59 M.J. 79 (2003), the government introduced evidenced of several other injuries the appellant had allegedly inflicted on his daughter to establish a "pattern of abuse" that would help establish that the death of his daughter was a homicide and appellant was the perpetrator. The CAAF applied the *Reynolds* test and concluded that the uncharged misconduct was improperly admitted: (1) The government failed to establish that the accused had inflicted the other injuries on his daughter; (2) the evidence did not make a fact of consequence more or less probable because the accused's defense was a general denial and a claim that the death was due to unknown causes; and (3) when viewed in the light of improper opinion testimony that was also admitted at trial, the evidence was substantially more prejudicial than probative.

2. *United States v. McDonald*, 59 M.J. 426 (2004). In applying the second prong of *Reynolds*, the CAAF held that evidence of appellant's uncharged acts was not logically relevant to show either a common plan or appellant's intent. The CAAF concluded that the military judge abused his discretion in admitting the uncharged acts to establish a common plan due to how dissimilar the uncharged acts were to the charged offenses. The CAAF focused on the fact the appellant was 13 years of age at the time of the uncharged acts, rather than a 33-year-old adult; the uncharged acts were committed in the home of his stepsister, where he was visiting, while the charged acts occurred where he was the head of the household; the uncharged acts were with a stepsister who was about five years younger, rather than with a young stepchild under his parental control, who was about 20 years younger. The CAAF also held the uncharged acts were not relevant to show intent. The CAAF focused on the fact the appellant was a 13-year-old child at the time of the uncharged acts, and a 33-year-old married adult at the time of the charged acts. Absent evidence of that 13-year-old adolescent's mental and emotional state, sufficient to permit meaningful comparison with appellant's state of mind as an adult 20 years later, the CAAF held that the military judge's determination of relevance on the issue of intent was "fanciful and clearly unreasonable."

3. *United States v. Rhodes*, 61 M.J. 445 (2005). The CAAF reversed the affected findings and sentence after holding that the military judge abused his discretion in applying the third prong of the *Reynolds* test. The case involved a government witness who suddenly lost his memory after speaking with the appellant shortly before trial. The witness had given a confession implicating himself and the

appellant in drug offenses. The trial counsel wanted to offer evidence of the previous meeting to argue the appellant had intimidated the witness. The CAAF determined that the military judge did not err by allowing the government to enter evidence about the meeting between the appellant and the government witness. The Court concluded this evidence placed the memory loss in its proper context. However, the military judge did err when he instructed the members that they could use the evidence to prove consciousness of guilt on the appellant's part. The CAAF believed the military judge's instruction erroneously allowed the Government to suggest that the Appellant was at fault for a key government witness's memory loss (other factors could have contributed to the memory loss, such as the significant time between the confession and trial). "When evidence is admitted under Rule 404(b), the [members] must be clearly, simply, and correctly instructed concerning the narrow and limited purpose for which the evidence may be considered."

4. *United States v. Bresnahan*, 62 M.J. 137 (2005). Military judge abused his discretion by admitting uncharged misconduct evidence. Although not expressly stated in the opinion, the military judge's decision failed the first prong of the *Reynolds* test. The CAAF determined that the admission was harmless. When a military judge erroneously admits uncharged misconduct, that decision will not be overturned "unless the error materially prejudices the substantial rights of the accused." UCMJ, art. 59(a). The harmlessness of the error will be evaluated by "'weighing: (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.'" *McDonald*, 59 M.J. at 430, citing *United States v. Kerr*, 51 M.J. 401, 405 (1999).

5. *United States v. Hays*, 62 M.J. 158 (2005). The Appellant was convicted possessing child porn and soliciting the rape of a child. The issue on appeal was whether the solicitation conviction was tainted by improper introduction of uncharged misconduct. The evidence at issue included emails and pictures from the appellant discussing and showing children and adults engaging in sexual activity. The defense objected under Rules 401 and 403. The CAAF focused on the third *Reynolds* prong. Although the pictures and language in the e-mails were offensive, the CAAF believed that this was the nature of much of the evidence in cases involving child pornography. See *United States v. Garot*, 801 F.2d 1241, 1247 (10th Cir. 1986) (noting that defendants in child pornography cases unavoidably risk the introduction of evidence that would offend an average juror). The CAAF determined that in light of the nature of the offense and the other evidence admitted, the prejudicial impact of the admitted exhibits did not substantially outweigh their probative value in demonstrating appellant's intent and motive to solicit sex with a child. See *United States v. Acton*, 38 M.J. 330, 334 (C.M.A. 1993) (explaining that any prejudicial impact due to the "shocking nature" of a pornographic video depicting incest was diminished because the same conduct was already before the court members).

6. *United States v. Harrow*, 62 M.J. 649 (A.F. Ct. Crim. App. 2006). The important aspect of this case is not that the *Reynolds* analysis was done, but the fact it was

done in such detail. This fact is explained by the AFCCA in the opinion when they state: "Before leaving this issue, however, we note that, generally speaking, Rule 404(b) is interpreted more restrictively in military jurisprudence than its counterpart in other federal courts. In applying this jurisprudence, it is clear that military decisions are very fact specific, often based upon the totality of the circumstances, rather than granting the military judge broad discretion." *Harrow*, 62 M.J. at 660; See e.g., *Hays*, 62 M.J. 158 (2005); *Bresnahan*, 62 M.J. 137 (2005); *Rhodes*, 61 M.J. 445 (2005); and *Diaz* 59 M.J. at 79 (2003). The AFCCA opinion contained interesting dicta on the difference between M.R.E. 404(b) and F.R.E. 404(b). However, the CAAF elected to ignore the AFCCA dicta and instead concentrate on the second prong of the Reynolds' test regarding whether the evidence was relevant to show the appellant's intent or absence of mistake. *United States v. Harrow*, 65 M.J. 190 (2007).

7. *United States v. Booker*, 62 M.J. 703 (A.F. Ct. Crim. App. 2006). May evidence be admitted under M.R.E. 404(b) to show an accused's consciousness of guilt? Yes. Evidence may be admitted under M.R.E. 404(b) to show an accused's consciousness of guilt. The relevant evidence need not fit exactly into one of the pigeon holes described under M.R.E. 404(b) so long as the evidence is offered for a purpose other than to show the accused's predisposition to commit the crime.

8. *United States v. Thompson*, 63 M.J. 228 (2006). The Appellant was convicted of wrongful use, possession and distribution of marijuana. The issue on appeal was whether the military judge erred in admitting evidence of uncharged misconduct. The uncharged misconduct involved two pretrial statements by the Appellant that contained information about his preservice drug use. The appellant maintained the uncharged misconduct served no legitimate purpose and merely painted him as a habitual drug user. The CAAF focused on the second *Reynolds* prong. The Court found that Thompson did not raise the issues of lack of knowledge or mistake of fact regarding marijuana. Although the defense counsel referred to the Appellant as "naïve" and "young" in his opening statement, this description was never tied to marijuana or tied to anything that caused the Appellant to misapprehend any fact of consequence. Because the military judge admitted the uncharged acts evidence for the purpose of disproving lack of knowledge or mistake of fact, that evidence served no relevant purpose. Since it was not relevant, the evidence failed the second prong of the *Reynolds* analysis. The evidence did not make a fact of consequence more or less probable by the existence of the evidence.

D. Limiting the Admissibility of 404(b) Evidence

1. Admissibility of Post-Offense Misconduct. Evidence of an accused's crack-related activities occurring after the charged offense was admissible to show intent and knowledge as to earlier offense. *United States v. Latney*, 108 F.3d 1446 (D.C. Cir. 1997). *But see, United States v. Matthews*, 53 M.J. 465 (2000) (holding that evidence of a hot urinalysis that occurred after the charged wrongful use could not be used to show knowing use on the date of the charged offense).

2. Defense Concessions. *United States v. Crowder*, 141 F.3d 1202 (D.C. Cir. 1998). Case remanded from the Supreme Court in light of *Old Chief v. United States*, 519 U.S. 172 (1997). In an en banc reversal, a majority of the court held that the defense could not stipulate to uncharged misconduct in an effort to preclude the government from introducing evidence under Rule 404(b). The D.C. Circuit said that the evidence was relevant under Rule 401 even though there may have been other forms of evidence available. The defense cannot force the government to stipulate, and if the evidence fits an exception under Rule 404(b) and is not unduly prejudicial under Rule 403, then it is admissible in the form the government wants. Stipulations are not the same as other evidence and government is not required to sacrifice the context and richness of the evidence through stipulations. Unless, as in *Old Chief*, the stipulation deals with the legal status of the accused and the stipulation gives the government everything they otherwise would want through use of the evidence. *See also United States v. McCrimmon*, 60 MJ 145 (2004) (assuming no overreaching by the government, evidence of uncharged misconduct, otherwise inadmissible evidence, may be presented to the court by stipulation and may be considered by the court).

3. Uncharged Acts During Sentencing: Admissibility of uncharged misconduct during presentencing is controlled by Rule 1001(b)(4), not Rule 404(b). Rule 404(b) evidence which may have been admissible on the merits is not admissible during presentencing unless it constitutes aggravating circumstances within the purview of Rule 1001(b)(4).

4. Effect of an Acquittal on Admissibility of Rule 404(b): In *United States v. Mundell*, 40 M.J. 704 (A.C.M.R. 1994), the accused alleged error based on the admission of uncharged misconduct which had been the subject of a not guilty finding at a prior court martial. ACMR found the military judge properly applied Rule 404(b) and 403, noting that the COMA in *United States v. Hicks*, 24 M.J. 3 (C.M.A. 1987) and the Supreme Court in *Dowling v. United States*, 493 U.S. 342 (1990) already held that "collateral estoppel does not preclude using otherwise admissible evidence even though it was previously introduced on charges of which an accused has been acquitted."

V. METHODS OF PROVING CHARACTER

Rule 405. Methods of proving character

(a) *Reputation or opinion*. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) *Specific instances of conduct*. In cases in which character or a trait of character of a person is an essential element of an offense or defense, proof may also be made of specific instances of the person's conduct.

(c) *Affidavits*. The defense may introduce affidavits or other written statements of persons other than the accused concerning the character of the accused. If the defense introduces affidavits or other written statements under this subdivision, the prosecution may, in rebuttal, also introduce affidavits or other written statements regarding the character of the accused. Evidence of this type may be introduced by the defense or prosecution only if, aside from being contained in an affidavit or other written statement, it would otherwise be admissible under these rules.

(d) *Definitions*. "Reputation" means the estimation in which a person generally is held in the community in which the person lives or pursues a business or profession. "Community" in the armed forces includes a post, camp, ship, station, or other military organization regardless of size.

A. Rule 405. Form of proof.

1. Rule 405 is best understood as a rule that governs "how" a proponent may prove character or a character trait, not "whether" they may prove a particular character or character trait. The rule applies in those situations where "character is in issue" (likely only entrapment cases) and in certain instance of allowable character evidence under Rule 404(a)(1) (character of the accused), Rule 404(a)(2) (character of the alleged victim) and Rule 608 (character of a witness).

2. Rule 405 DOES NOT APPLY to the following:

a) Propensity Inferences under Rule 404(a). Since this use of character evidence is prohibited, there is no acceptable form of proof to introduce the character evidence.

b) Nonpropensity purpose under Rule 404(b). If one of the stated purposes of introduction under Rule 404(b) (KIPPOMIA – Knowledge, Intent, Plan, Preparation, Opportunity, Motive, Identity, or Absence of mistake) or any other non-character basis is offered for introduction of the evidence, then Rule 405 does not apply. Under Rule 404(b), relevancy does not depend upon conclusions about a person's character.

c) Habit under Rule 406. Habit evidence is not treated as character evidence and as such, is exempted from Rule 405.

d) Evidence of victim's traits under Rule 412. This rule allows the government or defense, in specific relatively rare instances, to use character evidence. Rule 405 does not govern the method of proof. Under Rule 412, if character evidence is allowed, it may only be proven by extrinsic specific acts.

e) Evidence of similar crimes under Rules 413 and 414. These rules are exempted from 405. Under Rules 413 and 414, the accused's sex-related traits in sex offense or child molestation cases may be proven by reputation, opinion, or extrinsic specific acts.

B. Rule 405. Methods of Proving Character.

1. Rule 405(a) limits a proponent of character evidence to proving it either through using reputation or opinion testimony. A proponent is generally not allowed to

elicit testimony regarding specific instances of conduct (unless character is an essential element of an offense or defense – discussed in detail below).

a) Reputation evidence is information that a witness knows about an individual from having heard discussion about the individual in a specified community. Rule 405(d) lists several permissible examples of a "community." *See United States v. Reveles*, 41 M.J. 388 (1995) (for purposes of reputation testimony, "community" broadly defined to include patrons at officer's club bar).

b) Opinion evidence is a witness's personal opinion of an individual's character. From a practical standpoint, the impact of this evidence, depends greatly upon the individual giving it.

c) On cross-examination of a character witness, inquiry is allowable into relevant instances of conduct (discussed in greater detail below).

2. Mechanically, the proponent demonstrates reputation/opinion/specific instances character evidence by showing the following that an individual has a particular character trait; the witness has an opinion about the trait, or is familiar with the person's reputation concerning that particular trait, or can testify concerning specific acts relevant to the trait; AND the witness states an opinion, relates the reputation, or, under very limited circumstances, testifies about specific instances of conduct relevant to trait in issue.

3. Cross-Examining a Character Witness

a) The witness giving the reputation or opinion testimony is subject to impeachment by relevant specific instances of conduct. Rule 405(a). The rule in practice tends almost exclusively to be used by the government; however, it applies equally to both trial and defense counsel. This method is obviously a very effective way of testing a witness's opinion or reputation knowledge. If the witness admits hearing or knowing of the act, the trier of fact may discredit their testimony. If the witness denies having heard or knowing of the act, the trier of fact may question how well the witness knows the individual or the individual's reputation.

b) Counsel may inquire about specific instance of conduct by asking "Have you heard" or "Do you know" questions. Prior to asking any such question, however, the counsel must have a good faith belief. *United States v. Pruitt*, 43 M.J. 864 (A.F. Ct. Crim. App. 1996). The opponent to such inquiry may require the proponent to state their good faith belief by way of a motion in limine.

c) The witness either knows of the specific instances of conduct or they do not. The counsel asking the question is stuck with the witness's response.

United States v. Robertson, 39 M.J. 211 (C.M.A. 1994), *cert. denied*, 115 S. Ct. 721 (1995). This is true since the purpose of the specific instance of conduct is to test the basis of the witness providing the character evidence.

d) When cross-examining on specific instances of conduct, the focus should be on the underlying conduct and not the government action taken in response to the underlying conduct. For example, counsel's questions should focus on the conduct which led to an article 15 and not the fact of the article 15 itself. *Robertson*, 39 M.J. at 214-15.

e) Timeliness of Acts – Rule 405(a) is concerned with character at the time of the charged offense. Under the rule, any cross-examination should be limited to acts that would have occurred prior to the offense charged, because the court wants to test character at that time. Thus, it is improper to ask a character witness whether the charges brought in the case have affected reputation or their opinion. *United States v. Brewer*, 43 M.J. 43 (1995) (although not objected to, the court held that counsel are not permitted to test the basis of a witness' character opinion by using the charged offense).

4. Under Rule 405(b), specific instances of conduct are allowed in cases where character or a trait of character of an individual is an essential element of an offense or defense. Character is rarely an essential element of an offense or defense. An example of when character would be an essential element of an offense or defense is in a court-martial where the defense to purchasing illegal drugs is entrapment. Either the government or defense would be permitted to offer character evidence regarding the predisposition to purchase illegal drugs. Such evidence escapes the general proscription against character evidence because it is not offered to prove conformity, but because of the significance of the trait in relation to the crime. Where character is "an essential element of the offense or defense," proof may be made by means of opinion or reputation evidence or specific instances of a person's conduct. Rule 405(a) and (b).

a) *United States v. Schelkle*, 47 M.J. 110 (1997) (character is not an essential element of good soldier defense such that proof may be made by reference to specific acts of conduct).

b) *United States v. Dobson*, 63 M.J. 1 (2006). May evidence of specific acts of violence by an alleged victim, known to the accused, be admitted into evidence on the issue of the accused's intent? Yes. Although the military judge correctly prevented the defense from using specific acts under Rule 405 to prove character of the accused, the military judge erred by not admitting the evidence to show the appellant's state of mind at the time of the victim's death. Under Rule 405, a relevant character trait may only be admitted by reputation or opinion testimony, unless the character trait is an essential element of an offense or defense. The military judge

determined that although the victim's character for violence could be proved by opinion or reputation evidence, specific acts by the victim were not admissible because the character trait for violence was not an essential element of the self-defense claim. The CAAF held the military judge erred when he did not address the question of whether evidence of specific acts of violence known to the appellant were admissible on the issue of the appellant's intent. Since the government lacked any direct evidence on premeditation, the prohibited testimony was material. With no direct evidence of intent, the panel could have accepted all of the government's evidence pointing to the appellant as the perpetrator of the murder, but still have a reasonable doubt as to whether she premeditated the murder in light of the impact of abuse on her intent. Under these circumstances, the CAAF could not be confident that the error of excluding the testimony of the defense's two witnesses was harmless on the issue of premeditation. The findings as to premeditated murder and sentence were reversed.

5. Rule 405(c) has no federal counterpart, and is made necessary by the worldwide disposition of the armed forces and the difficulty of securing witnesses, particularly in connection with brief statements concerning character. Rule 405(c) is based on prior military practice and permits the defense to use affidavits or other documentary evidence to establish the accused's character. The rule permits the government to make use of similar evidence in rebuttal.

a) This use may have Sixth Amendment difficulties under *Crawford v. Washington*, 541 U.S. 36 (2004).

b) *United States v. Lowe*, 56 M.J. 914 (N-M Ct. Crim. App. 2002), the service court held that the military judge erred in allowing opinion testimony through the introduction of hearsay documents containing a "litany" of uncharged misconduct. The court went on to note that while Rule 405(c) relaxes the rules of evidence regarding hearsay concerning the form of such testimony, it does not relax the rules of evidence concerning the substance of such evidence. While the government counsel could have presented a written opinion under Rule 405(c) rebutting the opinion offered by the defense, it couldn't use Rule 405(c) to admit extrinsic evidence of otherwise inadmissible uncharged misconduct to rebut the offered opinion.

VI. RULE 410. INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS.

(a) In general. Except as otherwise provided in this rule, evidence of the following is not admissible in any court-martial proceeding against the accused who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any judicial inquiry regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with the convening authority, staff judge advocate, trial counsel or other counsel for the Government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a court-martial proceeding for perjury or false statement if the statement was made by the accused under oath, on the record and in the presence of counsel.

(b) Definitions. A "statement made in the course of plea discussions" includes a statement made by the accused solely for the purpose of requesting disposition under an authorized procedure for administrative action in lieu of trial by court-martial; "on the record" include the written statements submitted by the accused in furtherance of such request.

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1. Rule 410. The rule aims to encourage legitimate plea bargaining by protecting open, candid discussions between the accused and the prosecution. *See* Notes of Advisory Committee to Federal Rule of Evidence 410 (1975); Standard 14-2.2, ABA Standards Relating to Pleas of Guilty (1986). *Mezzanatto v. United States*, 513 U.S. 196 (1995).

2. The Military Rule extends to pretrial agreements, or discussions of the same with the trial counsel, staff judge advocate, or convening authority **or other counsel for the Government**. The federal rule extends only to "an attorney for the prosecuting authority."

3. The following are inadmissible against an accused:

   a) A plea of guilty that is later withdrawn;

   b) Any statement made by the accused and defense counsel in the course of the providence inquiry concerning a plea of guilty that is later withdrawn;

   c) Any statement made by the accused and defense counsel in the course of plea discussions which do not ultimately result in a plea of guilty or which result in a plea of guilty that is later withdrawn.

4. *United States v. Vasquez*, 54 M.J. 303 (2001). Accused submitted a chapter 10 request admitting to a 212 day AWOL. That charge was not before the court. Government admitted that request in the sentencing case as part of the accused's service records. CAAF said that accused's statements were covered by Rule 410 in light of the court's long-standing precedent for avoiding an excessively formalistic application of the rule in favor of a broad application.

5. Rule 410 Examples.

   a) *United States v. Barunas*, 23 M.J. 71 (C.M.A. 1986) (accused's letter to commander requesting non-judicial disposition of use and possession of cocaine charges was inadmissible under Rule 410).

b) *United States v. Brabant*, 29 M.J. 259, 264-65 (C.M.A. 1989) (accused's statement that he would do whatever it took to "make this right" was inadmissible).

c) *United States v. Watkins*, 34 M.J. 344 (C.M.A. 1992) (accused's questions to investigator as to amount of likely prison sentence is not plea negotiation as CID not within enumerated exceptions of Rule 410).

d) *United States v. Balagna*, 33 M.J. 54, (C.M.A. 1991). CSM testified concerning the accused's duty performance. CSM previously had spoken for the accused in an Article 15 hearing based on a positive urinalysis, but stated that because of a report he had read, he would not do so again. Court member asked about the report. The panel was told about a Chapter 10 request, and the judge instructed that the report had no relevance to the trial.

e) The Government may be able to introduce such evidence if it can establish that the same information was independently obtained or pursuant to other theories. *See United States v. Magee*, 821 F.2d 234 (5th Cir. 1987).

VII. THE "RAPE SHIELD" – RULE 412

Rule 412. Sex offense cases; relevance of alleged victim's sexual behavior or sexual predisposition

(a) *Evidence generally inadmissible.* The following evidence is not admissible in any proceedings involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions.

(1) In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the accused.

A. Rule 412. Background History.

1. It was once not that uncommon for an accused to introduce the sexual history of an alleged victim in order to suggest that she was unchaste, and therefore likely not to be telling the truth when she testified or had consented to the sexual contact

with the accused. This use of the alleged victim's sexual history by an accused came under criticism in the late 1970s. As a result, Congress passed the Privacy for Rape Victim Act of 1978, as Federal Rule of Evidence 412. Congress revised the rule as part of the Violent Crime Control and Law Enforcement Act of 1994. The military adopted Federal Rule of Evidence 412 under the provisions of Rule 1102 as Rule 412. The rule is intended to shield victims from personal questions about their sexual history that have little if any relevance in the court-martial.

2. Understanding the Rule: the logical premise behind the rule is that evidence of a person's past sexual conduct rarely is relevant to the question of how a person acted sexually on a specific occasion. This logical premise is in conflict with that advanced under Rules 413 and 414 (requiring admission of evidence of an accused's past sexual offenses as relevant to the question of an accused's sexual conduct on a specific occasion).

3. Rule 412 makes specific instances of past sexual behavior of an alleged victim generally inadmissible. In specific, relatively rare instances, the government or the accused may offer specific acts of conduct by the alleged victim. However, reputation and opinion evidence of the past sexual behavior of an alleged victim of alleged sexual misconduct **appears**, under the rule, to be inadmissible. Rule 412(a) and (b). The Court of Military Appeals has stated, however, "we have grave doubts whether Rule 412(a) should be properly construed as an absolute bar to the admission of evidence of a prosecutrix' sexual reputation." *United States v. Elvine*, 16 M.J. 14 (C.M.A. 1983).

4. The rule's protections depend on the **status** and **presence** of a victim, rather than whether the offense is consensual. *United States v. Banker*, 60 M.J. 216 (2004). The 2007 Amendment clarifies that Rule 412 applies in all sexual offense cases where the evidence is offered against a person that can reasonably be characterized as a "victim of the alleged sexual offense." Hence, Rule 412 applies to nonconsensual as well as consensual offenses, sexual offenses specifically proscribed under the UCMJ, federal sexual offenses prosecutable under clause 3 of Article 134, and state sexual offenses prosecutable under the Federal Assimilative Crimes Act.

5. Under Rule 412, there are three stated exceptions to the general rule:

   a) *Someone else is the source of the evidence*: if the trial counsel has introduced evidence of semen, injury, or other physical evidence, the defense must be allowed to introduce the victim's past sexual behavior if relevant to show another was the source of the evidence. Rule 412(b)(1)(A).

   b) *Evidence of past accused-victim sexual behavior on the issue of consent*: this may be offered by the accused to prove consent or by the prosecution to prove lack of consent. Rule 412(b)(1)(B).

(1) *United States v. Jensen*, 25 M.J. 284 (C.M.A. 1987). Includes acts and statements of intent to engage in intercourse.

(2) *United States v. Kelly*, 33 M.J. 878 (A.C.M.R. 1991). The military judge erred in excluding evidence of an alleged rape victim's flirtatious and sexually provocative conduct. To admit evidence of past sexual behavior, the proponent must demonstrate that the evidence is relevant, material, and favorable to the defense. The prosecutrix's past sexual conduct met those requirements. The rape shield provisions aim to protect the victim from harassment and humiliation, but those ends are not served by excluding evidence of open, public displays of sexually suggestive conduct. Findings and sentence were set aside.

c) *Evidence constitutionally required to be admitted*: Under Rule 412(b)(1)(C), the standard is that the evidence must be (1) relevant, (2) material, and (3) favorable (defined by case-law as "vital") to the defense. For all practical purposes, this is a test of necessity or vitality in military courts-martial. *United States v. Banker*, 60 M.J. 216 (2004).

(1) *United States v. Williams*, 37 M.J. 352 (C.M.A. 1993). The military judge denied the defense motion for a rehearing based on newly discovered evidence concerning the victim's credibility. The evidence suggested a motive to fabricate, and showed that the government expert based his opinion testimony on her "deceitful and misleading" information. Since the evidence was relevant, material and favorable to the defense, it was "constitutionally required to be admitted."

(2) *United States v. Greaves*, 40 M.J. 432 (C.M.A. 1994). The military judge properly prevented accused from testifying that he knew that rape victim was a hostess at a Japanese bar and dressed provocatively. The testimony was not relevant where the victim was semi-conscious and where the accused was allowed to testify about circumstances which allegedly led him to believe the victim consented.

(3) *United States v. Harris*, 41 M.J. 890 (A. Ct. Crim. App. 1995). Evidence of a victim's prior sexual activity as a prostitute was constitutionally required to be admitted where defense theory was that victim agreed to sexual intercourse in expectation of receiving money for a bus ticket to Cleveland, and was motivated to retaliate by alleging rape only after accused called her a "skank bitch." *See also United States v. Saipaia*, 24 M.J. 172 (C.M.A. 1987), cert. denied, 484 U.S. 1004 (1988).

(4) *United States v. Buenaventura*, 45 M.J. 72 (1996). Evidence of sexual abuse of an eight-year-old victim by the grandfather, and expert testimony regarding "normalization" – replacing abusive person (grandfather) with friendly person (accused) in recalling the abuse – was constitutionally required to be admitted. *But see United States v. Gober*, 43 M.J. 52 (1995); *United States v. Pagel*, 45 M.J. 64 (1996).

d) The victim's past sexual history must be relevant to the defense's theory before it is admissible under a Constitutionally-required standard.

(1) *United States v. Velez*, 48 M.J. 220 (1998). Accused was convicted of rape. The CAAF noted that the defense theory of the case was that the contact never happened, so even if the victim was promiscuous, it didn't matter under the defense theory.

(2) *United States v. Datz*, 59 M.J. 510 (C.G. Ct. Crim. App. 2003). Affirming appellant's rape conviction, the court held that evidence of the victim's previous sexual encounters with another servicemember was too speculative and not commonly viewed as being relevant.

(3) *United States v. Banker*, 60 M.J. 216 (2004). The appellant was convicted of sodomy and indecent acts involving his son's fourteen-year-old babysitter. The appellant tried to introduce evidence that the alleged victim in his case had sexually abused his son some sixty times during the period of the appellant's alleged sexual misconduct with the victim. The allegations from his son first arose some eight months after the victim first reported the appellant to OSI. The appellant could never explain the relevance of this to his defense. The defense counsel stated only that the appellant's son's testimony went directly to the babysitter's credibility and motive to fabricate. The defense counsel failed to articulate a specific theory or motive as to why the babysitter might have fabricated the allegations against the accused. The CAAF held that this proffer was not adequate to support the theory advanced on appeal that the babysitter fabricated the allegations against him in order to preemptively discredit any allegations that his son might ultimately have made regarding the babysitter's sexual conduct with him. The CAAF held that the military judge did not abuse his discretion because the accused did not meet his burden of proving why the Rule 412 prohibition should be lifted.

B. Rule 412. Requirements for admission.

1. As a foundational matter the proponent must show: The act is relevant for one of the specified purposes in Rule 412(b); where the act occurred; when the act occurred; AND who was present;

2. Proponent (typically the defense) must show that its probative value outweighs the danger of unfair prejudice to the alleged victim's privacy.

   a) *United States v. Sanchez*, 44 M.J. 174 (1996). As offer of proof failed to identify the significance and theory of admissibility of the victim's prior sexual behavior, accused was not entitled to hearing on the admissibility of Rule 412 evidence. Judge Everett claims that, where alleged motive is commonly understood and obvious from the facts, it is unnecessary for the defense to produce expert testimony. However, where the proffered motive is highly speculative and not commonly understood, expert testimony is essential to understand the connection between the motive to lie and the prior consensual behavior.

   b) *United States v. Banker*, 60 M.J. 216 (2004). In applying Rule 412, the military judge is not asked to determine if the proffered evidence is true. Rather, the military judge serves as a gatekeeper by deciding first whether the evidence is relevant and next whether it is admissible under the Rule. The members weigh the evidence and determine its veracity. While evidence of a motive to fabricate an accusation is generally constitutionally required to be admitted, the alleged motive must itself be articulated to the military judge in order for her to properly assess the threshold requirement of relevance.

   c) *United States v. Zak*, 65 M.J. 786 (A. Ct. Crim. App. 2007). The military judge abused her discretion in excluding evidence of the victim's prior sexual behavior towards appellant (i.e., a mostly nude massage) because she did not believe that the incident occurred. Based on *Banker*, the ACCA reiterated that the military judge only determines whether the evidence is relevant and meets one of the exceptions under MRE 412 (b), not whether the evidence is true.

3. Evidence admissible under Rule 412 is still subject to challenge under Rule 403. (Note that the 2007 Amendment to 412 (c) specifically states, "Such evidence is still subject to challenge under Mil. R. Evid. 403.") Hence, evidence admissible under Rule 412 may nevertheless be excluded under Rule 403.

4. Procedural Requirements for admission. Rule 412(c) imposes procedural and notice requirements that must be implemented before a defense counsel may use one of the exceptions. The defense must file a written motion at least five days prior to entering a plea. The motion must specifically describe the desired evidence and the purpose for which it is being offered. The defense must serve the motion on the government, the military judge, and notify the alleged victim. The military judge, if necessary, conducts a closed Article 39(a) session. During

this proceeding both parties may call witnesses, including the alleged victim and offer other evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. The defense is required to establish that its evidence satisfies one of the stated exceptions. The military judge must determine whether, on the basis of the hearing, the evidence the defense seeks to admit is relevant. If the military judge determines the evidence is relevant, then the military judge must conduct a Rule 412(c)(3) balancing test. The evidence is admissible if the probative value of such evidence outweighs the danger of unfair prejudice to the alleged victim's privacy. Evidence admissible under Rule 412 is still subject to challenge under Rule 403.

VIII. EVIDENCE OF SIMILAR CRIMES IN SEXUAL ASSAULT CASES AND CHILD MOLESTATION CASES

Rule [413][414]. Evidence of Similar Crimes in [Sexual Assault][Child Molestation Cases]

(a) In a court-martial in which the accused is charged with an offense of [sexual assault][child molestation], evidence of the accused's commission of one or more offense of [sexual assault][child molestation] is admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a court-martial in which the Government intends to offer evidence under this rule, the Government shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 5 days before the scheduled date of trial, or at such later time as the military judge may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) [definitions of "offenses of sexual assault" and "child molestation"].

A. Rule 413/414.

1. Rule 413 states that "evidence of the accused's commission of one or more offenses of sexual assault is admissible." Rule 414 has similar language for child molestation. The rules were written to overcome perceived restrictive aspects of Rules 404(a) and (b). Rules 413 and 414 represent a rejection of the traditional prohibitions on propensity evidence. This rejection resulted from three main criticisms of Rule 404(b) in sex offense cases: Rule 404(b) requires trial counsel to articulate a nonpropensity purpose; the military judge always has discretion under Rule 403 to exclude the evidence; AND the limiting instruction from the military judge prohibited the government from using the evidence to show a propensity to commit sexual offenses.

2. Congressional Response: Rules 413 and 414 were enacted by Congress on 13 September 1994, as part of the Violent Crime Control and Enforcement Act of 1994. During the Congressional debate on these provisions, Representative Susan Molinari, the Rules' primary sponsor, said it was Congress' specific intention that

the courts "must liberally construe" both Rules so that finders of fact can accurately assess a defendant's criminal propensities and probabilities in light of his past conduct.

B. Rule 413/414. Scope of the Rule.

1. In order to admit evidence under Rules 413 or 414, three threshold determinations must be made:

a) the accused is charged with an offense of sexual assault/child molestation;

b) the evidence proffered is evidence of the accused's commission of another offense of sexual assault/child molestation; and

c) the evidence is relevant under Rules 401 and 402. *United States v. Berry*, 61 M.J. 91 (2005).

2. Once the evidence meets the threshold requirements of Rule 413 or Rule 414, a military judge must apply the balancing test of Rule 403 under which the testimony may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members. A military judge must consider several nonexclusive factors in performing the required balancing of probative value and prejudicial effect. These include: strength of proof of the prior act--conviction versus gossip; probative weight of the evidence; potential for less prejudicial evidence; distraction of the factfinder; time needed for proof of prior conduct; temporal proximity; frequency of the acts; presence or lack of intervening circumstances; and relationship between the parties. *United States v. Wright*, 53 M.J. 476, 482 (2000).

a) *United States v. Green*, 51 M.J. 835 (A. Ct. Crim. App. 1999). Military judge erroneously believed Rule 413 "trumped" Rule 403, and that the Rule 403 balancing test did not need to be applied. The court stated that a military judge is required to conduct a Rule 403 balancing test prior to admitting evidence under either Rules 413 or 414.

b) *United States v. Wright*, 53 M.J. 476 (2000). The accused pled guilty to indecent assault of P in October of 1996. He pled not guilty, but was convicted of indecent assault of D in April of 1996, and housebreaking of P's room in October of 1996. The government admitted the offense that he pled guilty to under Rule 413 to prove propensity to commit indecent assault against D. The defense claimed that Rule 413 was unconstitutional. The CAAF rejected this argument, following the rationale of the Federal Circuit Courts on both due process and equal protection grounds.

c) *United States v. Henley*, 53 M.J. 488 (2000). Accused convicted of committing oral sodomy on his natural son and daughter. At trial, the government introduced incidents outside the statute of limitations under both Rules 414 and 404(b). The trial court admitted if for both purposes. The Air Force Court admitted it under Rule 404(b) and said that they did not need to address the Rule 414 issue. The CAAF agreed with the Air Force Court's approach and affirmed. The CAAF did go on to say, in light of their opinion in *Wright*, that Rule 414 is constitutional and this evidence would have been admissible under that rule as well.

d) *United States v. Bailey*, 55 M.J. 238 (2001). Appellant was convicted at a general court-martial of rape, forcible sodomy, aggravated assault, and other offenses. He argued on appeal that the military judge erred in admitting, over defense objection, evidence of prior acts of forcible sodomy through the testimony of the appellant's former wife and former girlfriend when the acts in question occurred up to a decade in time prior to the charged offenses. The military judge allowed the evidence under Rule 413, after performing a balancing test under Rule 403. The military judge also provided a limiting instruction to the panel concerning this evidence. The CAAF held that the balancing test conducted by the military judge, in conjunction with his limiting instruction, met the requirements for an appropriate balancing test outlined in *United States v. Wright*, even though the trial judge had not applied all of the non-exclusive factors outlined in the *Wright* decision. *See also United States v. Dewrell*, 55 M.J. 131 (2001).

e) *United States v. Berry*, 61 M.J. 91 (2005). Appellant was convicted of forcible sodomy involving another male soldier. At trial, the appellant's defense to the charge of forcible sodomy was that the alleged victim had consented to the oral sex incident. To counter this defense, the Government sought to introduce testimony from LS, who testified he had been the victim of a similar act by the appellant eight years earlier. The military judge found that the testimony was relevant and admissible under Rule 413. The ruling was affirmed by ACCA in an unpublished opinion. The CAAF found that although the testimony was relevant, the military judge erred in admitting it because he failed to do an adequate balancing test under Rule 403 and that under a proper Rule 403 balancing test the testimony was inadmissible and prejudicial.

3. No Temporal Limit. *United States v. James*, 63 M.J. 217 (2006). The CAAF concluded that the clear language of Rule 414 does not limit the admission of other incidents of child molestation to those occurring before the charged offenses. This reading has equal application to Rule 413. Therefore, the fact that propensity evidence under Rule 413/414 occurs after the date of the charged offenses is not a barrier to its admission in the accused's court-martial.

4. No requirement that the acts admitted under MRE 413/414 be the exact same acts of molestation as the charged offenses. *United States v. Ediger*, 68 M.J. 243 (C.A.A.F. 2010).

5. ***ARMY MILITARY JUDGES, AFTER ADMITTING EVIDENCE UNDER RULE 413, HAVE A LIMITED SUA SPONTE DUTY TO INFORM MEMBERS OF THE FOLLOWING:***

a) The accused is not charged with this other sexual assault offense;

b) the Rule 413 evidence should have no bearing on their deliberations unless they determine the other offense occurred;

c) if they make that determination, they may consider the evidence for its bearing on any matter to which it is relevant in relation to the sexual assault offenses charged;

d) the Rule 413 evidence has no bearing on any other offense charged;

e) they may not convict the accused solely because they may believe the accused committed other sexual assault offenses or has a propensity or predisposition to commit sexual assault offenses;

f) they may not use Rule 413 evidence as substitute evidence to support findings of guilty or to overcome a failure of proof in the government's case, if any;

g) each offense must stand on its own and they must keep the evidence of each offense separate; and

h) the burden is on the prosecution to prove the accused's guilt beyond a reasonable doubt as to each and every element of the offenses charged. *United States v. Dacosta*, 63 M.J. 575 (Army Ct. Crim. App. 2006).

i) *United States v. Schroder*, 65 M.J. 49 (2007). This case highlights the need for a *Dacosta*-esque instruction. The military judge properly admitted the uncharged misconduct under M.R.E. 414, but failed to adequately instruct the members on its proper uses. The failure to properly instruct the members was harmless error. The CAAF determined that the military judge's instruction fell short of what was required when M.R.E. 414 evidence is admitted at trial. The CAAF noted that the military judge correctly instructed the members on the government's burden, but improperly qualified the statement by informing the members that they may "[h]owever . . . consider the similarities in the testimony" of the three alleged victims concerning the

alleged rape and indecent acts. The CAAF believed the instruction was "susceptible to unconstitutional interpretation." Namely that the similarities between the charged and uncharged misconduct could, standing alone, convict the appellant. The CAAF pointed to the Military Judges Benchbook, instruction 7-13-1, and also favorably cited the *Dacosta* opinion and its suggested instruction. While not mandating the *Dacosta* instruction, the CAAF stated the members "must be instructed that the introduction of such propensity evidence [under M.R.E. 414] does not relieve the government of its burden of proving every element of every offense charged. Moreover, the factfinder may not convict on the basis of propensity evidence alone." In this case, the CAAF was convinced beyond reasonable doubt that the error did not contribute to the appellant's conviction. As such, the court determined the error was harmless.

6. *United States v. Bare*, 65 M.J. 35 (2007). The appellant, a thirty-four-year-old E-5 with thirteen years of active service, was charged with sexually molesting his natural daughter, RB. At the time of the trial, RB was fourteen years old. However, the sodomy specification covered a period when RB was under the age of twelve. At trial, the government sought to admit the testimony of KB, the appellant's sister regarding his sexual molestation of her when she was between the ages of seven and eleven and the appellant was between the ages of fifteen and nineteen. The Government also sought to admit the testimony of TA, the appellant's stepdaughter. TA alleged the appellant had sexually molested her when she was about eleven years old. The government offered KB and TA's testimony under M.R.E. 414. The appellant did not challenge the admissibility of TA's testimony (since this occurred when he was an adult). However, the appellant did argue that the military judge erred in conducting the required M.R.E. 403 analysis. The appellant analogized his case to that of *United States v. Berry*, 61 M.J. 91 (2005) and *United States v. McDonald*, 59 M.J. 426 (2004). In both *Berry* and *McDonald*, the CAAF concluded the military judge erred in admitting evidence of uncharged adolescent sexual misconduct to prove the charged adult sexual misconduct. The appellant argued that, as in *Berry* and *McDonald*, the military judge failed to give adequate consideration to his young age at the time of the uncharged misconduct when conducting his M.R.E. 403 analysis. The CAAF considered, whether, in light of *Berry* and *McDonald*, the military judge error in admitting uncharged sexual acts between the appellant, when he was an adolescent, and his sister. The CAAF stated that a military judge must take care to meaningfully analyze the different phases of an accused's development when projecting on a child the mens rea of an adult or extrapolating an adult mens rea from the acts of a child. The CAAF cautioned military judges to not treat the different phases of the accused's development as being unaffected by time, experience, and maturity. In this case, however, the military judge did not abuse his discretion in admitting evidence of uncharged, but similar molestation. The CAAF was persuaded that the appellant's facts were distinguishable from those in *Berry*. Unlike *Berry*, the military judge conducted a meaningful MRE 403 balancing analysis which considered factors weighing both against and in favor of admission of the evidence; the misconduct occurred while the accused was an adult as well as an adolescent; the appellant was charged with an offense of child

molestation (Berry was not); and the misconduct occurred regularly for a period of about two or three years. All of these factors, according to the CAAF, made KB's testimony more probative and less unfairly prejudicial than the testimony admitted in *Berry*. As such, the military judge did not abuse his discretion in admitting the evidence under M.R.E. 414.

7. *United States v. Yammine*, 69 M.J. 70 (C.A.A.F. 2010). Over defense objection, the government admitted file names suggestive of homosexual acts with preteen and teenage boys under MRE 414 (and alternatively under MRE 404(b) against the accused who was charged with sodomizing a fourteen-year-old male. The CAAF held that the file names were not proper propensity evidence under MRE 414, nor were they admissible for any purpose under MRE 404(b). In order to be admissible under MRE 414, the proffered propensity evidence must be evidence of the accused's commission of another offense of child molestation as defined by the rule. The military judge admitted the evidence under MRE 414(d)(5) and alternatively under section (d)(2). MRE 414(d)(5) allows evidence of an offense of child molestation that constitutes a crime under any Federal law that prohibits "deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child." MRE 414(d)(2) allows evidence of "any sexually explicit conduct with children" proscribed by the UCMJ, Federal, or State law. The court held that MRE 414(d)(5) could not include possession of just the file names suggestive of child pornography because, in the absence of the actual files, it was not possible to determine if the conduct depicted in the media fell within the parameters of MRE 414(d)(5). Next, the court held that MRE 414(d)(2) did not apply because it requires that the qualifying "sexually explicit conduct" proscribed by Federal law be "with children." According to the court, under military law, "with children" means in the physical presence of children. *United States v. Miller*, 67 M.J. 87 (C.A.A.F. 2008).[2] As such, possession or attempted possession of child pornography would not qualify under MRE 414(d)(2) because the appellant himself was not physically present with the children depicted in the child pornography. The court also held that the unassociated file names were not admissible under MRE 404(b) because the military judge failed to make a proper MRE 404(b) analysis. The court noted that the military judge specifically referenced "propensity" in making his MRE 404(b) determination. Propensity may be a relevant basis under MRE 413 and 414, but it is not a proper basis for admitting evidence under MRE 404(b). Accordingly, the military judged erred in alternatively admitting the unassociated file names under MRE 404(b). Additionally, the court independently determined that the probative value of the proffered evidence did not outweigh the danger of unfair prejudice. Finally, the court held that admitting the unassociated file names was prejudicial and therefore set aside appellant's conviction for sodomy and indecent acts. The court also noted that the indecent acts charge was not subject to rehearing because the finding to that charge was reached as a lesser included offense of forcible sodomy under Article 125, UCMJ. Pursuant to *United States v. Jones*, 68 M.J.

[2] In *Miller*, CAAF held that an accused cannot be convicted of with indecent liberties with a child under Article 134 UCMJ, when the alleged indecent conduct takes place over a webcam rather than in the actual presence of the child. *United States v. Miller*, 67 M.J. 87, 90-91 (C.A.A.F. 2008).

465 (C.A.A.F. 2010), indecent acts with a child is no longer a lesser included offense of sodomy.

IX. RULES 501-513. PRIVILEGES.

A. Privileges generally.

1. Schlueter, Salztburg, Schinasi, and Imwinkelried, in Military Evidentiary Foundations, view the privilege analysis in the following manner: in certain proceedings, the holder has a privilege unless it is waived or there is an applicable exception. There are six considerations:

a) The proceedings to which the privileges apply: pursuant to Rule 1101, the Rules respecting privileges apply at all stages in virtually all proceedings conducted pursuant to the UCMJ, i.e., Article 32 hearings, Article 72 vacation proceedings, as well as search and seizure authorizations, and proceedings involving pretrial confinement.

b) The holder of the privilege: The original holder is the intended beneficiary (e.g., the client, the penitent), although in certain cases, the holder's agent will have authority to assert the privilege.

c) The nature of the privilege: Encompasses three rights - to testify and refuse to disclose the privileged information; to prevent third parties from making disclosure; and the right to prevent counsel or the judge from commenting on the invocation of the privilege.

d) What is privileged? The confidential communication between properly related parties made incident to their relation.

(1) "Communication" is broadly defined.

(2) "Confidential" implies physical privacy and intent on the part of the holder to maintain secrecy.

e) Waiver of the privilege: Voluntary disclosure of the privileged matter, in-court or out-of-court, will waive the privilege.

f) Exceptions to the privilege: In the military, exceptions to a privilege (as well as the privilege itself) are expressly delineated. *See United States v. Custis*, 65 M.J. 366, 370-71 (2007) (stating that "whereas privileges evolve in other federal courts based on case law determinations, in the military system the privileges and their exceptions are expressly delineated.").

2. To claim a privilege, the elements of the foundation, in general, are: The privilege applies to this proceeding; the claimant is asserting the right type of privilege; the claimant is a proper holder of the privilege; and the information to be suppressed is privileged because it was a communication, it was confidential, it occurred between properly related parties, and it was incident to the relation.

B. Rule 501.

1. Rule 501 is the basic rule of privilege, recognizing privileges required by or provided for by the Constitution, acts of Congress, the Military Rules of Evidence, the MCM, and the privileges 'generally recognized in the trial of criminal cases in the United States district courts pursuant to FRE 501 to the extent that application of those principles to courts-martial is practicable. *United States v. Miller*, 32 M.J. 843 (N.M.C.M.R. 1991) (although it was unaware of any case applying 501(a)(4) to a privilege arising entirely from state law, here, accused did not even have standing to claim a statutory privilege for statements made by daughter to state social services officials).

2. Despite the express provisions of MRE 501 (a)(4), can military courts apply federal common law privileges? *See United States v. Custis*, 65 M.J. 366, 370-71 (2007) (stating that "whereas privileges evolve in other federal courts based on case law determinations, in the military system the privileges and their exceptions are expressly delineated.") *See also United States v. Wuterich*, 68 M.J. 511 (N-M. Ct. Crim. App. 2009) (refusing to recognize a "reporter's privilege," in part, because the privilege was not specifically delineated.)

C. Rule 502. Lawyer-Client Privilege.

1. An attorney-client relationship is created when an individual seeks and receives professional legal service from an attorney. In addition, there must be an acceptance of the attorney by the client and an acceptance of the client by the attorney before the relationship is established.

2. This privilege may be claimed by the client, or the lawyer on the client's behalf. However, Rule 502(d)(1) removes the privilege with respect to future crimes, as does 502(d)(3) with regard to breach of duty by lawyer or client, etc. *United States v. Smith*, 33 M.J. 527 (A.C.M.R. 1991).

3. Waiver is examined strictly. In *United States v. Marcum*, 60 M.J. 198 (2004), the appellant went AWOL after findings but before sentencing. His defense counsel used a 20-page document the appellant had prepared for use at trial as an unsworn statement on sentencing. The document contained unflattering observations about several of the victims involved in the case, and the trial counsel capitalized on those observations in his sentencing argument. The CAAF held that the right to introduce an unsworn statement is personal to the accused, and in the absence of affirmative evidence of waiver, the evidence was admitted in violation of the attorney-client privilege.

4. Remedy for breach. In *United States v. Pinson*, 57 M.J. 489 (2002), the CAAF held that when the actions of the government breached the attorney-client relationship between the accused and the defense counsel it may warrant reversal if it impacted the attorney's performance or resulted in the disclosure of privileged information at the time of trial. The CAAF identified the following factors when making that determination: (1) whether an informant testified at the accused's trial as to the conversation between the accused and his attorney; (2) whether the prosecution's evidence originated in the conversations; (3) whether the overheard conversation was used in any other way to the substantial detriment of the accused; or (4) whether the prosecution learned from the informant the details of the conversations about trial preparations. Based upon these factors the court concluded no harm to the defense and affirmed the case.

D. Rule 503. Communications to Clergy.

1. This privilege protects communications made as a formal act of religion or conscience. The privilege may be claimed by the penitent or in the absence of contrary evidence, by the clergyman or his/her assistant. *United States v. Napoleon*, 46 M.J. 279 (1997). For privilege to apply, the communication must: be made either as a formal act of religion or as matter of conscience; be made to a clergyman in his or her capacity as a spiritual advisor or to a clergyman's assistant in his or her capacity as an assistant to a spiritual advisor; and be intended to be confidential. Note that the privilege was amended in 2007 to include communications made to a clergyman's assistant. "A 'clergyman's assistant' is a person employed by or assigned to assist a clergyman in his capacity as a spiritual advisor."

2. *United States v. Benner*, 57 MJ 210 (2002). The CAAF reversed the case, holding that when a chaplain meets with a penitent, Rule 503 allows the disclosing person to prevent the chaplain from disclosing the contents of the statement when it was made as a formal act of religion or as a matter of conscience. In this case the chaplain spoke with the accused and then informed him that army regulations would force the chaplain to disclose the confession of the accused. That was an erroneous statement of the Army's regulation governing chaplains. Based upon statements made by the chaplain the accused then made an involuntary confession to CID agents after the chaplain took him to the MP station. The CAAF held that the confession was involuntary, and under a totality of the circumstances test could not be deemed admissible.

3. In *United States v. Shelton*, 64 M.J. 32 (C.A.A.F. 2006), the CAAF held that communications made to a civilian minister acting as a marital counselor were covered by the attorney-client privilege.

E. Rule 504. Husband-Wife Privilege.

1. Rule 504 reflects the Supreme Court's decision in *Trammel v. United States*, 445 U.S. 40 (1998), in which the Court held that the witness spouse alone has a

privilege to refuse to testify adversely. The defendant spouse can only assert the privilege concerning confidential communications. Thus, one spouse may refuse to testify against the other. Confidential communications made during marriage are privileged, and that privilege may be asserted by the spouse who made the communication, or on his behalf by or the spouse to whom it was made during or after the marital relationship. *See United States v. Durbin*, 68 M.J. 271 (C.A.A.F. 2010) (allowing a witness spouse to testify concerning statements she made during a confidential marital communication so long as those statements did not repeat or reveal the accused spouse's privileged statements).

The rule contains several exceptions to the privilege, most importantly: (1) when the accused is charged with a crime against the person or property of the spouse OR A CHILD OF EITHER; and (2) when, at the time of the testimony is to be given, the marriage has been terminated by divorce or annulment. To prevent unwarranted discrimination among child victims, the term "a child of either" was amended in 2007 to include "not only a biological child, adopted child, or ward of one of the spouses but also includes a child who is under the permanent or temporary physical custody of one of the spouses, regardless of the existence of a legal parent-child relationship. For purposes of this rule only, a child is: (i) an individual under the age of 18; or (ii) an individual with a mental handicap who functions under the age of 18." Prior to this amendment, there was no *de facto child* privilege in the military. *See United States v. McCollum*, 58 M.J. 323(2003) (holding that Rule 504(c)(2)(A) requires a lawful parental relationship, as opposed to a custodial relationship, to trigger the "child of either" exception).

2. Adultery. *United States v. Taylor*, 64 M.J. 416 (C.A.A.F. 2007). Adultery constitutes a crime "against the person or property of the other spouse." Thus, when one spouse is charged with adultery, the marital privilege, pursuant to M.R.E. 504(c)(2)(A) does not apply to communications involving the adultery.

3. Presumption of Confidentiality. In *United States v. McCollum*, 58 M.J. 323 (2003), the appellant raped his wife's 14-year-old sister, who was staying with the family for a summer visit. He made several statements to his wife about the incident. At trial, the military judge admitted two of the statements, claiming that the appellant did not establish the intent to hold the communications confidential. The CAAF reversed, holding that marital communications carry a presumption of confidentiality. Once the party asserting the privilege has established that the communication was made privately during a valid marriage, the burden shifts to the opposing party to overcome the presumption.

4. Joint-Participant Exception. Although civilian federal courts recognize the joint-participant exception to the marital privilege, the joint-participant exception does not apply in military cases. *See United States v. Custi*s, 65 M.J. 366 (C.A.A.F. 2007). In *Custis*, the CAAF reasoned that unlike privileges in the federal civilian courts that evolve based on case law, privileges in the military system are specifically delineated. Hence, the only exceptions are those expressly authorized. Consequently, there is no joint-participant exception to the marital privilege. Note that the ACCA in *United States v. Davis*, 61 M.J. 530 (A. Ct.

Crim. App. 2005) had previously recognized a joint-participant exception to marital communications privilege.

F. Rule 509. Deliberations of Courts and Juries.

1. Rule 509 preserves the sanctity of the factfinder's deliberative process. See Schlueter, Salztburg, Schinasi, and Imwinkelried, Military Evidentiary Foundations.

2. Rule 606(b) provides an exception and permits intrusion into the factfinder's deliberative process when there are questions concerning:

a) Whether extraneous prejudicial information was brought to bear upon any member;

b) Whether any outside influence was improperly brought to the member's attention; or

c) Whether there was unlawful command influence.

See also Schleuter, Salztburg, Schinasi, and Imwinkelried, Military Evidentiary Foundations.

3. Note that the deliberative process of military judges, like that of a panel, is protected from post-trial inquiry. *United States v. Matthews*, 68 M.J. 29 (C.A.A.F. 2009)

G. Rule 513. Psychotherapist Patient Privilege.

1. Rule 513 offers a limited privilege for communications to psychotherapists and counselors. The privilege only applies to actions arising under the UCMJ and it is not a broader doctor-patient privilege.

a) *United States v. Rodriguez*, 54 M.J. 156 (2000). The CAAF affirmed the Army Court's ruling that *Jaffee v. Redmond* did not create a psychotherapist-patient privilege in the military. *United States v. Paaluhi*, 54 M.J. 181 (2000). Consistent with *Rodriguez*, the court ruled that *Jaffe v. Redmond* did not create a psychotherapist-patient privilege in the military. The CAAF reversed the conviction, however, holding it was ineffective assistance for the defense counsel to tell the accused to talk to a Navy psychologist without first getting the psychologist appointed to the defense team.

2. Quasi psychotherapist-patient privilege also exists under limited circumstances:

a) Where psychiatrist or psychotherapist is detailed to assist the defense team, communications are protected as part of attorney-client confidentiality. *United States v. Tharpe*, 38 M.J. 8, 15 n.5 (C.M.A. 1993)

b) Communications made by an accused as part of a sanity inquiry under Rule 302. *United States v. Toledo*, 26 M.J. 104 (C.M.A.), *cert. denied*, 488 M.J. 889 (1988). Note that confidentiality privilege for statements made during mental responsibility exams may not automatically apply retroactively to exams which the military judge deems as adequate substitute for court-ordered R.C.M. 706 examinations. *United States v. English*, 44 M.J. 612 (N-M. Ct. Crim. App. 1996), *rev'd on other grounds*, 47 M.J. 215 (1997).

X. WITNESSES.

A. Rule 601. Competency.

Rule 601. General rule of competency.

Every person is competent to be a witness except as otherwise provided in these rules.

1. The rule eliminates the categorized disabilities which existed at common law and under prior military law. *United States v. Morgan*, 31 M.J. 43 (C.M.A. 1990*), cert. denied*, 498 U.S. 1085 (1991). The very young (4 year old child here) are competent, even if hesitant, apprehensive, and afraid.

2. In the event that the competency of a witness is challenged, e.g., a child, the proponent of the witness must demonstrate that the witness has: capacity to observe; capacity to remember; capacity to relate; and recognition of the duty to tell the truth.

B. Rule 602. Personal Knowledge.

Rule 602. Lack of personal knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of MRE 703, relating to opinion testimony by expert witnesses.

1. As long as the panel could find that the witness perceived the event, the testimony should be admitted. Note, however, the term "sufficient," which affirms that the military judge retains power to reject evidence if it could not reasonably be believed.

2. To demonstrate personal knowledge, the proponent must show the witness was in a position to perceive the event, and did actually perceive it.

C. Rule 605. The military judge.

Rule 605. Competency of military judge as witness

(a) The military judge presiding at the court-martial may not testify in that court-martial as a witness. No objection need be made to preserve the point.

(b) This rule does not preclude the military judge from placing on the record matters concerning docketing of the case.

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1. *United States v. Howard*, 33 M.J. 596 (A.C.M.R. 1991). Without any supporting evidence at trial, the military judge used his own specialized knowledge of drug use in Germany to conclude the accused used hashish instead of leaf marijuana, how a pipe was used in the process, and that the charged offense was not the accused's first use of marijuana. In doing so, the judge became a witness, was disqualified, and all actions from then on were void.

2. The rule is an exception to Rule 103 waiver rule. It does not apply to:

   a) Subsequent proceedings concerning trial presided over; e.g., limited rehearing such as those ordered pursuant *to United States v. Dubay*, 37 C.M.R. 411 (1967).

   b) Judicial notice under Rule 201.

D. Rule 607. Who May Impeach.

1. Under prior practice, the party calling a witness was said to "vouch" for the witness. Ordinarily, that meant the party could not attack the credibility of that witness. However, for purposes of impeachment, a witness need not be adverse.

2. Rule 607 provides that "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." The rule contemplates impeachment, however, not the attempted introduction of evidence which otherwise is hearsay. Put differently, the Government may not use impeachment by prior inconsistent statement as a "subterfuge" to avoid the hearsay rule. *United States v. Hogan*, 763 F.2d 697, 702 (5th Cir. 1985). *United States v. Ureta*, 44 M.J. 290 (1996), *cert. denied*, 117 S. Ct. 692 (1997).

E. Methods of Impeachment.

1. Attacks focused on: Defects in capacity to observe, remember or relate; untruthful character; bias, partiality, interest in the outcome; prior convictions; prior inconsistent statements; or delay in reporting abuse or subsequent recantation.

2. Defects in Capacity. Here the focus is on the witness's ability to observe, remember, and relate the information.

a) Observation. The common mode of attack is that the witness could not adequately see/hear the incident in question because of poor lighting, cross-racial identification problems, distance from the scene, etc.

b) Recall. Because of the witness's age, mental condition at the time of the incident or at the time of trial, time lapse between the incident and their in-court testimony, etc., the witness cannot accurately remember the incident.

c) Relate. Because of the witness's age, mental condition, lack of expertise, etc., the witness cannot accurately relate the information.

F. Rule 608. Untruthful Character.

1. Rule 608(a) and (b):

Rule 608. Evidence of character, conduct, and bias of witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instance of conduct. Specific instances of conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of crime as provided in MRE 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the military judge, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning character of the witness for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by another witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters which relate only to credibility.

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2. Once a witness testifies, including the accused or a hearsay declarant, his or her credibility becomes an issue. Evidence of character is then relevant. Rule 608(a) limits the relevance to truthfulness or untruthfulness. Methods of proving character are set out in Rule 405. Under 608(a), the character must be attacked before it may be rehabilitated. Thus, bolstering is prohibited by the rule. Once attacked, the witness' character for being truthful may be rehabilitated with opinion or reputation evidence. *See United States v. Jenkins*, 50 M.J. 577 (N. M. Ct. Crim. App. 1999), witness cannot comment directly about the credibility of another witness's testimony.

a) The foundational elements:

(1) Reputation witness must show he or she is a member of the same community as the witness to be attacked or rehabilitated and that

he or she has lived or worked there long enough to have become familiar with the witness' reputation for truthfulness or the untruthfulness. *United States v. Toro*, 37 M.J. 313 (C.M.A. 1993).

(2) Opinion witness must demonstrate that he or she is personally acquainted with witness and on that basis is able to have formed an opinion about the truthfulness or the lack thereof. *United States v. Perner*, 14 M.J. 181 (C.M.A. 1982).

b) When cross-examination is conducted in such a manner as to induce the belief of untrustworthiness, rehabilitation is permitted. *United States v. Allard*, 19 M.J. 346 (C.M.A. 1985). Also, a "slashing cross-examination" will satisfy the "or otherwise" component of Rule 608(a). *United States v. Everage*, 19 M.J. 189 (C.M.A. 1985). Note, however, that merely introducing evidence that contradicts a witness's testimony or statement is not an "or otherwise" attack under Rule 608(a).

c) Rule 608(b)(2) provides that a character witness can be asked questions about specific acts of the person whose credibility has been attacked or rehabilitated as a means of "testing" the character witness.

3. The questioner is precluded from introducing extrinsic evidence in support of his inquiry. This avoids a "trial within a trial." If witness denies knowledge of the specific acts, no extrinsic evidence of specific acts is permitted. You are "stuck with the answer." *United States v. Cerniglia*, 31 M.J. 804 (AFCMR 1991).

a) Operation of the "Collateral Fact Rule." Under the rule, extrinsic evidence is inadmissible to impeach witnesses on collateral facts. The purpose of the rule is to prevent digression into unimportant matters, since the potential for wasting time and confusing the factfinder is particularly high when extrinsic evidence is used to impeach. It does not limit the cross-examiner's questioning a witness about collateral facts, subject to the general discretion of the court.

(1) The rule *applies* to: Impeachment under Rule 608(b) and the cross-examination of a character witness under Rule 405(a).

(2) When the rule does not apply, the cross-examiner may question the witness and offer extrinsic evidence. The rule does not apply to:

(a) Bias under Rule 608(c);

(b) Defects in capacity (*United States v. White*, 45 M.J. 345 (1996));

(c) Prior inconsistent statements under Rule 613 and 801(d)(1)(A);

(d) Impeachment by contradiction; or

(e) Impeachment under Mil.R.Evid 609.

b) "Human Lie Detector" Testimony. In *United States v. Kasper*, 58 M.J. 314 (2003), the CAAF held that "human lie detector" testimony by an OSI agent violates the limits on character evidence in Rule 608(a) because it offers an opinion of the declarant's truthfulness on a specific occasion. At trial, an OSI agent testified that her training had helped her to identify whether subjects were being truthful in interviews.

G. Rule 608. Bias.

Rule 608. Evidence of character, conduct, and bias of witness

(c) Evidence of bias. Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.

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1. Ulterior motives are <u>never</u> collateral and may be proved extrinsically. The three categories under 608(c) are a representative list, not an exhaustive one.

2. Rules should be read to allow liberal admission of bias-type evidence. *United States v. Hunter*, 21 M.J. 240 (C.M.A.), *cert. denied*, 476 U.S. 1142 (1986). *See United States v. Aycock*, 39 M.J. 727 (N.M.C.M.R. 1993) (the military judge abused his discretion and committed prejudicial error in excluding extrinsic evidence of a government witness' bias and motive to testify falsely (anger and resentment toward the appellant through loss of $195 wager)).

3. Constitutional dimensions:

a) *United States v. Bahr*, 33 M.J. 228 (C.M.A. 1991). 14 year-old prosecutrix testified concerning sodomy and indecent acts by her stepfather. Defense sought to introduce extracts from her diary showing a profound dislike of her mother and home life. The military judge ruled the extracts were inadmissible, and kept the defense from examining the prosecutrix concerning a prior false claim of rape, and alleged advice to her friends to turn in their family members for child sexual abuse. These rulings were evidentiary and constitutional error. Prosecutrix's hatred of her mother could be motive to hurt mother's husband.

b) *United States v. Moss*, 63 M.J. 233 (2006). Does the exclusion of evidence of bias under Rule 608(c) raise issues regarding an accused's

Sixth Amendment right to confrontation? Yes. An accused's right under the Sixth Amendment to cross-examine witnesses is violated if the military judge precludes an accused from exploring an entire relevant area of cross-examination. The military judge erred when he excluded evidence that the accused sought in order to challenge the credibility of the alleged victim. It is the members' role to determine whether an alleged victim's testimony is credible or biased. As such, bias evidence, if logically and legally relevant, are matters properly presented to the members.

The test is to determine whether a limitation on the presentation of evidence of bias constitutes a Sixth Amendment violation is "whether '[a] reasonable jury might have received a significantly different impression of [the witness's] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination.'" *United States v. Collier*, 67 M.J. 347, 352 (C.A.A.F. 2009) .

H. Rule 609. Impeachment with a Prior Conviction.

Amended (2008) Rule 609. Impeachment by evidence of conviction of crime

(a) (a) *General rule.* For the purpose of attacking the credibility character for truthfulness of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Mil. R. Evid. 403, if the crime was punishable by death, dishonorable discharge, or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the military judge determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness. In determining whether a crime tried by court-martial was punishable by death, dishonorable discharge, or imprisonment in excess of one year, the maximum punishment prescribed by the President under Article 56 at the time of the conviction applies without regard to whether the case was tried by general, special, or summary court-martial.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

* * *

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The military judge, however, may allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the military judge is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

* * *

(f) Definition. For purposes of this rule, there is a "conviction" in a court-martial case when a sentence has been adjudged.

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1. This method of impeachment can be done in cross-examination, with extrinsic evidence, or both. An important element in the analysis is the type of crime for which the witness was convicted.

2. Crimen falsi convictions are crimes such as perjury, false statement, fraud, or embezzlement, which involve deceitfulness or untruthfulness bearing on the

witness's propensity to testify truthfully. For crimen falsi crimes, the maximum punishment is irrelevant and the military judge must admit proof of the conviction.

3. Non crimen falsi crimes involve convictions for offenses punishable by death, dishonorable discharge, or imprisonment in excess of one year under the law of the prosecuting jurisdiction. The key is the maximum punishment the witness faced, not the actual punishment the witness received.

   a) Balancing test for witnesses: Admissibility of non crimen falsi convictions of witnesses is governed by Rule 403. The military judge can exclude this evidence if the probative value is substantially outweighed by unfair prejudice.

   b) Balancing test for the accused witness: Admissibility of non crimen falsi convictions of the accused is more restrictive than Rule 403. Convictions are only admissible if the military judge determines the probative value outweighs the prejudicial effect. See *United States v. Ross*, 44 M.J. 534 (A.F. Ct. Crim. App. 1996).

4. Time Limit. Conviction generally inadmissible if more than 10 years old. May be admitted if: Interests of justice require; probative value substantially outweighs prejudicial effect; proponent provides other party with notice. Although not specifically stated in the rule, most commentators believe the ten year limitation applies to crimen falsi as well as non crimen falsi convictions.

5. Juvenile Adjudications. Generally not admissible unless necessary to a fair resolution of the case, and evidence would have been admissible if witness previously had been tried as an adult. Juvenile proceedings may be used against an accused in rebuttal when he testifies that his record is clean. *See United States v Kindler*, 34 CMR 174 (C.M.A. 1964).

6. Summary courts-martial are allowed only if the accused was represented by counsel or representation was affirmatively waived. *United States v. Rogers*, 17 M.J.990 (A.C.M.R. 1984)

I. Rule 613. Impeachment with Prior Statements.

Rule 613. Prior statements of witnesses

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in MRE 801(d)(2).

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1. Evidence that on a previous occasion a witness made a statement inconsistent with his or her present testimony is "probably the most effective and most frequently employed" attack on witness credibility. Saying one thing on the stand and something different previously raises a doubt as to the truthfulness of both statements. A prior inconsistent statement (PIS) casts doubt on the general credibility of the declarant. Such evidence is considered only for purposes of credibility, not to establish the truth of the contents (avoiding a hearsay issue). Thus, a limiting instruction would be appropriate.

2. A witness may be impeached with competent evidence to show that he or she made a previous statement, oral or written, inconsistent with his or her in-court testimony. The evidence may be:

   a) Intrinsic: controlled by 613(a), involving interrogation of the witness concerning the prior statement, or

   b) Extrinsic: controlled by 613(b), involving extrinsic proof (testimony or documents) of the inconsistent statement.

3. Impeachment, however, is not the only possible use of a prior inconsistent statement. Pursuant to Rule 801(d)(1)(A), such statements are admissible substantively, and may be considered by the fact-finder for the truth of the matter asserted, as an exemption to the rule against hearsay when three requirements are met: The statement is inconsistent with the declarant's testimony; the declarant made the statement under oath subject to the penalty of perjury; and the statement was made at a trial, hearing, or other proceeding, or in a deposition.

J. Rule 611. Mode and Order of Interrogation and Presentation

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(a) Control by the military judge. The military judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The military judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, or a witness identified with an adverse party, interrogation may be by leading questions.

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1. This rule is the basic source of the military judge's authority to control proceedings at court-martial.

2. Scope of examination.

a) *United States v. Stavely*, 33 M.J. 92 (1992). When cross-examination goes to witness credibility, military judge should afford counsel wide latitude.

b) *United States v. Barnard*, 32 M.J. 530 (A.F.C.M.R. 1990). An accused who chooses to testify on the merits is subject to same cross-examination as any other witness. Here, TC did not impermissibly comment on right to counsel when he asked accused if he saw a lawyer before making a pretrial statement.

c) Controlling examination to avoid constitutional problems. In *United States v. Mason*, 59 M.J. 416 (2004), the CAAF held that it was error to permit a trial counsel to ask on re-direct whether the accused had ever requested a re-test of the DNA evidence in his case, because the question tended to improperly shift the burden of proof in the case to the defense.

d) Alternatives to in-court testimony. The 1995 Amendments to Drafter's Analysis provides that "when a witness is unable to testify due to intimidation by the proceedings, fear of the accused, emotional trauma, or mental or other infirmity, alternatives to live in-court testimony may be appropriate.

K. Rule 612. Refreshing Recollection.

Rule 612. Writing used to refresh memory

If a witness uses a writing to refresh his or her memory for the purpose of testifying, either (1) while testifying, or (2) before testifying, if the military judge determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains privileged information or matters not related to the subject matter of the testimony, the military judge shall examine the writing in camera, excise any privileged information or portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be attached to the record of trial as an appellate exhibit. If a writing is not produced or delivered pursuant to order under this rule, the military judge shall make any order justice requires, except that when the prosecution elects not to comply, the order shall be one striking the testimony or, if in the discretion of the military judge it is determined that the interests of justice so required, declaring a mistrial. This rule does not preclude disclosure of information required to be disclosed under other provisions of these rules or this Manual.

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1. This is **NOT** Rule 803(5), the recorded recollection hearsay exception.

2. Foundation and Procedure. Show the memory of the witness has failed; show there is some means available which will refresh the recollection of the witness; have the witness read/examine the refreshing document silently; recover the refreshing document; proceed with questioning; make the refreshing document an appellate exhibit and append it to the record of trial; protect privileged matters contained in the writing; nothing is read into the record. Refreshing document need not be admissible; and opposing counsel may inspect the writing, use it in cross examination, and introduce it into evidence.

XI. EXPERTS AND SCIENTIFIC EVIDENCE

Rule 702. Testimony by experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

A. Rule 702. Expert Witnesses

1. Trial judges decide preliminary questions concerning the relevance, propriety and necessity of expert testimony, the qualification of expert witnesses, and the admissibility of his or her testimony. *See* Rule 104(a).

a) *United States v. Warner*, 62 M.J. 114 (2005), the CAAF held "Article 46 is a clear statement of congressional intent against government exploitation of its opportunity to obtain an expert vastly superior to the defense's." Where the government provides itself with a top expert, it must provide a reasonably comparable expert to the defense.

b) *United States v. Lee*, 64 M.J. 213 (2006), commenting on *Warner* and Article 46, CAAF held the playing field is even more uneven when the government benefits from scientific evidence and expert testimony and the defense is denied a necessary expert to prepare for and respond to the government's expert. Arguably, *Warner* and *Lee* can be read together to give the defense a much stronger argument for not only the need for an expert witness (especially if the government has an expert), but the need for a particular expert witness (or one comparable to the government's expert).

c.) *United States v. McAllister*, 64 M.J. 248 (2007), the issue on appeal was: Whether the appellant's right to present his defense was violated when he was prevented from employing and utilizing a necessary DNA expert at his trial? The CAAF answered the question in the affirmative. Had the military judge granted the defense request for a PCR expert, the members would have heard testimony about the discovery of DNA from three previously unidentified individuals. The defense could have used this evidence to attack not only the thoroughness of the original test, but the weight that the members should have given to the government's expert testimony. Additionally, the CAAF believed the new evidence would have changed the evidentiary posture of the case. At trial, the defense had nothing to contradict the character of the government's DNA evidence

which excluded all known suspects other that the appellant. The DNA evidence, according to the CAAF, was the linchpin of the government's case. The additional evidence from TAI was hard evidence that someone other than the appellant, or any other known suspect, was in physical contact with the victim at or near the time of her death. It was error for the military judge to have denied the defense request for an additional expert and retesting of the government's sample. The CAAF concluded that this evidence could have raised a reasonable doubt as to guilt. As such, the CAAF held that the appellant was deprived of his constitutional right to a fair hearing as required by the Due Process Clause. The error in denying the defense request for expert assistance was not harmless beyond a reasonable doubt. As such, the findings of guilt with regards to the unpremeditated murder and the sentence were set aside.

2. In *United States v. Houser*, 36 M.J. 392 (1993) the CAAF set out six factors that a judge should use to determine the admissibility of expert testimony. Although *Houser* is a pre-*Daubert* case, it is consistent with *Daubert*, and the CAAF continues to follow it. *See United States v. Griffin*, 50 M.J. 278, 284 (1999) and *United States v. Billings*, 61 M.J. 163 (2005). They are:

a) Qualified Expert. To give expert testimony, a witness must qualify as an expert by virtue of his or her "knowledge, skill, experience, training, or education." *See* Rule 702

b) Proper Subject Matter. Expert testimony is appropriate if it would be "helpful" to the trier of fact. It is essential if the trier of fact could not otherwise be expected to understand the issues and rationally resolve them. *See* Rule 702.

c) Proper Basis. The expert's opinion may be based on admissible evidence "perceived by or made known to the expert at or before the hearing" or inadmissible hearsay if it is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. . . ." The expert's opinion must have an adequate factual basis and cannot be simply a bare opinion. *See* Rule 702 and 703.

d) Relevant. Expert Testimony must be relevant. *See* Rule 402.

e) Reliable. The expert's methodology and conclusions must be reliable. *See* Rule 702.

f) Probative Value. The probative value of the expert's opinion, and the information comprising the basis of the opinion must not be substantially outweighed by any unfair prejudice that could result from the expert's testimony. *See* Rule 403.

B. Rule 702. The Expert's Qualification to Form an Opinion.

Rule 702. Testimony by experts
. . . a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

1. Knowledge, Training, and Education Foundation. Show degrees attained from educational institutions; show other specialized training in the field; show the witness is licensed to practice in the field and has done so (if applicable) for a long period of time; show teaching experience in the field; show the witness' publications; and show membership in professional organizations, honors or prizes received, previous expert testimony.

2. Skill and Experience Foundation. An expert due to specialized knowledge. *See United States v. Mustafa*, 22 M.J. 165 (C.M.A. 1986).

   a) *United States v. Banks*, 36 M.J. 150 (C.M.A. 1992). Military judge erred when he refused to allow defense clinical psychologist to testify about the relevance of specific measurements for a normal prepubertal vagina, solely because the psychologist was not a medical doctor. As the court noted, testimony from a qualified expert, not proffered as a medical doctor, would have assisted the panel in understanding the government's evidence.

   b) *United States v. Harris*, 46 M.J. 221 (1997). Military judge did not err in qualifying a highway patrolman who investigated over 1500 accidents, as an expert in accident reconstruction.

   c) *United States v. McElhaney*, 54 M.J. 120 (2000). During the sentencing phase, the government called an expert on future dangerousness of the accused. The expert said he could not diagnose the accused because he had not interviewed him nor had he reviewed his medical records. In spite of this and objections by defense counsel, the expert did testify about pedophilia and made a strong inference that the accused was a pedophile who had little hope of rehabilitation. The CAAF held that it was error for the judge to admit this evidence. Citing *Houser*, the court noted that the expert lacked the proper foundation for this testimony, as noted by his own statements that he could not perform a diagnosis because of his lack of contact with the accused.

   d) *United States v. Billings*, 61 M.J. 163 (2005). To link the appellant to a stolen (and never recovered) Cartier Tank Francaise watch, the Government called a local jeweler as an expert witness in Cartier watch

identification to testify that a watch the appellant was wearing in a photograph had similar characteristics as a Tank Francaise watch. Although the jeweler had never actually seen a Tank Francaise watch, his twenty-five years of experience and general familiarity with the characteristics of Cartier watches qualified him as a technical expert.

C. Proper Subject Matter ("Will Assist")

1. Helpfulness. Expert testimony is admissible if it will assist the fact finder. There are two primary ways an expert's testimony may assist.

a) Complex Testimony. Experts can explain complex matters such as scientific evidence or extremely technical information that the fact finders could not understand without expert assistance.

b) Unusual Applications. Experts can also help explain apparently ordinary evidence that may have unusual applications. Without the expert's assistance, the fact finders may misinterpret the evidence. *See, United States v. Rivers*, 49 M.J. 434 (1998); *United States v. Brown*, 49 M.J. 448 (1998).

2. *United States v. Traum*, 60 M.J. 226 (2004). To answer the question of why a parent would kill her child, the government called a forensic pediatrician, who testified to the following matters: (1) overwhelmingly, the most likely person to kill a child would be his or her biological parent; (2) the most common cause of trauma death for children under four is child maltreatment; (3) for 80% of child abuse fatalities, there are no prior instances of reported abuse; (4) Caitlyn died of non-accidental asphyxiation. The CAAF held that there was no error in admitting "victim profile" evidence regarding the most common cause of trauma death in children under four and the fact that most child abuse deaths involve first-time abuse reports for that child. The CAAF held that the military judge erred in admitting evidence that overwhelmingly, the most likely person to kill a child is its biological parent. In context, however, the error was harmless because the government already had admitted the appellant's confession.

3. *United States v. Cendejas*, 62 M.J. 334 (2006). Do you need expert testimony in a child pornography prosecution based upon the Child Pornography Prevention Act (CPPA), to prove actual children were used to produce the images? No. A factfinder can make a determination as to whether actual children were used to produce the images based upon a review of the images alone, without expert testimony. *See also United States v. Wolford*, 62 M.J. 418 (2006).

D. Form of the Opinion.

1. The foundation consists of no more than determining that the witness has formed an opinion, and of what that opinion consists.

2. Rule 704.

Rule 704. Opinion on Ultimate Issue
Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

a) The current standard is whether the testimony assists the trier of fact, not whether it embraces an "ultimate issue" so as to usurp the panel's function. At the same time, ultimate-issue opinion testimony is not automatically admissible. Opinion must be relevant and helpful as determined through Rules 401-403 and 702.

b) In *United States v. Diaz*, 59 M.J. 79 (2003), the CAAF held that it was improper for an expert to testify that the death of appellant's child was a homicide and that the appellant was the perpetrator, when the cause of death and identity of the perpetrator were the primary issues at trial.

c) One recurring problem is that an expert should not opine that a certain witness's rendition of events is believable or not. *See, e.g., United States v. Petersen*, 24 M.J. 283, 284 (C.M.A. 1987) ("We are skeptical about whether any witness could be qualified to opine as to the credibility of another.") The expert may not become a "human lie detector." *United States v. Palmer*, 33 M.J. 7, 12 (C.M.A. 1991); *see also United States v. Brooks*, 64 M.J. 325 (2007) (discussing that in a child sexual abuse case, where the government expert's testimony suggested that there was better than a ninety-eight percent probability that the victim was telling the truth, such testimony was the functional equivalent of vouching for the credibility or truthfulness of the victim, and implicates the very concerns underlying the prohibition against human lie detector testimony.

(1) Questions such as whether the expert believes the victim was raped, or whether the victim is telling the truth when she claimed to have been raped (i.e. was the witness truthful?) are impermissible.

(2) However, the expert **may** opine that a victim's testimony or history is consistent with what the expert's examination found, and whether the behavior at issue is **typical** of victims of such crimes. Focus on symptoms, not conclusions concerning veracity. *See United States v. Birdsall*, 47 M.J. 404 (1998) (expert's focus should be on whether children exhibit behavior and symptoms consistent with abuse; reversible error to allow social worker and doctor to testify that the child-victims were telling the truth and were the victims of sexual abuse). Example: An expert may testify as to what symptoms are found among children who have suffered sexual abuse and whether the child-witness has exhibited

these symptoms. *United States v. Harrison*, 31 M.J. 330, 332 (C.M.A. 1990).

E. Rule 703. Basis For the Expert's Testimony.

1. Rule 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert, at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

2. The language of the rule is broad enough to allow three types of bases: facts personally observed by the expert; facts posed in a hypothetical question; and hearsay reports from third parties. *United States v. Reveles*, 42 M.J. 388 (1995), expert testimony must be based on the facts of the case.

a) Hypothetical questions (no longer required). No need to assume facts in evidence, but, if used, must be reasonable in light of the evidence. *United States v. Breuer*, 14 M.J. 723 (A.F.C.M.R. 1982). The proponent may specify historical facts for the expert to assume as true, or may have the expert assume the truth of another witness or witnesses.

b) Personal Perception. *United States v. Hammond*, 17 M.J. 218 (C.M.A. 1984). The fact that expert did not interview or counsel victim did not render expert unqualified to arrive at an opinion concerning rape trauma syndrome. *United States v. Snodgrass*, 22 M.J. 866 (A.C.M.R. 1986*; United States v. Raya*, 45 M.J. 251 (1996). Defense objected to social worker's opinion that victim was exhibiting symptoms consistent with rape trauma accommodation syndrome and suffered from PTSD on basis that opinion was based solely on observing victim in court, reading reports of others and assuming facts as alleged by victim were true. Objection went to weight to be given expert opinion, not admissibility. The foundational elements include: Where and when the witness observed the fact; who was present; how the witness observed the fact; and a description of the observed fact.

c) Facts presented out-of-court (non-record facts), if "of a type reasonably relied upon by experts in the particular field" (even if inadmissible). "The rationale in favor of admissibility of expert testimony based on hearsay is that the expert is fully capable of judging for himself what is, or is not, a reliable basis for his opinion. This relates directly to one of the functions of the expert witness, namely to lend his special expertise to the issue before him." *United States v. Sims*, 514 F.2d 147, 149 (9th Cir.), *cert. denied*, 423 U.S. 845 (1975). There is a potential problem of smuggling in otherwise inadmissible evidence.

(1) *United States v. Neeley*, 25 M.J. 105 (C.M.A. 1987), *cert. denied*, 484 U.S. 1011 (1988). Psychiatrist's testimony that she consulted with other psychologists in reaching her conclusion that accused had inflated results of psychiatric tests and her opinion was the consensus among these people was hearsay and inadmissible. Military judge may conduct a 403 balancing to determine if the probative value of this foundation evidence is outweighed by unfair prejudice.

(2) *United States v. Hartford*, 50 M.J. 402 (1999). Defense was not allowed to cross-examine the government expert about contrary opinions from two colleges. The defense did not call the two as witnesses and there was no evidence that the government expert relied on the opinions of these colleges. The CAAF held the MJ did not err in excluding this questioning as impermissible smuggling under Rule 703.

(3) The elements of the foundation for this basis include: The source of the third party report; the facts or data in the report; if the facts are inadmissible, a showing that they are nonetheless of the type reasonably relied upon by experts in the particular field. In *United States v. Traum*, 60 M.J. 226 (2004), the CAAF emphasized that the key to evaluating the expert's basis for her testimony is the type of evidence relied on by other experts in the field.

(4) *United States v. Ellis*, 68 M.J. 341 (C.A.A.F. 2010). Over defense objection, the government's expert testified that the accused had a moderately high risk of recidivism without having personally interviewed the accused. The expert had reviewed the accused's records, the charges and specifications, the stipulation of fact, chat logs, and the expert had listened to the accused's providency inquiry. The CAAF found that the military judge had not abused his discretion, stating that "[t]here can be no hard and fast rule as to what constitutes 'sufficient information and knowledge about the accused' necessary for an expert's opinion as to an accused's rehabilitation potential."

(5) *United States v. Mullins*, 69 M.J. 113 (C.A.A.F. 2010). Appellant was charged with sexually abusing his daughters who were seven and nine years old. The girls testified to sexual abuse that included rape, oral and anal sex, and masturbation. The Government called a forensic child interviewer as an expert witness. On redirect, the expert witness testified that the frequency of children lying about sexual abuse was less than 1 out of 100 or 1 out of 200. Defense counsel did not object. The CAAF held that it was error to allow the expert testimony which impermissibly invaded the province of the panel.

F. Relevance.

1. Expert testimony, like any other testimony must be relevant to an issue at trial. *See* Rule 401, 402; *Daubert, v. Merrell Dow Pharmaceuticals, Inc*. 509 U.S. 579 (1993).

2. If the expert testimony is not relevant, it is de facto not helpful to the trier of fact.

G. Reliability.

1. The Test for Scientific Evidence. In *Daubert v. Merrell Dow Pharmaceuticals Inc*., 509 U.S. 579 (1993), the Supreme Court held that nothing in the Federal Rules indicates that "general acceptance" is a precondition to admission of scientific evidence. The rules assign the task to the judge to ensure that expert testimony rests on a reliable basis and is relevant. The judge assesses the principles and methodologies of such evidence pursuant to Rule 104(a).

a) The role of the judge as a "gatekeeper" leads to a determination of whether the evidence is based on a methodology that is "scientific," and therefore reliable. The judgment is made before the evidence is admitted, and entails "a preliminary assessment of whether the reasoning or methodology is scientifically valid." Trial court possessed with broad discretion in admitting expert testimony; rulings tested only for abuse of discretion. *General Electric Co. v. Joiner*, 118 S. Ct. 512 (1997). *See also United States v. Kaspers*, 47 M.J. 176 (1997); *United States v. Sanchez*, 65 M.J. 145 (2007).

b) Factors. The Supreme Court discussed a nonexclusive list of factors to consider in admitting scientific evidence, which included the *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) test as a separate consideration:

(1) whether the theory or technique can be and has been tested;

(2) whether the theory or technique has been subjected to peer review and publication;

(3) whether the known or potential rate of error is acceptable;

(4) whether the theory/technique enjoys widespread acceptance.

2. Non-Scientific Evidence. The Supreme Court resolved whether the judge's gatekeeping function and the *Daubert* factors apply to non-scientific evidence. In *Kumho Tire v. Carmichael*, 119 S. Ct. 1167 (1999), the Court held that the trial judge's gatekeeping responsibility applies to all types of expert evidence. The

Court also held that to the extent the *Daubert* factors apply, they can be used to evaluate the reliability of this evidence. Finally, the Court ruled that factors other than those announced in *Daubert* can also be used to evaluate the reliability of non-scientific expert evidence.

3. Other Factors. Other factors courts have considered to evaluate the reliability of scientific and non-scientific testimony include:

   a) Was the information developed for the purpose of litigation?

   b) Did the expert unjustifiably extrapolate facts to support conclusions?

   c) Are there alternative explanations?

   d) Is the expert being as careful as they would be in their regular professional work outside paid litigation?

   e) Is there a well-accepted body of learning in this area?

   f) How much practical experience does the expert have and is there a close fit between the experience and the testimony?

   g) Is the testimony based on objective observations and standards?

H. Probative Value

1. The probative value of the expert's opinion, and the information comprising the basis of the opinion must not be substantially outweighed any unfair prejudice that could result from the expert's testimony.

2. This is a standard Rule 403 balancing.

XII. HEARSAY.

A. The Rule Against Hearsay.

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by any Act of Congress applicable in trials by court-martial.

B. The Necessary Definitions.

Rule 801. Definitions

The following definitions apply under this section:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(c) "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

1. Under the Rule, a statement may be oral, written, or nonverbal conduct intended as an assertion, not made at trial, offered to prove the truth of the matter asserted.

2. Under Rule 801(b), the declarant is a "person" who makes a statement, not a computer or a bloodhound. Although the data entered into a computer may be a statement of a person.

3. Out-of-court means that at the time the person made the statement, the person was not in the courtroom, unless it satisfies the requirements of Rule 801(d).

4. Proving the Truth of the Matter Asserted: This is the definitional prong that addresses the advocate's need to cross-examine the declarant. The proponent must offer the statement to prove the truth of an assertion contained in the statement. If the statement is logically relevant to another theory, it is non-hearsay. In other words, the value of the statement lies in the fact that it was made. For example, an uttered statement that constitutes an element of an offense is not hearsay, but may be called an operative fact or a verbal act, e.g.: disrespectful language; swearing, provoking language, threats, etc. Other common non-hearsay uses include using the statement as circumstantial evidence of the declarant's state of mind (e.g, premeditation), using the statement to show its effect on the state of mind of the hearer or reader.

C. Exemptions From Hearsay.

Rule 801(d) Statements which are not hearsay. A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition or (B) consistent with the declarant's testimony

and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person;

1. A prior statement of identification of a person made after perceiving the person is admissible as substantive evidence of guilt. Rule 801(d)(1)(c). The foundation includes: The witness is on the stand subject to cross-examination; the testifying witness made a prior out-of-court identification of a person; where and when the identification occurred; and who was present.

2. Admissions of a Party-Opponent. Rule 801(d)(2)(A).

Rule 801(d)(2). A statement is not hearsay if . . . [t]he statement is offered against a party and is (A) the party's own statement in either the party's individual or representative capacity, or (B) a statement of which the party has manifested the party's adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment of the agent or servant, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

a) The logical underpinning of the admissions doctrine derives from the simple fact that a party cannot be heard to complain that it should have an opportunity to cross-examine itself. There are three kinds of admissions: personal, adoptive, and vicarious.

b) Personal admissions are statements by the party, and should not be confused with statements against interest in Rule 804(b)(3). The latter derives its guarantee of reliability from the fact that it was against the declarant's interest when made. No similar rule is imposed on the admission, although for the accused there frequently will be constitutional and statutory rights that must be protected. The proponent must show: The declarant, identified by the witness as the accused, made a statement; if rights warning necessary, the accused was warned of his or her rights and waived them; the oral or written statement was voluntary; and the statement is offered against the accused.

c) Adoptive admissions. *See, e.g., United States v. Potter,* 14 M.J. 978 (N.M.C.M.R. 1982) (accused adopted another's statement when he introduced it at his own magistrate's hearing). *See also United States v. Datz*, 61 M.J. 37 (2005) (holding that a nod in response to equivocal and confusing compound questions was not an adoptive admission). The doctrine requires proof that the declarant made a statement in the party's presence; the party heard, read, or understood the statement; the party made a statement which expressed agreement with the declarant's statement; and the statement is offered against the party. Where a "tacit admission" is averred, that is, an adoption by silence, the critical inquiry

is whether the accused was faced with self-incrimination issues (i.e., official questioning). If not, the proponent must show the accused had the opportunity to deny the statement, that a reasonable innocent person would have denied it, and that the accused did not do so. While this exemption can cover authorized spokespersons or agents, the most common use is the co-conspirator's statement: the proponent must show a conspiracy existed; the declarant was part of the conspiracy at time of statement; the statement was made in furtherance of the conspiracy; and the statement was offered against the accused.

D. Common Hearsay Exceptions.

1. Present Sense Impressions and Excited Utterances.

Rule 803. Hearsay exceptions; availability of declarant immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while declarant was perceiving the event or condition or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

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a) Present sense impression, unlike excited utterance, does not require the perceived event to be a startling one. It does, however, apply only to statements made at the time the event is "perceived" or "immediately thereafter." The proponent must show: an event occurred; the declarant had personal knowledge of the event; the declarant made the statement soon after the event; and the statement "describes or explains" an event.

b) The excited utterance requires a showing that the event occurred; was startling; the declarant was acting under the stress of excitement cause by the event; and statement "relates" to a startling event. The time element or factor may determine whether the declarant was acting under the stress of excitement. *See United States v. Arnold*, 25 M.J. 129 (C.M.A. 1987), *cert. denied*, 484 U.S. 1060 (1988) (12 hours until first opportunity*); United States v. Le Mere*, 22 M.J. 61 (C.M.A. 1986) (3 year-old victim after 16 hours*); United States v. Armstrong*, 30 M.J. 769 (A.C.M.R. 1990) (4 to 5 days too long for an excited utterance), *rev'd*, 36 M.J. 311 (1993); *United States v. Knox*, 46 M.J. 688 (N.M. Ct. Crim 1996). App. 1997) (one year too long). *See also United States v. Miller*, 32 M.J. 843 (N.M.C.M.R. 1991), *aff'd*, 36 M.J. 124 (C.M.A. 1992). Spontaneous statement by crying, upset student to teacher concerning her father's sexual molestation 18 hours earlier held admissible. Focus is not on lapse of time since the exciting incident, but whether declarant is under stress of excitement so as to lack opportunity to reflect and to fabricate an untruthful statement. *See also United States v. Morgan*, 40 M.J. 405 (C.M.A. 1994), *cert. denied*, 115 S. Ct. 907 (1995) (textbook example of

excited utterance). The proponent must show: A startling or stressful event occurred; the declarant had personal knowledge of the event; the declarant made a statement about the event; and the declarant made the statement while he or she was in a state of nervous excitement.

c) *United States v. Grant*, 42 M. J. 340 (1995). Accused charged with various sexual offenses against his seven-year-old stepdaughter. Trial counsel offered victim's statements made to family friend 36-48 hours after one of the alleged incidents, both as excited utterance and residual hearsay. MJ admits as excited utterance but rejects as residual hearsay. While passage of time is not dispositive, CAAF concluded the requirements of 803(2) were not met where, as here, statements were the product of sad reflection and not made under the stress or excitement of the event. The statement was, however, admissible under the residual exception based on its spontaneity, lack of suggestiveness, corroboration, the non-threatening home environment, and its general similarity to an excited utterance. Case demonstrates the importance of using alternative theories for admissibility of evidence.

d) In *United States v. Feltham*, 58 M.J. 470 (2003), the CAAF held that a military judge did not abuse his discretion in admitting the statements a male sailor made to his roommate approximately one hour after appellant forcibly orally sodomized him. The military judge specifically found that the victim was still under the stress of a startling event; therefore, the lapse of time was not dispositive.

e) In *United States v. Donaldson*, 58 M.J. 477 (2003), the CAAF upheld the admission as an excited utterance of a 3-year-old sexual assault victim's statements to her mother 12 hours after the incident. Although the girl had spent the entire day with her mother, they had always been in the company of others. Her statement represented the first opportunity she had to be alone with and speak to a trusted adult.

2. Statements for purposes of medical diagnosis or treatment.

Rule 803. Hearsay exceptions; availability of declarant immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and described medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

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a) Proponent must show declarant had some expectation of promoting well being (and thus incentive to be truthful), and statement was made for purposes of medical diagnosis or treatment. As small children typically cannot articulate that they expected some benefit from treatment, it is

important that someone, like a mother or father, explain to them why they are going to the doctor, the importance of the treatment, and they need to tell what happened to feel better. CAAF also recommends the caretakers identify themselves, as such and engage in activity which could be construed as treatment by the child. *United States v. Siroky*, 44 M.J. 394 (1996).

b) If statement is in response to questioning, the questioning must be of medical necessity. *United States v. Haner*, 49 M.J. 72 (1998). *United States v. Armstrong*, 36 M.J. 311 (C.M.A. 1993) (statement made to TC was in preparation for trial, and repetition to the psychologist several days later did not "change the character of the statements.") *See United States v. Henry*, 42 M.J. 593 (A. Ct. Crim. App. 1995). Statements made to medical personnel not made with expectation of receiving medical benefits but instead for the purpose of facilitating collection of evidence. NOTE: 803(4) not limited to patient-declarants. *United States v. Yazzie*, 59 F.3d 807 (9th Cir. 1995) (mother's statements to docs ok). *United States v. Austin*, 32 M.J. 757 (A.C.M.R. 1991) (child's mom to social services).

c) *United States v. Rodriguez-Rivera*, 63 M.J. 372 (2006). Referral of a victim to a medical professional by trial counsel "is not a critical factor in deciding whether the medical exception applies to the statements she gave to those treating her. The critical question is whether she had some expectation of treatment when she talked to the caregivers." *United States v. Haner*, 49 M.J. 72, 76 (1998). Under the circumstances of this case, the fact the trial counsel initiated the examination of JK by Dr. Craig is not a sufficient reason to hold that the military judge erred by concluding the medical exception applied. The military judge's findings that Dr. Craig saw JK for the purpose of medical diagnosis and treatment, and that JK expected to receive medical treatment when she saw Dr. Craig, support his decision to admit the statement made by JK to Dr. Craig under Rule 803(4). As such, the military judge's decision was not an abuse of discretion.

3. Recorded Recollection.

Rule 803. Hearsay exceptions; availability of declarant immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence, but may not itself by received as an exhibit unless offered by an adverse party.

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a) Foundation and Procedure: Attempt refreshing memory; establish that the memory of the witness cannot be refreshed; establish that this witness made a record when the matter was fresh in the memory of this witness;

establish that the record made accurately reflects the knowledge of the witness at the time of the making; then have the witness read the recorded recollection into evidence.

b) Note: The record could be marked as a prosecution or defense exhibit for identification, or as an appellate exhibit. It should not be admitted unless offered by the adverse party. Attach it to the record of trial. It should not go to the deliberation room unless offered by the adverse party. *United States v. Gans*, 32 M.J. 412 (C.M.A. 1991). Excellent case detailing the differences between using writings to refresh memory under Rule 613 and writings used to establish past recollection recorded under Rule 803(5).

4. Records of Regularly Conducted Activities (Business Records).

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(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes the armed forces, a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Among those memoranda, reports, records, or data compilations normally admissible pursuant to this paragraph are enlistment papers, physical examination papers, outline-figure and fingerprint cards, forensic laboratory reports, chain of custody documents, morning reports and other personnel accountability documents, service records, officer and enlisted qualification records, logs, unit personnel diaries, individual equipment records, daily strength records of prisoners, and rosters of prisoners.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

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a) Bank Records. Must lay the foundation specified in the Rule: Timely recording by a regularly conducted business activity in accordance with a regular practice of recording. When laying the business records foundation, witness familiarity with the records-keeping system must be sufficient to explain the system and establish the reliability of the documents. Witnesses need not be those who made the actual entries or even the records custodian. *United States v. Garces*, 32 M.J. 345 (C.M.A. 1991) *and United States v. Tebsherany*, 32 M.J. 351 (C.M.A. 1991). *United States v. Brandell*, 35 M.J. 369 (C.M.A. 1992). Bank records not admissible under this provision unless a custodian or other qualified person testifies.

b) NCIC Reports. *United States v. Littles*: 35 M.J. 644 (N.M.C.M.R. 1992): NIS agent testified that he saw a National Crime Information Center (NCIC) report showing criminal activity and conviction of, the accused's father. The report was hearsay, and based upon the evidence presented, did not qualify for admission under Rule 803(6) or 803(8) (*i.e.*, not shown to have been made at or near the time by a person with knowledge; the

testifying agent was not the custodian of the record, nor did he show familiarity with the records-keeping system; the "rap" sheet was not a record or report of the activities of NCIC).

c) Lab Reports. *United States v. Schoolfield*, 36 M.J. 545 (A.C.M.R. 1992), *aff'd*, 40 M.J. 132 (CMA 1994): The accused alleged error in the admission of blood sample medical records (4 serology reports and a Western Blot test result) pursuant to Rule 803(6). He argued the records were not kept in the ordinary course of business, no chain of custody was established, and that errors called into question the reliability of the records. ACMR disagreed, finding no abuse of discretion by the military judge. The medical director of WRAMC Institute of Research was qualified to testify as to the record keeping system and maintenance of records. Lab reports and chain of custody documents are admissible. *United States v. Vietor*, 10 M.J. 69 (C.M.A. 1980); *United States v. Robinson*, 14 M.J. 903 (N.M.C.M.R. 1982). Admission under the rule does not preclude the defense from calling the lab technicians to attack the report. *United States v. Magyari*, 63 M.J. 123 (2006). Is data in a lab report a testimonial statement giving an accused the right to confront the makers of those statements pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004)? MAYBE. In the context of random urinalysis screening, where the lab technicians do not equate specific samples with particular individuals or outcomes, and the sample is not tested in furtherance of a particular law enforcement investigation, the data entries of the technicians are not "testimonial" in nature. IF, however, the lab reports were prepared at the behest of law enforcement in anticipation of a prosecution, the reports may become "testimonial." *See United States v. Harcrow*, 66 M.J. 154 (C.A.A.F. 2008) (finding lab reports to be testimonial since law enforcement requested the report).

d) Computer Phone Records. *United States v. Casey*, 45 M.J. 623 (N.M. Ct. Crim. App. 1996). Computer system does not have to be foolproof, or even the best available, to produce records of adequate reliability.

e) VHS Videotapes. Rule 803(6) Business records. *U.S. v. Harris*, 55 M.J. 433 (2001). The CAAF adopted the prevailing view of state and federal courts regarding the "silent witness" theory of admissibility vis-à-vis videotapes. The court noted that over the last 25 years, the "silent witness" theory of authentication has developed in almost all jurisdictions to allow photographs to substantively "speak for themselves" after being authenticated by evidence that supports the reliability of the process or system that produced the photographs. The court adopted the silent witness theory, noting that "any doubts about the general reliability of the video cassette recording technology had gone the way of the beta tape". The court also addressed when a witness could meet the requirements of 803(6). They noted that in order for a witness to meet the qualification requirements of 803(6) they must be "generally familiar" with the process.

5. Public Records and Reports. Rule 803(8).

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public office or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, matters observed by police officers and other personnel acting in a law enforcement capacity, or (C) against the government, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness. Notwithstanding (B), the following are admissible under this paragraph as a record of a fact or event if made by a person within the scope of the person's official duties and those duties included a duty to know or to ascertain through appropriate and trustworthy channels of information the truth of the fact or event and to record such fact or event: enlistment papers, physical examination papers, outline figure and fingerprint cards, forensic laboratory reports, chain of custody documents, morning reports and other personnel accountability documents, service records, officer and enlisted qualification records, records of court-martial convictions, logs, unit personnel diaries, individual equipment records, guard reports, daily strength records of prisoners, and rosters of prisoners.

a) Permits introduction of evidence from public office or agency where the data and source of information are indicative of trustworthiness and set forth (a) the activities of the office; or (b) matters observed pursuant to a duty imposed by law; or (c) (against the Government) factual findings resulting from an investigation made pursuant to authority granted by law. Presumption of regularity. Substantial compliance with regulation is sufficient. Irregularities material to the execution preclude admissibility. *United States v. Anderson*, 12 M.J. 527 (N.M.C.M.R. 1981). Excludes matters observed by police or personnel acting in a law enforcement capacity, if offered by the Government. Defense can admit police reports under Rule 803(8)(c). Purely ministerial recordings of police may be admissible. *United States v. Yeoman*, 22 M.J. 762 (N.M.C.M.R. 1986), *aff'd*, 25 M.J. 1 (C.M.A. 1987) (the reporting of a filed complaint).

b) In *United States v. Taylor*, 61 M.J. 157 (2005), the CAAF held that a military judge erred by admitting a document with undecipherable content under the public records exception; the custodian could not explain the origin or meaning of the undecipherable content. The CAAF further held that any underlying documents used to create a public record must satisfy a hearsay exception to satisfy Rule 805.

c) *United States v. Rankin*, 64 M.J. 243 (2007). Are service record entries documenting an accused's period of unauthorized absence "testimonial" for purposes of the Confrontation Clause? No. Service records documenting absence are not prepared by law enforcement or any prosecutorial agency, rather, they are routine personnel documents that chronicle the relevant dates, times, and locations of the accused. Additionally, at the time the documents are created, an objective witness would not reasonably believe the statement would be available for use at a later trial. *But see Whorton v. Bockting*, 127 S. Ct. 1173 (2007) (changing the analysis of nontestimonal statements under the Confrontation Clause, "Under Roberts, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand,

the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.")

6. Contents of Learned Treatises.

Rule 803. Hearsay exceptions; availability of declarant immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(18) Learned treatises. To the extent called to the attention of an expert where established as reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

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a) Main requirement for using the exception, whether on direct or cross-examination, is the establishment of the treatise, periodical, or pamphlet as reliable authority. *See generally* David F. Binder, *Hearsay Handbook*, ch. 7 §19.01 at 337 (3d ed. 1991). The proponent of the evidence accomplishes this task either by obtaining an admission from an expert witness concerning the reliability or authority of the statement. The provision concerning calling the treatise to the attention of the expert in cross-examination, or having the expert rely upon the treatise on direct examination "is designed to ensure that the materials are used only under the sponsorship of an expert who can assist the fact finder and explain how to apply the materials." 2 C. McCormick, *McCormick on Evidence* ch. 34, §321 at 352 (4th ed. 1992) Another method is through judicial notice. "Given the requirements for judicial notice, Rule 201, and the nature and importance of the item to be authenticated, the likelihood of judicial notice being taken that a particular published authority other than the most commonly used treatises is reliable is not great." Michael H. Graham, *Federal Practice and Procedure-Evidence* §6769 at 714, note 4 (1992).

b) As is the case with the hearsay exception for recorded recollections, Rule 803(18) provides that statements from the learned treatise are read into evidence; the learned treatise itself does not become an exhibit.

7. Residual Hearsay Rule - The "Catchall". Rule 803(24) and 804(b)(5). **Transferred to rule 807 which reads**

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807. A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

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a) The proponent must demonstrate "equivalent circumstantial guarantees of trustworthiness";

(1) Inherent Reliability. *Idaho v. Wright*, 497 U.S. 805 (1990) (admissibility of child's statement to doctor regarding abuse pursuant to residual hearsay rule requires a showing of indicia of reliability <u>at the time statement made</u>, not through corroborating evidence.)

(2) *United States v. Morgan*, 40 M.J. 405 (CMA 1994), *cert. denied*, 115 S. Ct. 907 (1995): Military judge properly admitted sworn statement of rape complainant under residual exception. The statement was made near to the time of the attack and was consistent with earlier excited utterances.

b) Establish the evidence is offered to prove a material fact in issue;

c) Show evidence offered is more probative of the point than any other evidence reasonably available.

(1) All the prerequisites for use must be met, including the requirement that it be more probative than any other evidence on the point for which it is offered. *United States v. Pablo*, 50 M.J. 658 (A. Ct. Crim. App. 1999), testimony of school counselor inadmissible hearsay because victim testified on the same issues and counselor's testimony did not shed any new light on the issue.

(2) *United States v. Czachorowski*, 66 M.J. 432 (2008). The military judge ruled that the alleged child-victim was unavailable based on the trial counsel's proffer that the child had forgotten the alleged instances of abuse. The military judge admitted the child's statements of the alleged incident to both the mother and the grandparents as residual hearsay. The CAAF found that the government failed to meet its burden that it could not obtain more probative evidence despite "reasonable efforts." The government offered nothing to corroborate its assertions that the child had forgotten the alleged incident, and the military judge relied solely on government's assertions without seeking any corroboration before declaring the child unavailable. Because the residual hearsay exception should be rarely used, "Absent personal observation or a hearing, there must be some specific evidence of reasonable efforts to obtain other probative evidence."

d) Demonstrate that admission fosters fairness in the administration of justice; and

e) Provide notice of intended use.

(1) *United States v. Holt*, 58 M.J. 227 (2003). During the sentencing phase of appellant's court-martial for writing bad checks, the military judge admitted a letter from one of the victims to show victim impact and the full circumstances of the offenses. The letter was not admitted for the truth of the matters asserted therein. On appeal, the AFCCA held that the contents of the letter were admissible as residual hearsay under Rule 807. The CAAF reversed, holding that the AFCCA failed to apply the notice and foundational requirements of Rule 807. In order to admit evidence under Rule 807, the appellant must be afforded sufficient notice in advance of the trial or hearing to prepare to meet the evidence; this requirement applies equally to trial and appellate proceedings.

(2) *United States v. Czachorowski*, 66 M.J. 432 (2008). The CAAF took a flexible approach and found that the advance notice requirement applies to the statements and not the means that the proponent intended to use to seek admission of the statements. While the trial counsel gave no formal notice, the defense counsel knew about the statements and the trial counsel's intent to offer the statements. Notice was satisfied.

f) Harmless Error Test. In *United States v. Lovett*, 59 M.J. 230 (2004), the appellant was convicted of raping his 5-year-old daughter. The daughter testified at trial. The Government also introduced several hearsay statements of the victim through written statements by her mother and the testimony of a family friend. The CAAF refused to rule as to whether admission of these items was error, holding instead that any errors in admitting the evidence were harmless because the statements were cumulative to and consistent with the victim's in-court testimony, and some of the statements were contained in another Government exhibit that was entered into evidence without defense objection.

E. Rule 804. Common Hearsay Exceptions - Unavailability.

Rule 804. Hearsay exceptions; declarant unavailable

(a) Definitions of unavailability. "Unavailability as a witness" includes situations in which the declarant-

(1) is exempted by ruling of the military judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the military judge to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means; or

(6) is unavailable within the meaning of Article 49(d)(2).

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

1. 804(a)(1): Claim of privilege (which cannot be remedied by grant of testimonial immunity). *United States v. Robinson*, 16 M.J. 766 (A.C.M.R. 1983).

2. 804(a)(4): Death, Physical Inability, Mental Incapacity, or Intimidation. *United States v. Arruza*, 26 M.J. 234 (C.M.A. 1988), *cert. denied*, 489 U.S. 1011 (1989) (child intimidated); *United States v. Ferdinand*, 29 M.J. 164 (C.M.A. 1989), *cert. denied*, 493 U.S. 1044 (1990) (A child victim may become unavailable if testifying would be too traumatic). *But see United States v. Harjak*, 33 M.J. 577 (N.M.C.M.R. 1991) (notwithstanding judge's empathetic concerns for child, unauthenticated medical reports detailing victim's physical and psychological condition to demonstrate unavailability irrelevant as reports did not discuss her current condition).

3. 804(a)(5): Absence. Inability to locate or procure attendance or testimony through good faith, major efforts: *United States v. Hampton*, 33 M.J. 21 (C.M.A. 1991). The victim refused to return for the trial and the military judge had no means to compel the victim's attendance. She properly was determined to be unavailable under Rule 804(a)(5). Under these circumstances, the pretrial deposition was admissible.

4. *United States v. Gardinier*, 63 M.J. 531 (A. Ct. Crim. App. 2006). Military judge erred when he determined a child-witness was unavailable within the meaning of Rule 804(a). Even though a child-witness may not provide any "helpful" information, this is not a valid basis for a finding of unavailability. The Confrontation Clause guarantees only an opportunity for effective cross-examination, not necessarily effective cross-examination.

F. Rule 804(b). Former Testimony.

Rule 804(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.

(1) Former testimony. Testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. A record of testimony given before courts-martial, courts of inquiry, military commissions, other military tribunals, and before proceedings pursuant to or equivalent to those required by Article 32 is admissible under this subdivision if such a record is a verbatim record. This paragraph is subject to the limitations set forth in Articles 49 and 50.

1. The foundational requirements are: The first hearing was a fair one; the witness testified under oath at the first hearing; the opponent was a party in the first hearing; the opponent had an opportunity to develop the witness' testimony; the opponent had a motive to develop the witness' testimony at the first hearing; the witness is unavailable; and there is a verbatim transcript of the first hearing.

2. Despite wording of Rule 804(b)(1), admissibility of Article 32 testimony under former testimony exception depends on opponent's opportunity to cross-exam, not whether cross-examination actually occurred or the intent of the cross-examiner. *United States v. Connor*, 27 M.J. 378 (C.M.A. 1989); *United States v. Hubbard*, 28 M.J. 27 (C.M.A.), *cert. denied*, 493 U.S. 847 (1989). *United States v. Austin*, 35 M.J. 271 (C.M.A. 1992): UCMJ art. 32 testimony was admitted under Rule 801(d)(1)(A) and 804(b)(1). After the testimony was read to the members, they were permitted to take it into deliberations, over defense objection. Analogizing to a deposition, which is not taken into deliberations (*See* R.C.M. 702(a), Discussion), COMA concluded the verbatim Article 32 testimony was <u>not</u> an "exhibit" within the meaning of R.C.M. 921(b). *See also United States v. Montgomery*, CM 9201238, (A.C.M.R. 28 July 1994) (*per curiam*) (unpub.), the A.C.M.R. applied a similar analysis to a verbatim transcript of a prior trial.

G. Rule 804(b)(3). Statement Against Pecuniary, Proprietary, or Penal Interests.

Rule 804(b)(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the position of the declarant would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

1. The foundational requirements include: The declarant is unavailable; the declarant previously made a statement; the declarant subjectively believed that the statement was contrary to his or her interest; the interest was of a recognized type; and if the defense offers a statement which tends to expose the declarant to criminal liability, to exculpate the accused, there must be corroboration to show the statement is trustworthy. *United States v. Perner*, 14 M.J. 181 (C.M.A. 1982).

H. Rule 804(b)(6). Forfeiture by wrongdoing.

Rule 804(b)(6) *Forfeiture by wrongdoing*. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

1. *Giles v. California*, 128 S. Ct. 2678 (2008) (holding that before finding that a defendant forfeited his right to confrontation by his wrongdoing, the government must prove that the defendant intended to prevent a witness from testifying.)

2. *United States v. Marchesano*, 67 M.J. 535 (A. Ct. App. 2008) (adopting a four-part test for determining whether a party "acquiesced in the wrongdoing." (1) Whether "the witness was unavailable through the actions of another;" (2) whether "the act of another was wrongful in procuring the unavailability of the witness;" (3) whether "the accused expressly or tacitly accepted the wrongful actions of another;" and (4) whether "the accused did so with the intent that the witness be unavailable."

I. Rule 805 and 806. Hearsay within Hearsay; Attacking and Supporting Credibility of Declarant.

1. Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule. *United States v. Little*, 35 M.J. 644 (N.M.C.M.R. 1992).

2. When a hearsay statement, or a statement defined in rule 801(d)(2)(c), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness.

XIII. MISCELLANEOUS RULES.

A. Rule 1101. Applicability of Rules.

Rule 1101. Applicability of rules

(a) Rules applicable. Except as otherwise provided in this Manual, these rules apply generally to all courts-martial, including summary courts-martial; to proceedings pursuant to Article 39(a); to limited fact-finding proceedings ordered on review; to proceedings in revision; and to contempt proceedings except those in which the judge may act summarily.
(b) Rules of privilege. The rules with respect to privileges in Section III and V apply at all stages of all actions, cases, and proceedings.
(c) Rules relaxed. The application of these rules may be relaxed in sentencing proceedings as provided under R.C.M. 1001 and otherwise as provided in this Manual.
(d) Rules inapplicable. These rules (other than with respect to privileges and MRE 412) do not apply in investigative hearings pursuant to Article 32; proceedings for vacation of suspension of sentence pursuant to Article 72; proceedings for search authorizations; proceedings involving pretrial restraint; and in other proceedings authorized under the code or this Manual and not listed in subdivision (a).

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1. The Military Rules apply generally to all courts-martial, including summary courts-martial; to proceedings pursuant to Article 39(a); to limited fact-finding proceedings ordered on review; to proceedings in revision; and to contempt proceedings except those in which the judge may act summarily.

2. The application of the rules may be relaxed in sentencing proceedings.

3. The Military Rules do not apply in investigative hearings pursuant to Article 32; proceedings for vacation of suspension of sentence pursuant to Article 72;

proceedings for search authorizations; proceedings involving pretrial restraint; and in other proceedings authorized under the Uniform Code of Military Justice or the MCM and not listed in rule 1101(a).

B. Rule 1102. Amendments.

1. The Rule provides that "Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 18 months after the effective date of such amendments unless action to the contrary is taken by the President."

XIV. CONCLUSION

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TAB O

CLASSIFIED EVIDENCE PROCEDURES

Table of Contents

I. ESSENTIAL REFERENCES 1

II. NATIONAL SECURITY PROSECUTIONS AND GRAYMAIL 1

III. KEY CONCEPTS AND DEFINITIONS 2

IV. CLASSIFIED EVIDENCE AND PRIVILEGES 7

V. CLASSIFIED INFORMATION PROCEDURES AT COURTS-MARTIAL 9

VI. CHECKLIST FOR CLASSIFIED CASE IN AN IDEAL WORLD 13

VII. CONCLUSION 15

MAJ Tyesha Lowery Smith
January 2011

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CLASSIFIED EVIDENCE PROCEDURES

I. ESSENTIAL REFERENCES

A. U.S. Dep't of the Navy, Office of the Judge Advocate General, National Security and Intelligence Law Division (Code 17), The Judge Advocate's Handbook for Litigating National Security Cases: Prosecuting, Defending and Adjudicating National Security Cases (2002) [hereinafter Code 17 Handbook].

B. Executive Order (EO) No. 12598, "Classified National Security Information," April 17, 1995, 60 Fed. Reg. 19825, reprinted at 50 U.S.C. § 435 note.

C. Order of the President of the United States, dated Oct. 13, 1995, 60 Fed. Reg. 53485, designating original classification authorities, reprinted at 50 U.S.C. § 435 note.

D. DoD Directive 5200.1, DoD Information Security Program, 13 Dec 96.

E. DoD 5200.1-R, DoD Information Security Program Regulation, 14 Jan 97.

F. U.S. Dep't of the Army, Reg. 380-67, Personnel Security Program, 9 Sep 88.

G. U.S. Dep't of the Army, Reg. 27-10, Military Justice, 16 Nov 05.

H. Classified Information Procedures Act (CIPA), 18 U.S.C. appx. III, §§ 1-16 and interpretative caselaw.

I. Military Rule of Evidence (MRE) 505, Classified Information.

II. NATIONAL SECURITY PROSECUTIONS AND GRAYMAIL

A. "Graymail" occurs when a criminal defendant, whether for legitimate reasons or otherwise, threatens to disclose classified information during the course of a trial hoping that the government will forego prosecution rather than see the information disclosed.

B. There are two competing values at play in every prosecution involving classified or national security information:

1. The accused's right to a fair trial;

2. The government's need to protect from disclosure national security information that might be required for the trial.

C. Classified information is potentially relevant at trial under three primary circumstances:

1. The charges are related to the improper handling of classified information. Examples of such charges include the following:

a) Art. 92, Failure to Obey Order or Regulation. This would apply to instances of mishandling classified information. *See, e.g.*, U.S. DEP'T OF ARMY, REG. 380-5, DEPARTMENT OF THE ARMY INFORMATION SECURITY PROGRAM para. 1-21 (29 Sep. 2000).

b) Art. 92, Dereliction of Duty.

c) Art. 106a, Espionage.

d) Art. 134, The General Article. Would pertain to violations of federal statutes not specifically contained in the UCMJ. For examples of these statutes and sample specifications, see U.S. DEP'T OF THE NAVY, OFFICE OF THE JUDGE ADVOCATE GENERAL, NATIONAL SECURITY AND INTELLIGENCE LAW DIVISION (CODE 17), THE JUDGE ADVOCATE'S

HANDBOOK FOR LITIGATING NATIONAL SECURITY CASES: PROSECUTING, DEFENDING AND ADJUDICATING NATIONAL SECURITY CASES, Chapter 8 (2002) [hereinafter Code 17 Handbook].

e) Art. 104, Aiding the Enemy.

f) Art. 106, Spies.

2. The classified information may be essential in establishing an element of or defense to a charge or specification. For instance, in *United States v. Schmidt*, 60 M.J. 1 (2004), the appellant was charged with dereliction of duty for failing to exercise appropriate flight discipline and to comply with rules of engagement and special instructions in an air-to-ground bombing incident that caused the deaths of several Canadian soldiers in Afghanistan. The appellant was privy to classified information pertaining to his case. The military judge ruled, and the Air Force Court of Criminal Appeals affirmed, that the appellant could not discuss the classified aspects of his case with his civilian defense counsel (who eventually obtained an interim security clearance) without submitting a request through the trial counsel. The CAAF vacated the AFCCA opinion and reversed the ruling of the military judge, holding that MRE 505 does not require an accused to engage in adversarial litigation with the government as a precondition to discussing potentially relevant information pertaining to the case that is already in the appellant's knowledge or possession.

3. Classified evidence is somehow relevant to the discovery process.

III. KEY CONCEPTS AND DEFINITIONS[1]

A. Key Definitions. E.O. 12958, Part 1.

1. National Security. Pertaining to the national defense or foreign relations of the United States. E.O. 12958, § 1.1(a).

2. Information. Any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States Government. **Control means the authority of the agency that originates information, or its successor in function, to regulate access to the information**. E.O. 12958, § 1.1(b).

3. Classified National Security Information (aka Classified Information). Information that has been determined pursuant to Executive Order No. 12598 or any predecessor order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form. E.O. 12958, § 1.1(c). Classified information falls into seven main subject-matter categories. E.O. 12958, § 1.5.

a) Military plans, weapons systems, or operations;

b) Foreign government information;

c) Intelligence activities (including special activities), intelligence sources or methods, or cryptology;

d) Foreign relations or foreign activities of the United States, including confidential sources;

e) Scientific, technological, or economic matters relating to the national security;

[1] Unless otherwise noted, the information in this section comes from EO 12958.

f) United States Government programs for safeguarding nuclear materials or facilities; or

g) Vulnerabilities or capabilities of systems, installations, projects or plans relating to the national security.

4. Classification. The act or process by which information is determined to be classified information. E.O. 12958 § 1.1(e).

5. Restricted Data. All data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy. *See* Code 17 Handbook, Chapter 1.

6. Original Classification Authority (OCA): An individual authorized in writing, either by the President, or by agency heads or other officials designated by the President, to classify information in the first instance. The only OCAs are the President, agency heads and officials designated by the President in the Federal Register, and certain Government officials. E.O. 12958 § 1.1(g).

7. Derivative Classification. Incorporating, paraphrasing, restating, or generating in a new form information that is already classified and marking the new material consistently with the classification markings of the source information. Duplication or reproduction of classified information is not derivative classification. E.O. 12958 § 2.1.

8. Levels of Classification. E.O. 12958 § 1.3.

a) Top Secret. Information, the unauthorized disclosure of which reasonably could be expected to cause **exceptionally grave damage to the national security** *that the OCA is able to identify or describe*.

b) Secret. Information, the unauthorized disclosure of which reasonably could be expected to cause **serious damage to the national security** *that the OCA is able to identify or describe*.

c) Confidential. Information, the unauthorized disclosure of which reasonably could be expected to cause **damage to the national security** *that the OCA is able to identify or describe*.

9. Compartmented Information. Information within a formal system which strictly controls the dissemination, handling and storage of a specific class of classified information. Another name for compartmented information is "codeword information." *See* Code 17 Handbook, Chapter 2. There are two categories of compartmented information:

a) Special Access Program (SAP). A program established safeguarding and access requirements that exceed those normally required for information at the same classification level. A person must obtain authorized access to SAP information by completing personnel security requirements unique to the SAP and signing a SAP nondisclosure agreement. Furthermore, the person may not disclose SAP information to anyone without verifying that the other person has access to the SAP and a verified need-to-know the information.

b) Sensitive Compartmented Information (SCI). Classified information concerning or derived from intelligence sources, methods, or analytical processes that is required to be handled exclusively within formal access control systems established by the Director of Central Intelligence.

10. "Need to Know." A determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function. E.O. 12958, § 4.1(c). In order to gain access to classified information, a person must satisfy two requirements: (1) The appropriate authority must deem the person suitable for receiving classified materials; and (2) the person must have a "need-to-know" the classified material. *See Schmidt v. Boone*, 59 M.J. 841, 852 (A.F. Ct. Crim. App. 2004), *rev'd on other grounds sub nom., United States v. Schmidt*, 60 M.J. 1 (2004).

B. The Classification Process.

1. Scope. Approximately 4,000 federal employees have the authority to classify information, and in 2003, more than 14 million new classified documents were produced. *See* Eileen Sullivan, *Too Much Secrecy: Overclassification Hampers Cooperation*, FEDERAL TIMES, Sep. 13, 2004, at 1.

2. Process.

a) All 4 of the following conditions must be met:

(1) An OCA must classify the information;

(2) Information must be owned by, produced by or for, or be under the control of the United States Government;

(3) Information must fall within one of the 7 categories of national security information; and

(4) OCA must make two determinations:

(a) Unauthorized disclosure of the information reasonably could be expected to result in damage to the national security;

(b) The OCA can identify or describe the potential damage.

b) OCA must determine appropriate classification level. Doubts should be resolved in favor of a lower classification level.

c) When an employee, contractor, licensee, certified holder, or grantee of an agency that does not have OCA originates information believed by that person to require classification, the information will be protected as if it is classified within the meaning of EO 12958. The information will be promptly transmitted to an agency with OCA and subject matter interest. A decision must be made within 30 days.

3. Duration. OCA will attempt to establish a specific date or event for declassification, subject to the following guidelines:

a) If an earlier date or event cannot be identified, the default position is 10 years from date of original decision.

b) OCA may extend duration of classification for successive time periods not to exceed 10 years per period.

c) Under the following circumstances, an OCA can exempt from declassification information beyond the 10-year limit, if release would:

(1) Reveal an intelligence source, method, or activity, or cryptologic system or activity;

(2) Reveal information that would assist in the development or use of WMD;

(3) Reveal information that would impair the development or use of technology within a United States weapon system;

(4) Reveal foreign government information;

(5) Damage relations between the United States and a foreign government, reveal a confidential source, or seriously undermine diplomatic activities that are reasonably expected to be ongoing for longer than 10 years;

(6) Impair the ability of United States government officials to protect the President, Vice President, or other individuals for whom protection services in the interest of national security are authorized;

(7) Violate a statute, treaty, or international agreement.

4. Information Not Subject to Classification.

a) Sec. 1.8 of EO 12958 provides that information shall not be classified in order to:

(1) Conceal violations of law, inefficiency, or administrative error;

(2) Prevent embarrassment to a person, organization, or agency;

(3) Restrain competition; or

(4) Prevent or delay the release of information that does not require classification in the interest of national security

b) Basic scientific information not clearly related to national security may not be classified;

c) Information may not be reclassified after it has been declassified and released to the public under the proper authority.

5. Classification Challenges. Authorized holders of information who believe in good faith that the classification status of information is improper are expected to challenge the status.

a) Agency heads or officials shall establish procedures for challenge.

b) The procedures shall ensure:

(1) Individuals are not subject to retribution for bringing an action;

(2) An impartial official or panel will review the information;

(3) Individuals may appeal agency decisions to an Interagency Security Classification Appeals Panel.

C. Document Marking.

1. The following information is required on classified documents or other classified media:

a) Classification level;

b) Identity, by name or personal identifier or position, of the OCA

c) Agency and office of origin;

d) Declassification instructions;

e) Concise reason for classification, unless it would reveal additional classified information.

2. Classification authorities, should, where practicable, use a classified addendum if the classified information forms a small portion of an otherwise unclassified document.

3. Information that has been classified does not become unclassified merely because a document has either been improperly marked or not marked at all.

D. Declassification.

1. Definition. An authorized change in the status of information from classified to unclassified information.

2. Authority. The official who authorized the original classification (if still serving in that position); the official's successor in function; a supervisor of either; or individuals who have been delegated this authority by an agency head or senior agency official.

3. Types:

a) Automatic. Declassification based solely on the occurrence of a specific date or event as determined by the OCA, or expiration of a maximum time frame for duration of classification.

b) Systematic. Review for declassification of classified information contained in records that have been determined by the Archivist of the United States to have permanent historical value.

c) Mandatory. A review for declassification that occurs in response to a request for declassification. Information can be declassified if the public's interest in disclosure outweighs the need to protect the information. Procedures:

(1) Request for review must describe the document or material specifically enough to enable the agency to locate with reasonable effort;

(2) Agency heads will develop procedures for handling requests and reviews, appeal procedures, and procedures to notify requestors of their right to appeal a final agency decision to the Interagency Security Classification Appeals Panel.

(3) When an agency receives a request for review of information in its custody that was originally classified by another agency, it will refer the documents to the original agency for processing. Depending on the type of information in a document, there can be multiple OCAs for the information contained therein.

E. Classification Review.[2]

1. The classification review is a key litigation support function in national security cases.

[2] The classification review is described in Code 17 Handbook, Chapter 3.

2. The review should be coordinated with higher technical supervisory channels as soon as possible. The CR should occur prior to action under the UCMJ and/or discovery.

3. What the classification review accomplishes:

a) Verifies the current classification level for the information and its duration;

b) Verifies the classification level of information when subjected to compromise;

c) Determines whether another command requires review of the information; and

d) Provides a general description of the impact on affected operations.

F. Basic Information Security Requirements.

IV. CLASSIFIED EVIDENCE AND PRIVILEGES

A. Common Law Government Secrets Privilege.

1. Nature of the Privilege. An absolute privilege to prohibit the disclosure of information pertaining to military or diplomatic secrets. The Supreme Court discussed the privilege in *United States v. Reynolds*, 345 U.S. 1 (1952). In *Reynolds*, an Air Force B-29 bomber on a mission to test secret electronic equipment caught on fire and crashed. Widows of three of the deceased brought suit against the United States and moved for discovery of the official accident investigation. The Secretary of the Air Force claimed privilege. The Supreme Court recognized a common law privilege protecting military and state secrets. *Id.* at 7-8. This is different from the so-called "executive privilege," a qualified privilege pertaining to the deliberative processes of the executive branch. In *United States v. Nixon*, 418 U.S. 683 (1974), the Supreme Court held that the President does not have an absolute unqualified privilege in a criminal case to protect tape recordings and documents from disclosure. In *Cheney v. United States District Court for the District of Columbia*, 124 S.Ct. 2576 (2004), the Supreme Court held that the D.C. Circuit Court of Appeals read *Nixon* too broadly in requiring the Vice President to make a claim of executive privilege with specificity in a civil case.

2. Claiming the Privilege. The privilege must be claimed formally by the head of a department after personal consideration by that officer. It cannot be claimed or waived by a private party. *Reynolds*, 345 U.S. at 8-9. There is no privilege until a formal claim of privilege has been made.

B. Classified Information Procedures Act.

1. Nature of the "Privilege." CIPA establishes procedures for the protection of classified national security information at all stages of a proceeding, to include discovery. CIPA does not, however, create an evidentiary privilege; indeed, the legislative history of CIPA indicates that it was not intended to alter existing standards for determining relevance and admissibility. *See United States v. Smith*, 780 F.2d 1102 (4th Cir. 1985) (favorably quoting a lower court for the proposition that CIPA is merely a procedural tool requiring a pretrial court ruling on the admissibility of classified evidence).

a) Much broader than the state secrets privilege.

b) Recognizes the power of the executive branch to determine that public disclosure of classified evidence will not be made in a criminal trial.

c) Outlines procedures to protect against threat of disclosure or unnecessary disclosure.

d) Requires the defendant to give notice of intent to reveal classified information as part of the defense.

e) Gives several options to government:

(1) Seek a ruling that some or all of the information is immaterial.

(2) Move for substitution of non-sensitive summary information.

(3) Move for redaction of sensitive information.

(4) Admit facts sought to be proven.

f) If government is unwilling or unable to disclose, court may dismiss charges or provide appropriate relief.

2. Claiming the Privilege. CIPA contains a number of specific sections for determining whether classified evidence or substitutes are relevant and admissible at trial. If a court concludes under CIPA that classified evidence is relevant at trial, the government may still be able to claim a privilege and withhold the evidence. For example, in *United States v. Smith*, the defendant was charged with several counts of espionage that occurred when he worked for the Army Intelligence Security Command (INSCOM). In his defense, he argued that he had turned material over to the Russians under the direction of two men whom he believed to be CIA agents as part of a double-agent operation. At trial, he wanted to introduce classified evidence to support his claim. The district court found the evidence admissible, but the 4th Circuit reversed, holding that the district court should have applied a qualified privilege similar to the common law informer's privilege recognized in *Roviaro v. United States*, 353 U.S. 53. *Smith*, 780 F.2d at 1106-07. The key is that CIPA now permits the government to claim its privilege prior to trial. *See Smith*, 780 F.2d at 1109.

C. Military Rule of Evidence 505

1. Nature of the Privilege. MRE 505 is based upon CIPA, the common law government secrets privilege discussed in *United States v. Reynolds*, and the executive privilege discussed in *United States v. Nixon*. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 505 analysis, at A22-40 (2002). It establishes a privilege prohibiting disclosure of classified information if disclosure would be detrimental to national security. It applies at all stages of the proceedings. MRE 505(a). In many respects, such as the requirement for the defendant to provide notice of intent to disclose classified information and the evidentiary substitution procedures, MRE 505 essentially mirrors CIPA.

2. Claiming the Privilege. The head of the executive or military department or government agency may claim the privilege based upon a finding that the information is properly classified and that disclosure would be detrimental to the national security. A witness or trial counsel is presumed to have the authority to claim the privilege on behalf of the holder of the privilege in the absence of evidence to the contrary. MRE 505(c). However, case law makes it clear that trial counsel should not claim the privilege in the absence of direction to do so by the appropriate agency head. In *United States v. Flannigan*, 28 M.J. 988 (AFCMR 1998), the Air Force Court of Military Review dismissed a charge

because the trial counsel claimed the privilege at the direction of OSI personnel but did not coordinate with the Secretary of the Air Force.

V. CLASSIFIED INFORMATION PROCEDURES AT COURTS-MARTIAL

A. Pre-preferral. At this stage of the proceeding, the government should comply as closely as possible with the procedures outlined in the Navy Code 17 publication, The Judge Advocate's Handbook for Litigating National Security Cases. In particular, the government should:

1. Notify higher headquarters. AR 27-10, para. 2-7*a* requires an SJA to coordinate with OTJAG, Criminal Law Division and OTJAG, Operational Law Division prior to *preferral* of charges in cases that have national security implications.

2. Request a classification review of the evidence.

3. Contact the OCA (and often, multiple OCAs) for a determination as to what evidence may be disclosed at trial.

4. Establish security procedures, identify security assistance personnel, and plan all aspects of a trial involving classified evidence.

5. Make charging decisions based on OCA willingness to disclose certain information.

6. Note that speedy trial implications still exist in classified information cases. The discussion to RCM 707(c) indicates that a military judge can grant delays in order to give counsel time to prepare for complex cases, to obtain appropriate security clearances or gain time to declassify evidence. However, the reasonableness standard applies, and it is worth noting that the convictions of the accused in the "Yellow Fruit" cases were all overturned on appeal for speedy trial violations. *See United States v. Longhofer*, 29 M.J. 22 (CMA 1989) (rejecting proposed rule that speedy trial clock doesn't start in classified cases until all participants have security clearances and applying instead a reasonableness test for measuring the delay); *United States v. Duncan*, 34 M.J. 1232 (ACMR 1992) (holding that complex prosecution involving coordinated efforts between DOJ and DOD did not render reasonable the 303 days of pretrial delay for one set of charges and 176 days for another); *United States v. Byard*, 29 M.J. 803 (ACMR 1989) (holding that the government did not exercise due diligence in obtaining the accused's financial records and therefore could not exclude the time it took to obtain them).

B. From Preferral through Trial: A Quick Trip Through MRE 505

1. Counsel Security Clearance Requirements and the 6th Amendment.

a) The Sixth Amendment does not promise a defendant his choice of counsel, but rather guarantees that he receive an effective advocate. *United States v. Bin Laden*, 58 F. Supp. 2d 113, 118-19 (S.D.N.Y. 1999) (quoting *Wheat v. United States*, 486 U.S. 153 (1988). Thus, the government may require counsel to obtain a proper security clearance in order to have access to classified information. *Bin Laden*, 58 F. Supp. 2d at 119-20.

b) Under DoD and individual service regulations, counsel must have a proper security clearance in order to have access to classified information. In the alternative, an agency may conduct a streamlined background check and provide specific items of classified evidence to the attorney. *See, e.g.*, 59 M.J. 841, 852 (A.F. Ct. Crim. App. 2004), *rev'd on other grounds sub nom., United States v. Schmidt*, 60 M.J. 1 (2004) (discussing

in exhaustive detail the process of obtaining a security clearance for civilian counsel).

2. Article 32 Investigation. As a rule of privilege, MRE 505 applies to proceedings held under Art. 32. MRE 505(d) provides that a convening authority may do any of the following to protect classified information prior to referral of charges:

   a) Delete specified items of classified evidence from documents made available to the accused;

   b) Substitute a portion or summary of the information for the classified documents;

   c) Substitute a statement admitting relevant facts the classified evidence would tend to prove.

   d) Provide documents subject to conditions that will guard against compromise of information;

   e) Withhold disclosure if necessary to protect national security.

3. Discovery. MRE 505(e) provides for a pretrial Art. 39(a) session any time after referral of charges but before arraignment to settle discovery issues and ensure compliance with the procedures of MRE 505. The normal "open discovery" system provided under UCMJ Art. 46 and RCM 703 simply does not exist for classified information. According to the Navy Code 17 publication, the government must make the following determinations prior to permitting discovery of classified information:

   a) The accused has a "need to know" the classified information. Disagreements must be resolved by the convening authority prior to referral under MRE 505(d) or by the military judge after referral under MRE 505(g).

   b) Government must obtain permission from the originating agency of the classified information. This requires a classification review.

   c) It may be necessary to dismiss some charges rather than permit discovery of classified information.

   d) In *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992), the COMA held that under MRE 505, the appellant did not have to know the true identity of an intelligence agent in order to properly prepare for cross-examination. The COMA cited a federal case, *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989), in which the Court of Appeals held that the District Court erred in ordering production of transcripts of taped conversations between the appellant and an informant. The Court held that the transcripts were not sufficiently material to the appellant's defense to overcome the classified information privilege.

4. Post-Referral Convening Authority Options. Once a convening authority becomes aware that classified information is relevant and necessary to an element of the offense or a legally cognizable defense (and is otherwise admissible in evidence), MRE 505(f) provides that the CA may do any of the following:

   a) Institute action to obtain the classified information so the military judge can make an appropriate *in camera* determination under MRE 505(i) concerning the proper use of the evidence;

   b) Dismiss the charges;

c) Dismiss the charges or specifications or both to which the information relates;

d) Take such other actions as may be required in the interests of justice.

5. Post-Referral Military Judge Options. If, after a reasonable period of time, information is not provided to the military judge and the absence of that information would materially prejudice a substantial right of the accused, the military judge shall dismiss the charges or specifications or both to which the classified information relates. MRE 505(f).

6. Protective Order. If the government agrees to disclose classified information to the accused, the military judge can enter a protective order to guard against improper disclosure of the information. MRE 505(g)(1) provides for a protective order that is quite broad and sweeping in its scope. The protective order may:

a) Prohibit unauthorized disclosure of information;

b) Require storage of material in a manner appropriate to its classification level;

c) Require controlled access to material during business hours and other hours at reasonable notice;

d) Require cooperation of all persons who need security clearances with investigatory personnel;

e) Require maintenance of logs regarding access by authorized personnel to the classified information;

f) Regulate the making and handling of notes taken from classified information;

g) Request the CA to authorize assignment of government security personnel and provision of government storage facilities.

7. Limited Disclosure/Substitutes. MRE 505(g)(2) permits the military judge to authorize the limited disclosure of classified information following an *in camera* review by the military judge, unless the military judge determines that the classified information itself is necessary to enable the accused to prepare for trial. Courts construing substitution issues under CIPA have held that proper substitutes for classified evidence do not hamper the accused's ability to present a defense. *See, e.g.*, *United States v. Rezaq*, 134 F.3d 1121, 1142-43 (D.C. Cir. 1998), *cert. denied* 525 U.S. 384 (1998) (holding that the district court's CIPA substitutions "protected Rezaq's rights very effectively"); *United States v. Collins*, 603 F. Supp. 301, 303 (S.D. Fla. 1985) (ruling that CIPA's substitution provisions do not unconstitutionally interfere with the accused's Sixth Amendment right to the compulsory process of witnesses). Limited disclosure and substitutes include:

a) Deletion of specific items of classified information from documents to be made available to an accused;

b) Substitution of a portion or summary of the information for such documents;

c) Substitution of a statement admitting relevant facts, unless the judge determines that the classified information itself is necessary.

d) In *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004), the appellant filed a writ of habeas corpus *ad testificandum* to obtain the trial testimony

of enemy combatant witnesses being held overseas by the United States. While agreeing with the appellant that the witnesses were necessary and material to his defense, the court held that it was possible to craft adequate substitutes for their testimony that would balance the government's national security interests with the appellant's constitutional rights. The court recommended a process in which the defense would identify substitutions, the government would object and propose additional information, and the district court would then compile an appropriate set of substitutions.

8. Requirement for Accused to Provide Notice of Intent to Disclose. MRE 505(h) requires the accused to provide notice of his intent to disclose or cause the disclosure in any manner of classified information as follows:

   a) Notice must be in writing and shall include a brief description of the classified information;

   b) The accused has a continuing duty to notify;

   c) The accused may not disclose any information until notice has been given;

   d) If the accused fails to comply, the judge may preclude disclosure of the information or may prohibit the examination by the accused of any witness respecting such information.

9. Classified Information and the Attorney-Client Privilege. In *United States v. Schmidt*, 60 M.J. 1 (2004), the CAAF held that MRE 505(h)(1), which requires the accused to give notice to the trial counsel of an intention to disclose classified information, applies only when the defense is *seeking* classified information from the Government or when it reasonably expects to disclose classified information during a proceeding. MRE 505(h)(1) does not require an accused to engage in adversarial litigation with the opposing side as a precondition to discussing with a defense counsel who has a security clearance classified information *already known to the accused* because of previous proper access. The MJ must balance the government's interest in protecting national security information with the accused's right to effective assistance of counsel in preparing a defense and the attorney-client privilege.

10. *In-Camera* Proceedings. MRE 505(i) contains the procedures for an *in-camera* review of classified evidence in an Article 39(a) session closed to the public. Similar procedures have been validated under CIPA. *See United States v. Sarkissian*, 841 F.2d 959, 965-66 (9th Cir. 1988). The following procedures apply:

    a) Government must make motion for *in-camera* proceeding;

    b) Government must submit classified evidence and an affidavit *ex parte* for the consideration of the military judge only. Affidavit must demonstrate that disclosure of the information reasonably could be expected to cause damage to the national security.

    c) At the *in-camera* proceeding, the Government will provide the accused with notice of the information that will be discussed. If the information has previously been made available to the accused, it will be identified; if not, it will be described in generic form as approved by the military judge.

    d) Information will not be disclosed at trial unless it is:

(1) Relevant and necessary to an element of the offense or a legally cognizable defense;

(2) Is otherwise admissible in evidence.

e) The military judge can permit alternatives to full disclosure of the evidence unless the classified information itself is necessary to afford the accused a fair trial.

f) If the MJ determines that the information is necessary for a fair trial but the government continues to object to disclosure, the MJ may employ sanctions as follows:

(1) Striking or precluding the testimony of a witness;

(2) Declaring a mistrial;

(3) Finding against the government on issues to which the evidence is relevant and material to the defense;

(4) Dismissing charges, with or without prejudice;

(5) Dismissing charges or specification or both to which the information pertains.

11. Admitting Classified Information at Trial. MRE 505(j).

a) Evidence may be admitted without change in its classification status;

b) MJ may order admission of only part of a writing, recording, or photograph to prevent unnecessary disclosure of classified information;

c) MJ may permit proof of the contents of a writing, recording, or photograph that contains classified information without requiring admission of the original or a duplicate;

d) During the taking of testimony, MJ will take suitable actions to ensure that questions or lines of inquiry that may require a witness to disclose classified information not previously found relevant and necessary do not result in the improper compromise of classified information.

12. MJ may order closed sessions of the court-martial that discuss classified material.

VI. CHECKLIST FOR CLASSIFIED CASE IN AN IDEAL WORLD[3]

A. The Beginning Stages:

[3] This journey through the stages of handling a classified case in an ideal world is courtesy of LTC Timothy MacDonnell, formerly of the U.S. Army Trial Counsel Assistance Program (TCAP).

1. A Crime regarding Classified Information is discovered.
2. The classified information is protected and the breach in security is closed.
3. Special Security Officer is informed of the possible breach (Navy--notifies Det. 17 and NCIS).
4. Law Enforcement begins to investigate.
5. The suspected classified information is sent to the various "equity holders."
6. The "equity holders" screen the information to determine potential level of classification.
7. The information that is suspected of being classified undergoes a classification review.
8. Once the review is completed the OCA verifies the findings of the review and determines whether release should be permitted.
9. In instances where the privilege under MRE 505 is to be invoked memos from OCAs articulating the danger of release of the classified information are produced.

B. Preferral

1. Charges are preferred.
2. Panel is reviewed for security clearances.
3. Government secures an interim security clearance for accused and clearances for defense counsel.

C. Article 32

1. An investigation security officer (ISO) and subject matter expert (SE) is assigned to the Article 32 IO.
2. Convening Authority issues a protective order to defense.
3. Article 32 begins with a Grunden hearing (to determine whether the Art. 32 should be open or closed).
4. 32 completed.
5. Charges are referred.

D. Trial.

1. Court has Court Security Officer and a Subject Matter Expert regarding classified information assigned. Note: you should consider appointing a security expert to the defense team.
2. Government or defense moves under MRE 505 for a 39a session to address issues regarding classified material.
3. Court Security Officer insures that the courtroom is prepared should a closed session be necessary-Judge, counsel, accused, bailiff, escorts have clearances; courtroom is appropriate for the presentation of evidence; etc. (Court Reporter may want to use a different machine for recording).
4. Trial has a Grunden hearing.
5. The Court makes specific findings regarding classified issues.

E. The Navy Code 17 publication contains extremely thorough and useful checklists for the SJA, trial counsel, and military judge. **Read it!**

VII. CONCLUSION

A. Classified cases are not easy, but early coordination and planning will help you set the conditions for success.

B. Do not be intimidated by MRE 505 or CIPA: they are your (obnoxious) friends.

C. Remember: the OCA controls the information, and if you can't gain release, you may have to dismiss in the interests of justice.

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TAB P

URINALYSIS

Table of Contents

I. INTRODUCTION. 1

II. SCIENTIFIC ASPECTS OF URINALYSIS PROGRAM. 1

III. COMMANDERS' OPTIONS. 6

IV. CONSTITUTIONALITY OF URINALYSIS PROGRAM. 6

V. LIMITED USE POLICY. 10

VI. PROSECUTING URINALYSIS CASES. 11

VII. DEFENDING URINALYSIS CASES. 16

MAJ ANDREW D. FLOR

JANUARY 2011

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URINALYSIS

Outline of Instruction

I. INTRODUCTION.

A. References.

1. U.S. DEP'T OF DEF., DIR. 1010.1, MILITARY PERSONNEL DRUG ABUSE TESTING PROGRAM (9 Dec. 1994) (C1, 11 Jan. 1999).

2. U.S. DEP'T OF DEF., INSTR. 1010.16, TECHNICAL PROCEDURES FOR THE MILITARY PERSONNEL DRUG ABUSE TESTING PROGRAM (9 Dec. 1994).

3. U.S. DEP'T OF ARMY, REG. 600-85, THE ARMY SUBSTANCE ABUSE PROGRAM (2 Feb. 2009) (Rapid Action Revision, 2 Dec. 2009) [hereinafter AR 600-85].

4. Army Center for Substance Abuse Programs, Drug Testing Branch, Alexandria, VA. http://www.acsap.army.mil/. Telephone: (703) 681-5566.

II. SCIENTIFIC ASPECTS OF URINALYSIS PROGRAM.

A. What Urinalysis Test Proves.

1. Urine test proves only past use; it proves that drug or drug metabolites (waste products) are in the urine.

2. Urine test does not prove:

a. Impairment.

b. Single or multiple usages.

c. Method of ingestion.

d. Knowing ingestion. In the past ten years, there have been dramatic changes regarding the use of the permissive inference for proof of "knowing" ingestion. Previously, the presence of an amount of drug metabolite allowed a permissible inference that the accused knowingly consumed a particular drug. *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988). The government's burden was made considerably heavier (to raise the permissible inference) after *United States v. Campbell*, 50 M.J. 154 (C.A.A.F. 1999), *supplemented on reconsideration*, 52 M.J. 386 (C.A.A.F. 2000). The CAAF later backed off of this heavier burden in *United States v. Green*, 55 M.J. 76 (C.A.A.F. 2001). In *Green*, the CAAF emphasized the importance of the Military Judge as the "gatekeeper to determine whether . . . expert testimony has established an adequate foundation with respect to reliability and relevance." *Id*. at 80. Some of the more troubling "factors" announced by the court in *Campbell* are not mandatory but may still be applicable in urinalysis cases dealing with novel testing methods or procedures. *Id*. at 80.

B. Drugs Tested.

MAJ ANDREW D. FLOR
JANUARY 2011

1. Marijuana (THC metabolite)

2. Cocaine (BZE metabolite)

3. Other drugs tested (some only upon request):

   a. LSD – removed from the testing program in 2006. Still periodically screened for under the "prevalence program."

   b. Opiates (morphine, codeine, 6-MAM metabolite of heroin)

   c. PCP

   d. Amphetamines; including designer amphetamines MDMA, MDA, MDEA

   e. Oxymorphone/Oxycodone

   f. Anabolic steroids – testing only done by UCLA.

C. Drug Metabolites.

1. Marijuana.

   a. Main psychoactive ingredient is delta 9-tetrahydrocannabinol (short name: delta-9 THC).

   b. Main metabolite (waste product) of delta-9 THC is delta 9-tetrahydrocannabinol-9-carboxylic acid (short name: 9-carboxyl THC). This is the metabolite tested for within DOD.

   c. 9-carboxyl THC is not psychoactive, and is not the only metabolite. 10-90% percent of the total number of metabolites are 9-carboxyl THC.

   d. 9-carboxyl THC is found in urine only when human body metabolizes marijuana; the human body cannot naturally produce 9-carboxyl THC.

2. Cocaine.

   a. Main metabolite is benzoylecgonine (BZE).

      (1) This is the metabolite tested for within DOD.

      (2) BZE is found in urine when human body metabolizes cocaine; it cannot be naturally produced by human body, but can be produced by introducing cocaine directly into urine (no metabolizing needed).

   b. Secondary metabolite is ecgonine methyl ester (EME).

      (1) This metabolite is not tested for within DOD.

      (2) EME dissipates from the body more quickly than BZE.

      (3) EME is found in urine when human body metabolizes cocaine; it cannot be naturally produced by human body and cannot be produced by introducing cocaine directly into urine.

D. Army Testing Procedures. *See* AR 600-85, Appendix E for full procedures.

1. Unit Prevention Leader (UPL).

   a. Prepares urine sample bottle by placing Soldier's social security number, Base Area Code (BAC), and date on bottle.

   b. Prepares DD Form 2624 (chain of custody form) listing up to 12 samples on form.

c. Prepares urinalysis ledger listing all samples.

d. Directs the Soldier to verify his information on the bottle label, unit ledger, and DD form 2624. The Soldier will then initial the bottle label. His/her initials are verification.

e. Removes a new collection bottle from the box in front of the Soldier and replace it with the Soldier's military ID card. The UPL will then affix the label to the bottle, in full view of both the Soldier and the observer, and hand it to the Soldier.

2. Observer.

a. Directly observes Soldier provide a sample of at least 30 mL (approximately half the specimen bottle) and place cap on bottle. (The observer must see urine leaving the Soldier's body and entering the specimen bottle).

b. Return with the Soldier to the UPL's station. The observer will keep the bottle in sight at all times.

c. Observes Soldier return the bottle to UPL.

3. UPL/Observer/Soldier.

a. UPL affixes red tamper evident tape seal across the bottle cap and then initials the bottle label.

b. UPL places the specimen in the collection box, removing the Soldier's ID card.

c. Observer signs the unit ledger in front of both the observer and UPL and Soldier to verify he/she complied with the collection process and directly observed the Soldier provide the sample and maintained eye contact with the specimen until it was placed in the collection box.

d. Solider will then sign the unit ledger in front of the observer and UPL verifying that he/she provided the urine in the specimen bottle and that he/she observed the specimen being sealed with tamper evident tape and placed into the collection box.

e. UPL will return the Soldier's ID card and release him/her from testing.

f. Once the UPL accepts a completed sample the specimen chain of custody begins. The specimens are sent to the drug testing laboratory.

4. Drug Testing Coordinator.

a. Receives samples from UPL (usually the same day as the sample collection). Ensures samples and forms are in proper order and signs chain of custody form.

b. Ensures bottles are sealed and mails them to laboratory for testing.

E. Testing Facilities Used by Army.

1. Army Forensic Toxicology Drug Testing Laboratory, Tripler Medical Center, Honolulu, HI. Telephone: (808) 433-5176.

2. Army Forensic Toxicology Drug Testing Laboratory, Fort Meade, MD. Telephone: (301) 677-7085.

3. The Army also utilizes other DoD testing facilities.

F. Urinalysis Tests Used.

1. Laboratory tests:

a. Screening test: immunoassay (KIMS Technology) or "Enzyme Multiplied Immunoassay Technique" (E.M.I.T. - Syva Co.) depending on the drug being tested.

(1) Used at Army and Air Force laboratories. Civilian samples are tested at Fort Meade, MD.

(2) Test attaches chemical markers to metabolites and measures transmission of light through sample. Every positive screened twice.

(3) Test is not 100% accurate, but screens out most negatives.

b. Confirming test: gas chromatography/mass spectroscopy (GC/MS).

(1) Used at Army and Air Force laboratories.

(2) GC test measures period of time molecules in sample take to traverse a tube; drug metabolites traverse tube in characteristic period of time.

(3) MS test fragments molecules in sample and records the fragments on spectrum. Metabolite fragments are unique.

(4) Test is 100% accurate.

G. Cut-off Levels. DOD and urine testing laboratories have established "cut-off" levels. Samples which give test results below these cut-off levels are reported as negative. A sample is reported as positive only if it gives test results above the cut-off level during both the screening (every positive screened twice) and the confirming test.

1. Cut-off levels for screening tests (EMIT and IA):

Drug	*ng/ml*
Marijuana (THC)	50
Cocaine (BZE)	150
Amphetamine/Methamphetamine	500
Designer Amphetamines (MDMA, MDA, MDEA)	500
Opiates	
Morphine/Codeine	2000
Oxycodone/Oxymorphone	100
6-monoacetylmorphine (heroin)	10
Phencyclidine (PCP)	25

2. Cut-off levels for GC/MS test:

Drug	*ng/ml*
Marijuana (THC)	15
Cocaine (BZE)	100
Amphetamine/Methamphetamine	100
Designer Amphetamines (MDMA, MDA, MDEA)	500

Opiates	
Morphine	4000
Codeine	2000
Oxycodone/Oxymorphone	100
6-monoacetylmorphine (heroin)	10
Phencyclidine (PCP)	25

H. Drug Detection Times.

1. Time periods which drugs and drug metabolites remain in the body at levels sufficient to detect are listed below. Source: U.S. Army Drug Oversight Agency & Technical Consultation Center, Syva Company, San Jose, California, telephone: 1-800-227-8994 (Syva).

Drug	*Approximate Retention Time*
Marijuana (THC) (Half-life 36 hours)	
Acute dosage (1-2 joints)	2-3 days
Marijuana (eaten)	1-5 days
Moderate smoker (4 times per week)	5 days
Heavy smoker (daily)	10 days
Chronic smoker	14-18 days (may exceed 20 days)
Cocaine (BZE) (Half-life 4 hours)	2-4 days
Amphetamines	1-2 days (2-4 days if heavy use)
Barbiturates	
Short-acting (e.g. Secobarbital)	1 day
Long-acting (e.g. Phenobarbital)	2-3 weeks
Opiates	2 days
Phencyclidine (PCP)	14 days

2. Factors which affect retention times:

   a. Drug metabolism and half-life.

   b. Donor's physical condition.

   c. Donor's fluid intake prior to test.

   d. Donor's method and frequency of ingestion of drug.

3. Detection times may affect:

   a. Probable cause. Information concerning past drug use may not provide probable cause to believe the Soldier's urine contains traces of drug metabolites, unless the alleged drug use was recent.

b. Jurisdiction over reservists. Reservists may not be convicted at a court-martial for drug use unless use occurred while on federal duty. *United States v. Chodara*, 29 M.J. 943 (A.C.M.R. 1990) (urine sample testing positive for cocaine less than 36 hours after reservist entered active duty was insufficient to establish jurisdiction). *But see United States v. Lopez*, 37 M.J. 702 (A.C.M.R. 1993) (court, in dicta, questioned the validity of *Chodara* and stated that body continues to "use" drugs as long as they remain in the body).

III. COMMANDERS' OPTIONS.

A. Courts-Martial. Court-martial procedures are complex and the Military Rules of Evidence apply.

B. Nonjudicial Punishment.

1. Nonjudicial punishment procedures are relatively simple. *See* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE ch. 3 (16 Nov. 2005) [hereinafter AR 27-10].

a. Military Rules of Evidence do not apply. AR 27-10, para. 3-18j.

b. Burden of proof is beyond a reasonable doubt. AR 27-10, para. 3-18l.

2. Reservists. Reservists may not receive nonjudicial punishment under Article 15 for drug use unless use occurred while on federal duty. *See* Article 2(d)(2) (reserve component personnel may be involuntarily recalled to active duty for nonjudicial punishment only with respect to offenses committed while on federal duty) and *United States v. Chodara*, 29 M.J. 943 (A.C.M.R. 1990).

C. Administrative Separations.

1. All Soldiers who are identified as illegally abusing drugs will be **processed** for administrative separation. AR 600-85, para. 10-6. Mandatory processing does not mean mandatory separation. Commander may recommend retention if warranted.

2. Rules at administrative separations are simpler than at a courts-martial. *See* U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (2 Oct. 2006) [hereinafter AR 15-6].

a. Military Rules of Evidence do not apply. AR 15-6, para. 3-7a.

b. Burden of proof is a preponderance of the evidence. AR 15-6, para. 3-10b.

3. Reservists. Reservists may be separated for drugs even though use did not occur while on federal duty. *See* U.S. DEP'T OF ARMY, REG. 135-178, ENLISTED ADMINISTRATIVE SEPARATIONS (13 Mar. 2007) (Rapid Action Revision, 27 Apr. 2010) and U.S. DEP'T OF ARMY, REG. 135-175, SEPARATION OF OFFICERS (28 Feb. 1987) (Rapid Action Revision, 27 Apr. 2010).

IV. CONSTITUTIONALITY OF URINALYSIS PROGRAM.

A. Probable Cause Urinalysis.

1. A urinalysis test is constitutional if based upon probable cause. Mil. R. Evid. 312(d) and 315.

2. A positive urinalysis provides probable cause to seize hair sample for drug testing. *United States v. Bethea*, 61 M.J. 184 (C.A.A.F. 2005).

3. A warrant or proper authorization may be required.

a. *Schmerber v. California*, 384 U.S. 757 (1966). Warrantless blood alcohol test was justified by exigent circumstances.

b. *United States v. Pond*, 36 M.J. 1050 (A.F.C.M.R. 1993). Warrantless seizure of urine to determine methamphetamine use was not justified by exigent circumstances because methamphetamine does not dissipate quickly from the body.

B. Inspections.

1. A urinalysis is constitutional if it is part of a valid random inspection. Mil. R. Evid. 313(b); *United States v. Gardner*, 41 M.J. 189 (C.M.A. 1994). The fact that the results of urinalysis inspections are made available to prosecutors did not make the inspection an unreasonable intrusion. (*Note*: This ruling has not been challenged since the U.S. Supreme Court's decision in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), which found a similar policy unconstitutional). *See also Skinner v. Railway Labor Executives*, 489 U.S. 602 (1989) (urine tests of train operators involved in accidents are reasonable searches) and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (urine testing of employees who apply to carry firearms or be involved in drug interdiction does not require a warrant). *Chandler v. Miller*, 520 U.S. 305 (1997) (to conduct urinalysis without probable cause, must show "special need").

2. Authority to order urinalysis inspections. *United States v. Evans*, 37 M.J. 867 (A.F.C.M.R. 1993). Commander of active duty squadron to which accused's reserve unit was assigned had authority to order urinalysis inspection. *But see United States v. DiMuccio*, 61 M.J. 588 (A.F. Ct. Crim. App. 2005) (Commander of 162nd FW, a national guard unit, had no authority to order accused to submit to urinalysis because accused was at the time in "Title 10" status vice "Title 32" status even though accused was still part of 162nd FW); *United States v. Miller*, 66 M.J. 306 (C.A.A.F. 2008) (where urinalysis which was the product of an order issued by a civilian Air Reserve Technician who did not have command authority to issue the order, and thus was not incident to command, was unlawful).

3. Subterfuge under Mil. R. Evid. 313(b).

a. Report of Offense. *United States v. Shover*, 45 M.J. 119 (C.A.A.F. 1996). Marijuana was planted in an officer's briefcase. During the investigation to find the "planter," the commander ordered a urinalysis. The accused tested positive for methamphetamines. Although the test triggered the subterfuge rule of Mil. R. Evid. 313(b), the government met its clear and convincing burden. The primary purpose for the inspection was to end the finger pointing and hard feelings caused by the investigation. The judge ruled the primary purpose was to "resolve the questions raised by the incident, not to prosecute someone." The CAAF affirmed.

b. Knowledge of subordinates.

(1) *United States v. Taylor*, 41 M.J. 168 (C.M.A. 1994). Urinalysis test results were properly admitted, even though the urinalysis inspection followed reports that accused had used drugs and even though accused's section was volunteered for inspection on basis of reports. Commander who ordered inspection was ignorant of reports. *But see United States v. Willis*, No. 96-00192, 1997 WL 658748 (N-M. Ct. Crim. App. Feb. 21, 1997) (unpublished).

(2) *United States v. Campbell*, 41 M.J. 177 (C.M.A. 1994). Urinalysis test results were improperly admitted where urinalysis inspection was conducted because first sergeant heard rumors of drug use in unit and selected accused to be tested based on his suspicions. Judge erred in finding that government proved, by clear and convincing evidence, that inspection was not subterfuge for criminal search.

c. Primary Purpose. *United States v. Brown*, 52 M.J. 565 (A. Ct. Crim. App. 1999). Several members of unit allegedly were using drugs. Because of this, the commander ordered random 30% inspection. The commander's primary purpose was because he "wanted to do a large enough sampling to validate or not validate that there were drugs being used in his company, and he additionally was very concerned about the welfare, morale, and safety of the unit caused by drugs." This met the primary purpose test of Mil. R. Evid. 313(b).

4. Targeting Soldiers for inspection. *United States v. Moore*, 41 M.J. 812 (N-M. Ct. Crim. App. 1995). Military judge improperly excluded urinalysis results where accused was placed in nondeployable "legal" platoon after an Article 15, and regimental commander inspected accused's platoon more frequently than others. Commander did not target. More frequent tests were based on disciplinary problems.

C. Consent Urinalysis.

1. A urinalysis is constitutional if obtained with consent. Mil. R. Evid 314(e).

2. Consent must be voluntary under totality of the circumstances. *United States v. White*, 27 M.J. 264 (C.M.A. 1988).

a. Consent is involuntary if commander announces his intent to order the urine test should the accused refuse to consent. Mil. R. Evid. 314(e)(4).

b. Consent is voluntary if the commander does not indicate his "ace in the hole" (authority to order a urinalysis). *United States v. White*, 27 M.J. 264 (C.M.A. 1988). *See also United States v. Whipple*, 28 M.J. 314 (C.M.A. 1989). Consent was voluntary where accused never asked what options were and commander never intimated that he could order him to give a sample. *See also United States v. Vassar*, 52 M.J. 9 (C.A.A.F. 1999) (permissible to use trickery to obtain consent as long as consent was not coerced).

c. If Soldier asks "what if I do not consent?"

(1) *United States v. Radvansky*, 45 M.J. 226 (C.A.A.F. 1996). Totality of the circumstances, not a bright-line rule, controls consent to urinalysis in the face of a command request. Notwithstanding First Sergeant's comment that accused could "give a sample of his own free will or we could have the commander direct you to do so," accused voluntarily consented to urinalysis. The mere remark that a commander can authorize a search does not render all subsequent consent involuntary.

(2) *But see United States v. White*, 27 M.J. 264 (C.M.A. 1988). Consent is involuntary if commander replies that he or she will order urine test.

d. Consent is voluntary if commander meaningfully explains the consequences of a consent sample versus a fitness for duty or probable cause sample. *United States v. White*, 27 M.J. 264, 266 (C.M.A. 1988) (dicta). *See also United States v. McClain*, 31 M.J. 130 (C.M.A. 1990).

3. Probable cause may cure invalid consent. *United States v. McClain*, 31 M.J. 130 (C.M.A. 1990). Urinalysis was inadmissible where consent was obtained involuntarily even though commander had probable cause to order urinalysis. However, the Court stated that probable cause to order urine test may provide an alternative basis upon which to admit urine sample obtained through invalid consent where:

a. Commander deals directly with accused in requesting consent, and would have authorized seizure of urine based on probable cause but for belief that he or she had valid consent; or,

b. Commander actually orders urinalysis based on probable cause, but relaying official asks for consent (which later is found to be invalid).

4. Requesting consent is not interrogation under Article 31, UCMJ, or the Fifth Amendment. *United States v. Schroeder*, 39 M.J. 471 (C.M.A. 1994). Civilian police officer apprehended accused for suspected use of drugs and later asked if he would consent to a urinalysis. This question was not custodial interrogation under the Fifth Amendment.

5. Attenuation of taint from prior unwarned admissions. *United States v. Murphy*, 39 M.J. 486 (C.M.A. 1994). Accused's consent to urinalysis test was not tainted by prior admissions obtained prior to rights warnings. Prior questioning was not coercive and consent was given voluntarily.

6. *Consent.* It's OK to Trick. *United States v. Vassar*, 52 M.J. 9 (C.A.A.F. 1999). NCO told accused he needed to consent to urinalysis because of a head injury. Permissible to use trickery to obtain consent as long as it does not amount to coercion.

D. Medical Urinalysis. A urinalysis is constitutional if conducted for a valid medical purpose. Mil. R. Evid. 312(f).

1. *United States v. Fitten*, 42 M.J. 179 (C.A.A.F. 1995). Forced catheterization of accused did not violate the Fourth Amendment or Mil. R. Evid. 312(f) where it was medically necessary to test for dangerous drugs because of accused's unruly and abnormal behavior. Diversion of a part of the urine obtained from medical test to drug laboratory to build case against accused was permissible. *But see United States v. Stevenson*, 66 M.J. 15 (C.A.A.F. 2008), which overrules *Fitten* ". . . to the extent that [it] . . . stand[s] for the proposition that there is a *de minimus* exception to the Fourth Amendment or to Mil. R. Evid. 312."

2. In the Army, most medical tests may only be used for limited purposes. AR 600-85, para. 10-12, and Table 10-1.

E. Fitness for Duty Urinalysis.

1. A commander may order a urinalysis based upon reasonable suspicion to ensure a Soldier's fitness for duty even if the urinalysis is not a valid inspection and no probable cause exists. Results of such tests may only be used for limited purposes. *United States v. Bair*, 32 M.J. 404 (C.M.A. 1991). *See* AR 600-85, para. 10-12(a)(1).

2. Reasonable suspicion required for a fitness for duty urinalysis is the same as reasonable suspicion required for a "stop and frisk" under the Fourth Amendment. *United States v. Bair*, 32 M.J. 404 (C.M.A. 1991).

F. Use in Rebuttal.

1. *United States v. Graham*, 50 M.J. 56 (C.A.A.F. 1999). Military Judge erred in allowing single rebuttal question by trial counsel about a prior positive marijuana result four years earlier, of which accused was acquitted in court-martial, after accused stated he was "flabbergasted" at having tested positive. *Accord United States v. Roberts*, 52 M.J. 333 (C.A.A.F. 2000). *But see* United States v. Tyndale, 56 M.J. 209 (C.A.A.F. 2001).

2. *United States v. Matthews*, 53 M.J. 465 (C.A.A.F. 2000). The CAAF holds that extrinsic evidence may not be used to rebut good military character.

G. Results of Violation of Constitution.

1. Administrative Separations. Evidence obtained in violation of the Constitution is admissible, unless it was obtained in bad faith (*i.e.* the officials conducting the urinalysis knew it was unlawful). A urinalysis conducted in bad faith is admissible only if the evidence would inevitably have been discovered. AR 15-6, para. 3-7c(6).

2. Nonjudicial Punishment under Article 15. Evidence obtained in violation of the Constitution is admissible. AR 27-10, para. 3-18j. However, Soldier may demand trial by court-martial. AR 27-10, para. 3-18d.

3. Court-martial. Evidence obtained in violation of the Constitution is inadmissible. *See* Mil. R. Evid. 311.

V. LIMITED USE POLICY.

A. Limited Use.

1. Under the limited use policy, the results of the following tests may not be used as a basis for an Article 15 or court-martial or to determine the "character of service" in an administrative separation action. AR 600-85, para. 10-14c.

a. Competence for Duty Tests. AR 600-85, para. 10-12a(1).

b. Medical Tests. The limited use policy applies to tests obtained as a result of Soldier's emergency medical care for an actual or possible drug overdose, unless such treatment resulted from apprehension by military or civilian law enforcement officials. AR 600-85, para. 10-12a(3).

2. If drug use discovered during a limited use test is introduced during an administrative separation, the Soldier must receive an honorable discharge.

3. The limited use policy does not preclude use of limited use tests in rebuttal or initiation of disciplinary action based on independently derived evidence. AR 600-85, para. 10-12d(1).

4. A fitness for duty urinalysis or medical test may serve as the basis for administrative action, to include requesting a second urinalysis. In *United States v. Williams*, 35 M.J. 323 (C.M.A. 1992), the exclusionary rule did not preclude admission of accused's incriminating statements or consensual second urinalysis even though the questioning and the request for the second urinalysis were based upon prior positive fitness for duty urinalysis. The taint from the fitness for duty urinalysis was sufficiently attenuated.

B. Full Use. The limited use policy does not apply to the types of tests listed below. These tests may be used at courts-martial, Article 15 proceedings, and administrative separations:

1. Probable cause tests.

2. Inspections.

3. Consent tests. In *United States v. Avery*, 40 M.J. 325 (C.M.A. 1994), the accused was not entitled to protection of Air Force limited use policy, which precludes the use of certain evidence derived from a service member's voluntary self-identification as a drug abuser. The accused voluntarily consented to a urinalysis after his wife revealed his drug use to his chain of command. The accused never admitted using drugs.

4. Medical tests which are **not** covered by the limited use policy described above.

a. Obtained as a result of Soldier's emergency medical care for an actual or possible drug overdose, where the treatment resulted from apprehension by military or civilian law enforcement officials. AR 600-85, para. 10-12a(3).

b. Routine tests directed by a physician which are not the result of suspicion of drug use and not taken in conjunction with ASAP. AR 600-85, para. 10-12a(3).

C. Command Directed Tests. Be wary of the term "command directed" urinalysis. The ability or inability to use the test results for UCMJ or separation purposes depends on the type of test, not on whether or not it is labeled command directed. In *United States v. Streetman*, 43 M.J. 752 (A.F. Ct. Crim. App. 1995), the accused was convicted of marijuana use. The court held that the letter reissuing the original inspection order but labeled as "Commander Directed" (Air Force equivalent to fitness for duty) and ordering accused to submit to drug testing did not transform prior legitimate random urinalysis inspection into a fitness for duty test that would preclude the admission of drug test results.

VI. PROSECUTING URINALYSIS CASES.

A. Procedures for Taking Test.

1. Observation During Testing. *Unger v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989). Direct observation of female officer providing sample by female enlisted person at a distance of eighteen inches did not make collection of urine unreasonable.

2. Refusal to Provide Sample. *United States v. Turner*, 33 M.J. 40 (C.M.A. 1991). Accused's submission of toilet water as urine sample did not constitute obstruction of justice, but could have been charged as disobedience of an order.

3. Inspection of AWOL (UA) Personnel.

a. Soldiers who are absent without leave may be subjected to compulsory urinalysis testing pursuant to command policy to inspect the urine of such Soldiers. *Cf. United States v. Bickel*, 30 M.J. 277 (C.M.A. 1990) (compelling Soldiers who previously tested positive for drug use to submit to second urinalysis is a proper inspection).

b. Such an inspection must be conducted in accordance with command policy.

(1) *United States v. Daskam*, 31 M.J. 77 (C.M.A. 1990). Accused, who was late for duty, was not an unauthorized absentee within meaning of policy requiring unauthorized absentees to submit to urinalysis; test of accused's urine was not a proper inspection.

(2) *United States v. Patterson*, 39 M.J. 678 (N.M.C.M.R. 1993). Testing of Soldier returning from unauthorized absence was not a proper inspection because it was not conducted in accordance with instruction requiring such inspections. Commander who ordered test did so based on the "seriousness" of the absence, rather than on a random basis.

4. Retesting Soldiers. Requiring retesting, during next random urinalysis, of all Soldiers who tested positive during previous urinalysis is a proper inspection.

a. *United States v. Bickel*, 30 M.J. 277 (C.M.A. 1990). Commander's policy letter which required retesting of Soldiers who were positive on previous urinalysis was proper.

b. *United States v. Ayala*, 69 M.J. 63 (C.A.A.F. 2010). Commander's policy letter required "all members whose urine tests positive for illegal drugs to provide another sample for testing by the end of the first duty day following receipt of a positive test result." Despite the SJA's advice that stated the policy would "decrease litigation risks and costs, and potentially aid in swifter judicial action," the commander's stated intent of promoting "security, military fitness, and good order and discipline . . . and not a criminal investigative tool," showed that the policy was a proper inspection under Mil. R. Evid. 313.

5. Retesting Samples. Selection of negative samples for additional testing is improper unless done on a random basis. *United States v. Konieczka*, 31 M.J. 289 (C.M.A. 1990). Installation alcohol and drug control officer's decision to select urine sample which had pre-tested negative for further testing at drug laboratory based on belief that sample might test positive constituted unreasonable inspection.

6. Deviations in Procedures.

a. Deviations from regulations generally do not affect admissibility of test results. *United States v. Pollard*, 27 M.J. 376 (C.M.A. 1989); *United States v. Timoney*, 34 M.J. 1108 (A.C.M.R. 1992).

b. Gross deviations from urinalysis regulation may allow exclusion of positive test results. *United States v. Strozier*, 31 M.J. 283 (C.M.A. 1990).

c. Accused randomly selected by computer for urinalysis testing as allowed by the applicable Air Force Instruction. Method was proper even if there were minor administrative deviations. *United States v. Beckett*, 49 M.J. 354 (C.A.A.F. 1998).

B. Proving Knowing Ingestion of Drugs.

1. To be guilty of wrongful use of drugs the accused must know that (1) he or she consumed the relevant substance; and, (2) the substance was contraband. *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988).

2. Presence of drug metabolite in urine permits permissible inference that accused knowingly used drug, and that use was wrongful. *United States v. Green*, 55 M.J. 76, 81 (C.A.A.F. 2001); *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988); *United States v. Alford*, 31 M.J. 814 (A.F.C.M.R. 1990).

3. Permissive inference of wrongfulness may be sufficient to support conviction despite defense evidence that ingestion was innocent. *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987) (permissive inference overcame accused's suggestion that wife may have planted marijuana in his food without his knowledge).

4. Ensure that the instruction on permissive inference as to knowledge and wrongfulness is not crafted in such a manner as to make it a mandatory presumption. A permissive inference is constitutional; a mandatory presumption is not. *United States v. Brewer*, 61 M.J. 425 (C.A.A.F. 2005) (instruction that military judge gave was confusing to the extent that it appeared to shift the burden to the accused to assert one of the three exceptions as to wrongfulness; findings and sentence set aside).

C. Use of Expert Testimony.

1. Expert testimony required at court-martial. Expert testimony is required to prove wrongful use of drugs; results of test alone (paper case) are inadequate. *United States v. Green*, 55 M.J. 76 (C.A.A.F. 2001); *United States v. Campbell*, 50 M.J. 154 (C.A.A.F. 1999), *supplemented on reconsideration*, 52 M.J. 386 (C.A.A.F. 2000); *United States v. Murphy*, 23 M.J. 310 (C.M.A. 1987).

a. Expert testimony must establish not only that the drug or metabolite was in the accused's body but that the drug or metabolite is not naturally produced by the body or any other substance but the drug in question. *United States v. Harper*, 22 M.J. 157 (C.M.A. 1986). In addition, for the permission inference of wrongfulness, the government may have to satisfy the three prongs of *United States v. Campbell*, 50 M.J. 154 (C.A.A.F. 1999), *supplemented on reconsideration*, 52 M.J. 386 (C.A.A.F. 2000) (at least in cases where novel testing procedures or methods were used).

b. Judicial notice is generally an inadequate substitute for expert testimony. *United States v. Hunt*, 33 M.J. 345 (C.M.A. 1991). *But cf. United States v. Green*, 55 M.J. 76, 81 (C.A.A.F. 2001); *United States v. Phillips*, 53 M.J. 758, 763 (A.F. Ct. Crim. App. 2000) (Chief Judge Young, concurring, argues that military judges should be able to take judicial notice of certain adjudicative facts in urinalysis cases).

c. Stipulations may be an adequate substitute for expert testimony.

(1) *United States v. Ballew*, 38 M.J. 560 (A.F.C.M.R. 1993). A stipulation of expected testimony that expert would testify that accused ingested cocaine was not a confessional stipulation. No providency inquiry was required before the stipulation could be received.

(2) *United States v. Hill*, 39 M.J. 712 (N.M.C.M.R. 1993). Evidence was insufficient to support conviction of use of marijuana where stipulations of fact, documentary evidence, and testimony failed to link positive urine sample to accused.

d. Expert evidence other than that used to meet the three-prong standard needs to meet evidentiary requirements of reliability and relevance. *United States v. Campbell*, 50 M.J. 154 (C.A.A.F. 1999), *supplemented on reconsideration*, 52 M.J. 386 (C.A.A.F. 2000), *citing Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993); *Kumho Tire C., Ltd. v. Carmichael*, 526 U.S. 137, 153–55 (1999). Although the three-prong standard announced in *Campbell* was watered-down in *United States v. Green*, 55 M.J. 76 (C.A.A.F. 2001), it may still be required in cases where novel testing methods or procedures were used.

2. Experts at counsel table. *United States v. Gordon*, 27 M.J. 331 (C.M.A. 1989). Government urinalysis expert may remain in courtroom to assist in explaining testimony while another government expert testifies about lab testing procedures.

3. "Non-expert" expert. *United States v. Smith*, 34 M.J. 200 (C.M.A. 1992). Allowing undercover agent to testify that he had never tested positive for drugs although he was often exposed to them was permissible to rebut accused's defense of passive inhalation.

4. Use and Choice of Experts. *United States v. Short*, 50 M.J. 370 (C.A.A.F. 1999). Defense counsel asked for an expert who was not employed by the DOD drug lab to assess chain of custody and procedures and to assist with scientific evidence. The defense also raised a passive inhalation defense. Military judge denied defense request to provide assistance. Defense failed to show that the case was not "the usual case." Accused is not entitled to independent, non-government expert unless there is a showing that the accused's case is not "the usual case." Available government expert from lab was sufficient to provide expert testimony on passive inhalation/innocent ingestion.

D. Sixth Amendment Confrontation Clause issue. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that a "testimonial" statement can only be admitted against an accused if the declarant is present at trial or there has been a prior opportunity for cross-examination.

1. *United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006). In the context of random urinalysis screening, where the lab technicians do not equate specific samples with particular individuals or outcomes, and the sample is not tested in furtherance of a particular law enforcement investigation, the data entries of the technicians are not "testimonial" in nature. Lab reports must meet reliability standard from *Ohio v. Roberts*, 448 U.S. 56 (1980).

2. *United States v. Harcrow*, 66 M.J. 154 (C.A.A.F. 2008). In the context of a probable cause seizure of items suspected to contain drug residue, where lab technicians know the items came from a "suspect," the data entries of the technicians are testimonial statements. Confrontation Clause must be satisfied.

3. *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009). In the context of a probable cause seizure of items suspected to contain drugs, where lab technicians are required by law to test the items and produce an "affidavit" for trial, those affidavits are testimonial. Absent a showing of unavailability and a prior opportunity to cross-examine, the lab technicians must be present to testify in court.

4. *United States v. Blazier*, 68 M.J. 439 (C.A.A.F. 2010). The cover page of a "litigation report" stating that a sample tested positive for a substance is testimonial for Confrontation Clause purposes. Decision on whether the testimony of an expert from the drug lab meets the Confrontation Clause delayed.

5. *United States v. Blazier II*, 69 M.J. 218 (C.A.A.F. 2010). The testimony of the expert from the drug lab does not satisfy the Confrontation Clause with regards to the cover page of the "litigation report." In future cases, the Confrontation Clause is satisfied only if the lab technician is subject to cross-examination or unavailable and subject to previous cross-examination. Drug lab experts may rely on machine generated data or testimonial hearsay in formulating their testimony, as long as the opinion they arrive at is their own. However, those experts may not circumvent the Confrontation Clause by just taking the stand and repeating the testimony of another person (such as the expected testimony of a lab technician).

E. Negative Urinalysis Results. A urine sample containing drug metabolites in concentrations below the regulatory cut-off level for positive results will be declared negative, even though the sample may indicate drug use.

1. Negative test results are usually inadmissible. *United States v. Johnston*, 41 M.J. 13 (C.M.A. 1994). Judge did not abuse discretion by excluding defense evidence of urinalysis test which was negative for the presence of marijuana three days after last charged use of marijuana. Admission of results of a negative, defense conducted, radioimmunoassay (RIA) test would have been too confusing. The proper testing methodology was GC/MS, and the RIA test showed the presence of marijuana (but below the cut-off level). The C.M.A. stated that the Mil. R. Evid. should be used to determine if negative test results are admissible and overruled *United States v. Arguello*, 29 M.J. 198 (C.M.A. 1989) (which prevented the government from using negative test results because such use was contrary to regulation).

2. Use of negative test results is permitted in the Coast Guard. *United States v. Ryder*, 39 M.J. 454 (C.M.A. 1994), *rev'd on other grounds*, 515 U.S. 177 (1995). Government's introduction of "negative" test results, which showed presence of marijuana, but at amount below cut-off, was not plain error. Results were used to corroborate testimony of witnesses who saw accused smoke marijuana and Coast Guard Regulation did not prohibit use of such test results.

F. Using Positive Test Results as Rebuttal Evidence.

1. *United States v. Graham*, 50 M.J. 56 (C.A.A.F. 1999). Accused testified that he was "flabbergasted" at having tested positive. Military Judge erred in allowing single rebuttal question by trial counsel about a prior positive marijuana result four years earlier, of which accused was acquitted in court-martial. The CAAF held that the prior positive marijuana result was not logically relevant: statistical probability is unknown as to whether accused might test positive twice within four years and there is no necessary logical connection between testing positive twice and being flabbergasted. *Accord United States v. Roberts*, 52 M.J. 333 (C.A.A.F. 2000). *But see* United States v. Tyndale, 56 M.J. 209 (C.A.A.F. 2001).

2. *United States v. Matthews*, 53 M.J. 465 (C.A.A.F. 2000). Accused tested positive for marijuana and was later given a command-directed urinalysis. At trial, the accused raised a good military character defense. The CAAF set aside the findings and sentence. The appellant was found guilty of a single specification of wrongful use of marijuana (between 1 and 29 April 1996). She testified that she did not use marijuana and that she did not know why she tested positive. The government then asked to use a subsequent command-directed urinalysis (conducted on 21 May 1996) for impeachment. The trial judge admitted the evidence for impeachment and ruled it was also admissible under Mil. R. Evid. 404(b) to show her prior use was knowing and conscious. The lower court found that her testimony raised the issue of innocent ingestion, but that it did not directly contradict that she knowingly used marijuana during the charged period. However, the lower court did find that the second urinalysis was relevant to the appellant's credibility and to rebut evidence of her good military character. The CAAF disagreed, finding that extrinsic evidence may not be used to rebut good military character.

G. *See generally* Captain David E. Fitzkee, *Prosecuting a Urinalysis Case: A Primer*, ARMY LAW., Sept. 1988, at 7, and Major R. Peter Masterton and Captain James R. Sturdivant, *Urinalysis Administrative Separation Boards in Reserve Components*, ARMY LAW., Apr. 1995, at 3.

VII. DEFENDING URINALYSIS CASES.

A. Defenses.

1. Passive inhalation. For this defense to be successful, a Soldier generally must have been exposed to concentrated drug smoke in a small area for a significant period of time. *See* Major Wayne E. Anderson, *Judicial Notice in Urinalysis Cases*, ARMY LAW., Sept. 1988, at 19.

2. Innocent ingestion.

a. *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987). Accused suggested wife planted marijuana in his food without his knowledge.

b. *United States v. Prince*, 24 M.J. 643 (A.F.C.M.R.1987). Accused's wife allegedly put cocaine in his drink without his knowledge to improve his sexual performance.

c. *United States v. Robertson*, 39 M.J. 211 (C.M.A. 1994). Accused's roommate testified that she put cocaine in beer which accused unwittingly drank. Government improperly cross-examined roommate on prior arrest for conspiracy and attempted burglary, but error was harmless.

3. Innocent inhalation.

a. *United States v. Perry*, 37 M.J. 363 (C.M.A. 1993). Accused's explanation that he unwittingly smoked a filtered cigarette laced with cocaine 28 hours before test was not credible, given expert's testimony that (1) accused would have to ingest an almost toxic dose of cocaine to achieve the 98,000 ng/ml test result his sample yielded, and (2) cocaine mixed with a cigarette would not work since cocaine will not vaporize or pass through a filter. Erroneous admission of evidence that accused acted as informant was harmless.

b. *United States v. Gilbert*, 40 M.J. 652 (N.M.C.M.R. 1994). Accused allegedly borrowed cigarettes from a civilian which, unknown to the accused, contained marijuana. At trial, the civilian refused to answer questions about what the cigarettes contained. Defense counsel was ineffective for not seeking to immunize the civilian.

4. Innocent absorption through contact with drugs on currency: unlikely to be a successful defense. *See* Mahmoud A. ElSohly, Ph.D., *Letter to the Editor: Urinalysis and Casual Handling of Marijuana and Cocaine*, 15 J. Analytical Toxicology 46 (1991).

5. Use of hemp related products. Hemp products come from the same plant as marijuana. *See* The Art of Trial Advocacy, *Tips in Hemp Product Cases*, ARMY LAW., Dec. 1998, at 30. Note: AR 600-85, para. 4-2p, prohibits the ingestion of products containing hemp and hemp oil.

6. Switched Samples ("chain of custody" broken).

a. *United States v. Gonzales*, 37 M.J. 456 (C.M.A. 1993). Where observer had no recollection of how the urine was transferred from one container to another, but testified that the urine was never out of her sight, military judge properly overruled chain of custody objection.

b. *United States v. Montijo*, No. 30385, 1994 WL 379793 (A.F.C.M.R. June 28, 1994) (unpublished). Government was not required to establish chain of custody for sample bottle from the time of its manufacture until its use.

7. Laboratory Error.

a. *Unites States v. Manuel*, 43 M.J. 282 (C.A.A.F. 1995). Urinalysis test results were improperly admitted where laboratory failed to retain accused's positive urine sample after test was completed. Regulation requiring retention of sample conferred substantive right upon accused. Conviction set aside.

b. Problems at Fort Meade Laboratory. On 24 July 1995, the commander of the Fort Meade Forensic Toxicology Drug Testing Laboratory discovered that lab technicians had violated procedures by switching quality control samples. All positive test results were still scientifically supportable, since the GC/MS tests were not affected.

8. Good Military Character. *United States v. Vandelinder*, 20 M.J. 41, 47 (C.M.A. 1985). Good military character is pertinent to drug charges against an accused because it may generate reasonable doubt in the fact-finder's mind.

9. Specific Instances of Non-Drug Use to Rebut Permissive Inference. In *United States v. Brewer*, 61 M.J. 425 (C.A.A.F. 2005), the defense requested four witnesses to testify that they knew MSgt Brewer and that they had never seen MSgt Brewer smoke marijuana as part of the defense "mosaic" innocent ingestion defense. The military judge denied the proffered witness testimony ruling that this was improper character evidence under Mil. R. Evid. 405, as specific instances of conduct of non-use. The CAAF held that the military judge erred in denying the requested witnesses because it was relevant. Findings and sentence set aside.

B. Defense Requested Tests.

1. Tests for EME metabolite of cocaine.

a. The government is not required to perform the test for EME metabolite when requested by defense if the sample tested positive for BZE and the chain of custody is not contested. *United States v. Metcalf*, 34 M.J. 1056 (A.F.C.M.R. 1992); *United States v. Pabon*, No. 29878, 1994 WL 108866 (A.F.C.M.R. Mar. 25, 1994) (unpublished), *aff'd*, 42 M.J. 404 (C.A.A.F. 1995).

b. Positive test result for BZE (metabolite tested for within DOD) is sufficient to support conviction for wrongful use of cocaine; test for EME metabolite unnecessary. *United States v. Thompson*, 34 M.J. 287 (C.M.A. 1992).

c. If tests for BZE and EME metabolites conflict, results may be insufficient to support conviction for wrongful use of cocaine. *United States v. Mack*, 33 M.J. 251 (C.M.A. 1991). Test results inadequate where test for BZE was positive and test for EME was negative.

2. Tests for contaminants. *United States v. Mosley*, 42 M.J. 300 (C.A.A.F. 1995). Military judge did not abuse his discretion by ordering retest of accused urine sample for BZE, EME, and raw cocaine. Such tests fall into a "middle ground" where military judges are not required to order such testing, but do not abuse their discretion if they do.

3. Blood tests and DNA tests. *United States v. Robinson*, 39 M.J. 88 (C.M.A. 1994). Military judge did not abuse discretion in denying defense request for "secretor test" to show accused was not source of positive sample where defense was unable to show discrepancies in collection or testing of sample.

4. Polygraphs. *United States v. Scheffer*, 523 U.S. 303 (1998). *Per se* rule against admission of polygraph evidence (Mil. R. Evid. 707) in court martial proceedings did not violate the Fifth or Sixth Amendment rights of accused to present a defense to charge that he had knowingly used methamphetamine. *Per se* rule serves several legitimate interests, such as ensuring that only reliable evidence is introduced at trial. *See also United States v. Williams*, 39 M.J. 555 (A.C.M.R. 1994) (Mil. R. Evid. 707 is unconstitutional), *set aside*, 43 M.J. 348 (C.A.A.F. 1995) (accused waived issue of admissibility of polygraph because he did not testify). *But see United States v. Wheeler*, 66 M.J. 590 (N-M. Ct. Crim. App. 2008).

5. Hair.

a. *United States v. Bush*, 47 M.J. 305 (C.A.A.F. 1997). Accused was convicted of use of cocaine. The CAAF held that mass-spectrometry hair analysis evidence was sufficiently reliable to be admitted into evidence in court-martial to establish cocaine use, even though there was some disagreement between experts about the procedure. *See also United States v. Cravens*, 56 M.J. 370 (C.A.A.F. 2002).

b. *United States v. Nimmer*, 43 M.J. 252 (C.A.A.F. 1995). Military judge precluded defense from introducing negative hair test results, because the test would not have ruled out a one-time use of cocaine. Case remanded for re-litigation of this issue using the proper standard of *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987) and *Daubert v. Merrell Dow Pharmeceuticals, Inc.*, 509 U.S. 579 (1993).

c. *See* Major Samuel J. Rob, *Drug Detection by Hair Analysis*, ARMY LAW., Jan. 1991, at 10. *See also United States v. Adens*, 56 M.J. 724 (A. Ct. Crim. App. 2002); *United States v. Cravens*, 56 M.J. 370 (C.A.A.F. 2002).

C. Experts.

1. Defense consultants. *United States v. Kelly*, 39 M.J. 235 (C.M.A. 1994). Defense counsel did not demonstrate necessity of presence of defense urinalysis consultant at trial where he had telephonic access to expert consultant and did not identify any irregularity in test.

2. Expert witnesses. *United States v. George*, 40 M.J. 540 (A.C.M.R. 1994). Military judge improperly precluded defense expert from testifying that the presence of cocaine on everyday objects may have led to contamination of the urine sample.

3. Choice of Experts. *United States v. Short*, 50 M.J. 370 (C.A.A.F. 1999). Accused not entitled to independent, non-government expert unless there is a showing that the accused's case is not "the usual case."

D. Use of Negative Urinalysis Results.

1. Negative test results are generally not admissible. *United States v. Johnston*, 41 M.J. 13 (C.M.A. 1994). The military judge did not abuse his discretion by excluding defense evidence of a urinalysis test which was negative for the presence of marijuana three days after the last charged use of marijuana. Admission of test results would have been too confusing.

2. The defense may use negative test results only if relevant to the charged use. *United States v. Baker*, No. 28887, 1993 WL 502185 (A.F.C.M.R. Nov. 30, 1993) (unpublished). The military judge properly excluded evidence that the accused gave a urine sample which tested negative for use of illegal drugs where the sample was given over a month outside the charged period. The defense failed to show the relevance of the negative test.

E. After *United States v. Campbell*, 50 M.J. 154 (C.A.A.F. 1999), *supplemented on reconsideration*, 52 M.J. 386 (C.A.A.F. 2000), the best defense may be a good offense. Raising the bar for the government has opened the door for defense to be successful in attacking the government's case primarily on the second prong of *Campbell*. *But see United States v. Green*, 55 M.J. 76 (C.A.A.F. 2001) (stating that the three-prong standard in *Campbell* is not mandatory).

F. *See generally* Captain Joseph J. Impallaria, *An Outline Approach to Defending Urinalysis Cases*, ARMY LAW., May 1988, at 27, and Major R. Peter Masterton and Captain James R. Sturdivant, *Urinalysis Administrative Separation Boards in Reserve Components*, ARMY LAW., Apr. 1995, at 3.

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TAB Q

ARTICLE 32 PRETRIAL INVESTIGATIONS AND ARTICLE 34 ADVICE

Table of Contents

I. WHAT IS AN ARTICLE 32 PRETRIAL INVESTIGATION? 1

II. WHAT ARE ITS PURPOSES? 1

III. WHEN IS AN ARTICLE 32 INVESTIGATION NECESSARY? 2

IV. SCOPE OF THE INVESTIGATION 3

V. PARTICIPANTS 4

VI. WITNESS AND EVIDENCE PRODUCTION 8

VII. ALTERNATIVES TO TESTIMONY AND EVIDENCE 10

VIII. PROCEDURE FOR CONDUCTING THE INVESTIGATION 11

IX. REPORT OF INVESTIGATION 13

X. ACTION BY THE APPOINTING AUTHORITY 14

XI. TREATMENT OF DEFECTS 14

XII. WHAT IS ARTICLE 34 PRETRIAL ADVICE? 17

XIII. WHAT ARE THE PURPOSES OF THE PRETRIAL ADVICE? 17

XIV. CONTENTS OF PRETRIAL ADVICE 17

XV. PREPARATION OF THE PRETRIAL ADVICE 18

XVI. DEFECTS IN THE PRETRIAL ADVICE 19

XVII. CONCLUSION 19

XVIII. APPENDIX – ARTICLE 32 & ARTICLE 34 SUMMARY 20

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JANUARY 2011

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ARTICLE 32 PRETRIAL INVESTIGATIONS AND ARTICLE 34 ADVICE

Outline of Instruction

I. WHAT IS AN ARTICLE 32 PRETRIAL INVESTIGATION?

A. **IN GENERAL**. The Article 32 investigation is a formal investigation conducted prior to trial. Article 32, UCMJ reads, "No charge or specification may be referred to a ***general court martial*** for trial until a ***thorough and impartial investigation*** of all the matters set forth therein has been made."

1. Formal investigation conducted before trial.

2. The Article 32 investigation has been labeled the "military equivalent" of a civilian grand jury proceeding. *United States v. Bell*, 44 M.J. 403, 406 (C.A.A.F. 1996). *See also United States v. Powell*, 17 M.J. 975, 976 (A.C.M.R. 1984).

B. **RESOURCES**. DA Pam 27-17, *Procedural Guide for Article 32(b) Investigating Officer* (16 Sep 90); DA Pam 27-173, *Trial Procedure*, Chapter 16 (31 Sep 92).

II. WHAT ARE ITS PURPOSES?

A. **IN GENERAL**. "The Article 32 investigation 'operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges.'" *United States v. Garcia*, 59 M.J. 447, 451 (C.A.A.F. 2004) (quoting *United States v. Samuels*, 27 C.M.R. 280, 286 (C.M.A. 1959)).

B. **STATUTORY PURPOSES**. UCMJ art. 32; RCM 405(a) discussion; RCM 405(e).

1. Inquire into the truth of the matter alleged in the charges.

2. Consider the form of the charges.

3. Make recommendations as to disposition of the charges.

C. **DISCOVERY AS A PURPOSE**. "The investigation also serves as a means of discovery." RCM 405(a) Discussion. *See also* Article 32(b), UCMJ; *United States v. Garcia*, 59 M.J. 447, 451 (C.A.A.F. 2004).

D. **PRESERVATION OF TESTIMONY**.

1. Article 32 testimony may be admissible as *substantive evidence* at trial, as a prior inconsistent statement under M.R.E. 801(d)(1) or as prior testimony under M.R.E. 804(b)(1). Use caution: *United States v. Austin*, 35 M.J. 271 (C.M.A. 1992). Child victim testified in detail at the Article 32 but recanted her testimony at trial and refused to talk about the offense. Over defense objection, trial court admitted 15-page transcript of Article 32 testimony as prior inconsistent statement pursuant to M.R.E. 801(d)(1)(A) and as former testimony under M.R.E. 804(b)(1). The transcript was read to the panel *and* then given to the panel to take into the deliberation room. Held: reversible error to send transcript back to deliberation room with panel. The transcript was not an exhibit under RCM 921.

2. *See also United States v. Ureta*, 44 M.J. 290 (C.A.A.F. 1996), *cert. denied*, 519 U.S. 1059 (1997). Article 32 transcript admissible as prior inconsistent statement and substantive evidence on issue of guilt in case of rape and carnal knowledge of 13-year-old daughter, under M.R.E. 801(d)(1). Accused's wife testified at Article 32 that accused confessed. After Article 32 terminated, wife refused to discuss her testimony with Government. Unsure whether wife would recant her Article 32 testimony at trial, Government called wife as witness, she recanted, acknowledged inconsistency, and over

defense objection, Article 32 transcript was admitted and taken into deliberations. CAAF held that Article 32 transcript was not admissible under M.R.E. 608(b) (no extrinsic evidence of prior inconsistent statement when witness available and testifies, admits making prior statement, and acknowledges specific inconsistencies), ***but*** Article 32 transcript admissible under M.R.E. 801(d)(1)(A) as substantive evidence and Government can call witness to establish foundation for admission. Error to send transcript into deliberations, but harmless because unlike *Austin*, transcript was not the only evidence against accused.

3. Article 32 testimony may be admissible at trial as former testimony under M.R.E. 804(b)(1), when the witness is unavailable. *See Austin* (above) *and United States v. Connor*, 27 M.J. 378 (C.M.A. 1989) ("If the defense counsel has been allowed to cross-examine the Government witness without restriction on the scope of cross-examination, then the provisions of M.R.E. 804(b)(1) and of the 6th Amendment are satisfied, even if that opportunity is not used, and the testimony can later be admitted at trial."). *See also United States v. Ortiz*, 35 M.J. 391 (C.M.A. 1992) (Government must establish that the witness was unavailable before former testimony may be properly admitted). *United States v. Hubbard*, 28 M.J. 27 (C.M.A. 1989) (When Article 32 testimony is offered at trial, the proponent must establish the unavailability of the witness per M.R.E. 804(b)(1) and the 6th Amendment). The Government proves unavailability through serving a subpoena (with appropriate fees), and in the last resort, a warrant of attachment on the witness.

4. Article 32 testimony may be admissible at trial as residual hearsay for unavailable declarants under M.R.E. 807. *United States v. Cabral*, 47 M.J. 268 (C.A.A.F. 1997), *affirming* 43 M.J. 808 (A.F. Ct. Crim. App. 1996). Five-year-old victim of sexual abuse appeared for trial but refused to testify. Witness declared "functionally unavailable" and Article 32 videotaped testimony, which had "particularized guarantees of trustworthiness" (language suitable for 5 year old, described acts not common to experience of 5 year old, use of non-leading questions, no motive to fabricate) was admissible as residual hearsay. ***Caution***: What is effect of *Crawford v. Washington*, 541 U.S. 36 (2004) on the continued viability of this opinion?

E. **IMPROPER PURPOSE**. RCM 405(a) discussion.

1. Purpose is ***not*** to perfect a case against the accused.

2. *Rather*, the purpose is to ascertain and weigh all the evidence in arriving at conclusions and recommendations.

III. WHEN IS AN ARTICLE 32 INVESTIGATION NECESSARY?

A. **PREREQUISITE TO TRIAL BY GENERAL COURT-MARTIAL**. Article 32, UCMJ; RCM 405(a).

1. Not required for trial by special court-martial.

2. Not required for trial by summary court-martial.

B. **EXCEPTIONS TO THE ARTICLE 32 REQUIREMENT**.

1. ***Adequate substitute***. RCM 405(b). There has already been an investigation into the subject matter of the charges before the accused is charged.

a) *United States v. Diaz*, 54 M.J. 880 (N-M. Ct. Crim. App. 2000). After the Article 32, the accused identified a defect in the preferral of the initial charges, which were dismissed, and new charges preferred. The accused requested a new Article 32, contending that the preferral defect meant that no charges had been

investigated by the first Article 32. The Navy Court held the first Article 32 was valid and satisfied the requirements of Article 32.

b) *United States v. Burton*, No. 36296, 2007 CCA LEXIS 281 (A.F. Ct. Crim. App. Jul. 16, 2007) (unpublished). A rape charge was preferred against the accused and the charge was investigated in accordance with UCMJ art. 32. At the investigation, the accused was represented by counsel and had an opportunity to cross-examine the victim. The charge was referred to trial, but subsequently withdrawn because the accused committed additional misconduct. The rape charge was re-preferred (along with several other charges) in an identical fashion except the accused's unit had changed. The charges were once again sent to an Article 32 investigating officer. The defense counsel noted that the Government intended to rely on the previous Article 32 investigation for the rape charge and objected, demanding further investigation into the rape charge under RCM 405(b) because of new evidence calling the victim's credibility into question. The investigating officer did not investigate the rape charge, but simply attached a copy of the previous Article 32 investigation to the report of the investigation for the three new charges. The defense objected that the original rape charge had not been re-investigated and filed a motion to dismiss at trial. The military judge denied the motion to dismiss, finding that the original rape charge was identical to the new rape charge (except for the unit) and that charge had been properly investigated, so no new investigation was required. The AFCCA held that the military judge abused his discretion in failing to order a new Article 32 investigation into the rape charge. The court found that "[W]hen the government relies on a previously completed Article 32 . . . hearing to support re-referral of dismissed charges, with no new recommendations by an investigating officer, the investigation is covered by Article 32(c) . . . and an accused has the opportunity to demand further investigation." However, the court held that the error was harmless beyond a reasonable doubt because the convening authority had been given the information concerning her credibility, the SJA had commented on the victim's credibility in the Article 34 advice, and the defense conducted a detailed cross-examination of the victim at trial.

2. ***Accused may waive the investigation***. RCM 705(c)(2)(E) and RCM 905(e).

a) Personal right of the accused. *United States v. Garcia*, 59 M.J. 447 (C.A.A.F. 2004). Accused must personally waive right to Article 32 hearing (attorney cannot waive it for him). Court does not proscribe method for waiver.

b) May be waived for personal reasons. If waived for personal reasons, withdrawal of the waiver need only be permitted upon a showing of good cause. *United States v. Stone*, 37 M.J. 558 (A.C.M.R. 1993). *See also United States v. Nickerson*, 27 M.J. 30 (C.M.A. 1988).

c) Defense offer to waive is not binding on the Government; investigation may still be held. RCM 405(a) Discussion.

d) May be waived as a condition of a pretrial agreement. RCM 705(c)(2)(E); *United States v. Shaffer*, 12 M.J. 425 (C.M.A. 1982). Article 32 is not a jurisdictional requirement. RCM 905(b)(1) Discussion.

IV. SCOPE OF THE INVESTIGATION

A. **IN GENERAL**.

1. Should be limited to issues raised by the charges and necessary to proper disposition of the case. RCM 405(a) Discussion.

2. Not limited to examination of the witnesses and evidence mentioned in the accompanying allied papers (or to what the Trial Counsel initially provides the Investigating Officer (IO)).

B. **INVESTIGATION OF UNCHARGED OFFENSES**. Article 32(d); RCM 405(e) and Discussion. IO may investigate subject matter of the uncharged offense(s) without preferral of additional charge(s), provided notice and certain rights are afforded to the accused.

1. IO may investigate subject matter of the uncharged offense without preferral of new/additional charge(s).

2. Similarly, if charges are changed to allege a more serious or essentially different offense, further investigation should be directed with respect to the new or different matter. *See, e.g., United States v. Bender*, 32 M.J. 1002 (N.M.C.M.R. 1991).

C. **ADMISSIBILITY DETERMINATIONS**. May include inquiry into legality of searches or the admissibility of a confession. RCM 405(e) (Discussion).

1. *But* investigating officer not required to rule on admissibility.

2. Investigating officer should note the issue in the report of investigation.

D. **BURDEN OF PROOF**. RCM 405(j)(2)(H). IO determines whether "reasonable grounds" exist to believe the accused committed the offense. "Reasonable grounds" is best translated as "probable cause." "Probable cause" means "more than a bare suspicion but less than evidence that would justify a conviction" BLACK'S LAW DICTIONARY 1321 (9th ed. 2009).

E. **NON-BINDING RECOMMENDATION**. IO's recommendations are only advisory. RCM 405(a) Discussion.

V. PARTICIPANTS.

A. **APPOINTING AUTHORITY**. RCM 405(c).

1. Any court-martial convening authority (including summary court-martial convening authority) may direct an Article 32 investigation.

2. Usually, the special court-martial convening authority (SPCMCA) will order the investigation.

3. Appointing Authority should be neutral and detached, within reason.

a) ***Accuser*** means a person who (1) signs and swears to charges, any person who (2) directs that charges nominally be signed and sworn to by another, and (3) any other person who has an interest other than an official interest in the prosecution of the accused. *See* UCMJ art. 1(9); RCM 601(c) discussion.

b) ***Statutory Disqualification***. A convening authority is statutorily disqualified if he or she prefers charges or directs another to prefer charges (the first two types of accuser in UCMJ art. 1(9)). *See, e.g., McKinney v. Jarvis*, 46 M.J. 870 (A. Ct. Crim. App. 1997) (convening authority who becomes an accuser by virtue of preferring charges in an official capacity as a commander is not, *per se*, disqualified from appointing a pretrial IO to conduct a thorough and impartial investigation of those charges).

c) ***Personal Disqualification***. A convening authority is personally disqualified if he or she has an other-than-official interest in the case (a "Type 3" accuser in Article 1(9), UCMJ).

(1) *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994). Accuser concept also applies to those who forward the charges. Special court-martial

convening authority's (SPCMCA's) girlfriend (later spouse) was acquainted with accused. Record did not establish that SPCMCA acted without improper motives. SPCMCA must disclose any potential personal interests, and if disqualified, forward without recommendation.

(2) *United States v. v. Dinges*, 55 M.J. 308 (C.A.A.F. 2001). A convening authority who becomes an accuser by virtue of having such a close connection to the offense that a reasonable person would conclude he had a personal interest in the case is disqualified from taking further action as a convening authority. At a GCM the accused was convicted of sodomy arising out of his activities as an assistant scoutmaster with a local troop of the Boy Scouts. The Scout Executive terminated his status as an assistant, and contacted the CA (who was a district chairman of the Big Teepee District, Boy Scouts of America) about the matter. Prior to preferral of charges, the accused was assigned to the CA's wing (a special court-martial convening authority level command). The CAAF ordered a *DuBay* hearing to determine whether the convening authority had an other than official interest that would disqualify him under UCMJ art. 1(9) and *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994). Based on facts gathered at the *DuBay* hearing, the CAAF held the SPCMCA did not become an accuser because he did not have such a close connection to the offense that a reasonable person would conclude he had a personal interest in the case. As such, he was not disqualified from taking action as a CA.

d) ***Fact that appointing authority has determined to send the accused's case to a general court-martial does not show he is biased***. *United States v. Wojciechowski*, 19 M.J. 577 (N.M.C.M.R. 1984) (appointing authority was not personally disqualified after telling an NIS agent and the defense counsel, prior to completion of the Article 32, that he was "going to send (appellant) to a general court-martial").

4. Why does statutory vs. personal disqualification matter? It will affect the range of options available.

Action contemplated	**If statutorily disqualified -**	**If personally disqualified -**
Appointing UCMJ art 32 investigating officer (IO)	May appoint Article 32 IO	May not appoint Article 32 IO
Dismissal of charges	May dismiss	May dismiss
Disposition by other means	May dispose of case via Article 15, Ltr of Reprimand, etc.	May dispose of case via Article 15, Ltr of Reprimand, etc.
Convening a court martial	May convene a SCM, but not a SPCM or a GCM	May convene a SCM, but not a SPCM or a GCM
Forwarding to superior	May forward with recommendation as to disposition (must note statutory disqualification)	May forward but may not make recommendation

B. **INVESTIGATING OFFICER (IO)**. RCM 405(d)(1).

1. ***Must be a commissioned officer***. In the Army, the IO cannot be a commissioned warrant officer. AR 27-10, para. 7-7d.

2. ***Preference for field grade officers or officers with legal training*** (judge advocates). RCM 405(d)(1) Discussion.

3. ***Controls the proceedings***. It was not error for the IO to limit redundant, repetitive, or irrelevant questions by the defense counsel. *United States v. Lewis*, 33 M.J. 758 (A.C.M.R. 1991).

4. ***Disqualified from serving later in same case in any capacity***. RCM 405(d)(1).

5. ***Must be impartial***.

a) May not be the accuser in the case.

b) IO must be impartial, but not disqualified merely because of:

(1) Prior knowledge about the case. *United States v. Schreiber*, 16 C.M.R. 639 (A.F.B.R. 1954).

(2) Investigated a related case. *United States v. Collins*, 6 M.J. 256 (C.M.A. 1979).

c) The IO *is partial* and *is disqualified* if the IO:

(1) Played a prior role in perfecting the case against the accused. *United States v. Lopez*, 42 C.M.R. 268 (C.M.A. 1970); *United States v. Parker*, 19 C.M.R. 201 (C.M.A. 1955).

(2) Previously formed or expressed an opinion about the accused's guilt. *United States v. Natallelo*, 10 M.J. 594 (A.F.C.M.R. 1980).

(3) Served as DSJA in the SJA office. *United States v. Davis*, 20 M.J. 61 (C.M.A. 1985).

(4) ***Anytime his/her impartiality might reasonably be questioned***. An IO is bound by the ethical standards applicable to judges, i.e. Code of Judicial Conduct and the ABA Standards for Criminal Justice. ABA Standards for Criminal Justice, Special Functions of the Trial Judge, Standard 6-1.6 (3d ed. 2000). *United States v. Castleman*, 11 M.J. 562 (A.F.C.M.R. 1981) (IO was close personal friend of accuser, purchased airplane and vacationed with accuser two days before Article 32); *United States v. Davis*, 20 M.J. 61 (C.M.A. 1985) (IO was XO of NLSO and was defense counsel's supervisor.) *See also United States v. Willis*, 43 M.J. 889 (A.F. Ct. Crim. App. 1996) (IO not biased, even though misapplied 100-mile rule as reason for not interviewing witnesses and considered sworn statements of unavailable witnesses and videotaped confession.)

6. ***Advice***. With regard to *substantive matters*, any advice received must be from a neutral source. *United States v. Payne*, 3 M.J. 354 (C.M.A. 1977).

a) Persons performing prosecutorial functions are not neutral. *United States v. Grimm*, 6 M.J. 890 (A.C.M.R. 1979).

b) Advice must not be given ex parte. *United States v. Payne*, 3 M.J 354 (C.M.A. 1977). ABA Standards, Special Functions of the Trial Judge 6-2.1 (1982). After receiving the advice notice must be given of the person consulted, the substance of the advice, and the parties must be afforded a

reasonable opportunity to respond. Canon 3(A)(4), Code of Judicial Conduct (1972).

7. ***Ex parte communication***. Ex parte contacts by the IO regarding substantive matters constitute error that will be tested for prejudice. Ex parte contacts have a presumption of prejudice that may be rebutted by the trial counsel, *but* actual prejudice to accused very unlikely to be found. *See United States v. Payne*, 3 M.J. 354 (C.M.A. 1977) (seven meetings with trial counsel); *United States v. Whitt*, 21 M.J. 658 (A.C.M.R. 1985) (two "informal" ex parte interviews with three witnesses); *United States v. Francis*, 25 M.J. 614 (C.G.C.M.R. 1987) (meeting with CO, trial counsel, and accuser); and *United States v. Rushatz*, 30 M.J. 532 (A.C.M.R), *aff'd*, 31 M.J. 450 (C.M.A. 1990) (contacting CID, visiting housing & finance offices, talking with potential witness),

a) *United States v. Argo*, 46 M.J. 454 (C.A.A.F. 1997). Staff Judge Advocate's request to Article 32(b) IO (a subordinate officer not under his supervision) to: reopen investigation to look into issue of unlawful command influence; and reject the defense's interpretation of precedent regarding "no-contact" order did not constitute unlawful command influence. Accused suffered no prejudice by a full investigation of the unlawful command influence issues. Although SJA's *ex parte* contact violated the law, there was no prejudicial impact because the IO consulted her own SJA for legal advice and exercised independent judgment; and the defense did not enter an objection at any stage of the court-martial process.

b) *United States v. Holt*, 52 M.J. 173 (C.A.A.F. 1999). IO's furnishing trial counsel with name and phone number of blood spatter expert who later provided helpful blood test and spatter testimony at trial created at least the appearance of impropriety by providing trial counsel with what was, in effect, a supplementary report that was neither transmitted to the commander who ordered the investigation nor served on the accused. Such communication did not prejudice the accused, although the CAAF held that, in the future, such supplementary communications must be reported promptly to the command and to the accused. If such a matter arises after referral, the information shall be provided promptly to the commander who referred the case to trial, the military judge, and the accused. The parties will be in the best position to determine whether any motions or objections are warranted based upon the nature of the information.

8. ***Delay Authority***. *United States v. Lazauskas*, 62 M.J. 39 (C.A.A.F. 2005). CAAF interprets RCM 707(c) to exclude, for 120-day calculation purposes, any delay approved by the ART 32 IO if the convening authority previously delegated authority to the IO to approve delays.

C. **ACCUSED**. RCM 405(f). The accused has the following rights:

1. To be informed of the charges under investigation.
2. To be informed of the identity of the accuser.
3. To be present throughout the taking of evidence unless the accused:
   a) Is disruptive.
   b) Is *voluntarily* absent (technically, cannot force accused to be present).
4. To be represented by counsel.
5. To be informed of the witnesses and other evidence then known to the IO.
6. To be informed of the purpose of the investigation.
7. To be informed of the right against self-incrimination under Article 31.

8. To cross-examine witnesses.

a) Accused given broad latitude to cross-examine. RCM 405(h)(1)(A).

b) This right is not absolute. *United States v. Lewis*, 33 M.J. 758 (A.C.M.R. 1991). The IO believed the defense counsel's questions were "going off into the ozone."

9. To have witnesses produced if they are reasonably available.

10. To have evidence produced which is within the control of military authorities, if reasonably available.

11. To present evidence in defense, mitigation, and extenuation.

12. To make a statement in any form, including an unsworn statement.

D. **DEFENSE COUNSEL**. RCM 405(d)(2).

1. Will be detailed.

2. Accused may also request individual military counsel (IMC), who will be provided if reasonably available.

3. Accused may be represented by civilian counsel at no expense to the Government.

a) Accused entitled to a reasonable time to acquire civilian counsel.

b) Investigation will not be unduly delayed to acquire civilian counsel. *United States v. Pruner*, 33 M.J. 272 (C.M.A. 1991).

c) Use of civilian counsel does not limit the accused's rights to military counsel.

4. Multiple representation of accused and three co-defendants at *joint* Article 32 did not demonstrate conflicts of interest. *United States v. Muma*, 5 M.J. 675 (A.C.M.R. 1978).

E. **GOVERNMENT REPRESENTATIVE** (Trial Counsel). RCM 405(d)(3)(A). Appointed or requested by the Appointing Authority to represent the Government.

1. Need not be an attorney.

2. May question witnesses at the hearing. DA PAM 27-17, *Procedural Guide for Article 32(b) Investigating Officer*, para. 1-2d (16 Sep. 1990).

3. Examine evidence considered by the IO. RCM 405(h)(1)(B).

4. Argue for an appropriate disposition of the case. DA Pam 27-17, para 1-2d.

F. **REPORTER**. RCM 405(d)(3)(B).

1. May be appointed by convening authority.

2. Assists the investigating officer in recording the proceeding.

VI. WITNESS AND EVIDENCE PRODUCTION.

A. **GENERAL RULE** (RCM 405(g)):

Any witness whose testimony would be relevant to the investigation and not cumulative shall be produced if the witness is "reasonably available." This includes witnesses for the accused upon a timely request.

B. **DETERMINATION OF "REASONABLE AVAILABILITY."** RCM 405(g)(1)(A).

1. ***Availability within 100 miles of situs***. "A witness is reasonably available when the witness is located within 100 miles of the situs of the investigation and the significance of

the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance." The IO makes the determination whether a witness is reasonably available. *Note, despite the "100 mile" language in RCM 405(g)(1)(A), the witness' immediate commander may veto an Article 32 IO's determination per RCM 405(g)(2)(A).

2. ***Interpretation of 100-Mile Test***. *United States v. Marrie*, 43 M.J. 35 (C.A.A.F. 1995). A witness located more than 100 miles away from the situs of an Article 32 investigation *is not per se unavailable*. IO's determination that three child sexual abuse victims were not reasonably available based on the 100-mile rule was error (although harmless) in light of IO's failures to apply the balancing test and obtain testimony through alternative form (*e.g.*, telephone, written sworn statement). The determination of reasonable availability for witnesses located more than 100 miles from the situs of the investigation is left to the discretion of the commander. The court effectively dissolved Change 5 to the MCM (established 100-Mile test). *See* Discussion, RCM 405(g)(1)(A) and RCM 405(g)(2)(A).

3. *United States v. Burfitt*, 43 M.J. 815 (A.F. Ct. Crim. App. 1996). Not every ruling of unavailability premised on wooden application of 100-mile rule is fatal. IO's error in applying the 100-mile rule *must cause some prejudice* to accused. It was harmless error for the IO to apply 100-mile test without determining if importance of testimony outweighed the difficulty, delay, and expense of securing physical presence of witness because IO obtained evidence via telephone, permitted defense counsel to conduct cross-examination, and MJ allowed accused further opportunity to interview witnesses. Record should support IO's determination of availability when victim does not appear for Article 32 investigation. IO's determination must be carefully considered, clearly articulated, and amply supported in the record.

4. *United States v. Willis*, 43 M.J. 889 (A.F. Ct. Crim. App. 1996). IO's misapplication of 100-mile rule, amongst other things, did not substantiate claims of IO bias.

5. ***Determining availability of witnesses***.

a) Military witnesses.

(1) IO makes an initial determination whether a witness is reasonably available.

(2) Immediate commander of the witness has the discretion and may exercise a "veto" and determine that the witness is not reasonably available.

(3) Unavailability determination is not subject to appeal, but may be reviewed at trial.

b) Civilian witnesses.

(1) IO makes initial determination.

(2) Final decision is within the discretion of the commander who ordered the investigation. Payment of transportation and per diem to civilian witnesses must be approved by the GCMCA. AR 27-10, para. 5-12.

(3) Cannot be subpoenaed to appear at an Article 32 hearing.

(4) Can be compelled by subpoena to testify at a deposition. RCM 702.

(5) Can be ordered to testify as an incident of employment if employed by the United States government and the Article 32 investigation concerns

matters which are related to the civilian's job. *Weston v. Dep't. of Housing & Urban Develop.*, 724 F.2d 943 (Fed. Cir. 1983).

(6) Local status of forces agreements (SOFA) may provide a mechanism for compelling attendance of foreign nationals.

6. ***Immunized witnesses***. Only a General Court-Martial Convening Authority (GCMCA) has the authority to grant immunity to witnesses to testify at an Article 32 investigation (or Court-Martial). RCM 704(c) and Discussion. *United States v. Douglas*, 32 M.J. 694 (A.F.C.M.R. 1991) (no abuse of discretion in denying defense requested immunity for two witnesses at Article 32).

C. **AVAILABLE WITNESSES**.

1. Must be compelled to testify if available and does not claim any privilege. *United States v. Colter*, 15 M.J. 1032 (A.C.M.R. 1983). Witness was a Government drug informant.

2. *United States v. Bell*, 44 M.J. 403 (1996). Appellant was not protected from prosecution for perjury by absence of Article 31 warnings at Article 32 investigation where he made statements during testimony as a defense witness. Article 32 investigations are judicial proceedings, not a disciplinary or law enforcement tool within the context of Article 31. The Article 31 requirement for warnings does not apply at trial.

D. **UNAVAILABLE WITNESSES AND EVIDENCE**.

1. IO must state in the report of investigation the reason(s) for an unavailability determination if the defense objects.

2. Witnesses who invoke their right to self-incrimination at the Article 32 are "not reasonably available" within the meaning of RCM 405(g)(1)(a); *United States v. Douglas*, 32 M.J. 694 (A.F.C.M.R. 1991). *See also* RCM 405(g)(1)(A) and MRE 804(a)(1).

VII. ALTERNATIVES TO TESTIMONY AND EVIDENCE.

A. **RULE**. RCM 405(g)(4) and (5).

B. **ALTERNATIVES TO TESTIMONY**.

1. The following are admissible if there is no defense objection, regardless of availability of the witness.

a) Sworn statements.

b) Statements under oath taken by telephone, radio, etc.

c) Prior testimony under oath.

d) Depositions. RCM 702.

e) Stipulations of fact or expected testimony.

f) Unsworn statements.

2. The following are admissible even if there is a defense objection if the witness is *not* reasonably available.

a) Sworn statements.

b) Statements under oath taken by telephone, radio, etc.

c) Prior testimony under oath.

d) Depositions; and,

e) in time of war, unsworn statements.

C. **ALTERNATIVES TO EVIDENCE**.

1. If no defense objection, regardless of availability of the evidence.

a) Testimony describing the evidence.

b) An authenticated copy, photograph, or reproduction.

c) Stipulation of fact document's contents, or expected testimony.

d) Unsworn statement describing the evidence.

e) Offer of proof concerning pertinent characteristics of the evidence.

2. Over defense objection, if evidence *not* reasonably available.

a) Testimony describing the evidence.

b) Authenticated copy, photograph, or reproduction.

VIII. PROCEDURE FOR CONDUCTING THE INVESTIGATION.

A. **GENERAL PROCEDURE**.

1. CA is authorized to prescribe specific procedures for conducting the investigation. RCM 405(c). *See United States v. Bramel*, 32 M.J. 3 (C.M.A. 1990) (appointing authority's instructions to IO to place a partition between the child witness and the accused okay).

a) Normally, DA Pam 27-17 (Sep 90) will be followed.

b) The CA will usually require expeditious proceeding and set the deadline for receipt of the record of investigation. Per RCM 707(c) and Discussion, have appointing authority delegate limited authority to approve delay to Article 32 IO. *See United States v. Thompson*, 46 M.J. 472 (1997), *affirming* 44 M.J. 598 (N-M. Ct. Crim. App. 1996). Defense requested delays that were granted by the Article 32 investigating officer and later ratified by the convening authority after the fact were properly excluded from the speedy trial calculations under RCM 707. The court leaves for another day the issue of whether the Article 32 Investigating Officer (IO) has inherent, independent power to exclude a delay from speedy trial consideration.

c) Report of investigation should be forwarded to GCMCA within eight days if accused in pretrial confinement. RCM 405(j)(1) discussion.

2. Investigating officer has broad discretion regarding sequence of events and other details. IO decides the –

a) Time and place of the hearing.

b) Order witnesses will testify.

c) Order in which evidence will be presented.

d) Order of examination by counsel.

e) Number of sessions needed to complete the investigation.

B. **MILITARY RULES OF EVIDENCE**. RCM 405(i). Military Rules of Evidence do ***not*** apply other than M.R.E. 301 (self incrimination), 302 (statements from mental examination), 303 (degrading), 305 (rights warning), 412 (rape shield) and Section V (privileges). *See United States v. Martel*, 19 M.J. 917 (A.C.M.R. 1985) (error for Article 32 Officer to consider evidence which violated marital privilege).

C. **RIGHT TO CONFRONTATION**.

Article 32 investigation, while an important pretrial right, is not the equivalent of a crucial trial right for Confrontation Clause purposes. *See United States v. Bramel*, 32 M.J. 3 (C.M.A. 1990). It is not improper for accused to be separated from child witness by a screen at Article 32. Consider admissibility at trial of testimony obtained in this manner if witness is later unavailable in light of *Crawford v. Washington*, 541 U.S. 36 (2004).

D. **OPEN vs. CLOSED HEARING**. RCM 405(h)(3). The proceedings may be closed or access restricted in the discretion of the appointing authority or the investigating officer. Ordinarily, though, the proceedings should be open. The analysis to RCM 405(h)(3) refers to RCM 806 (governing closure of the trial) for some reasons why the hearing may be closed.

1. *See ABC, Inc, v. Powell*, 47 M.J. 363 (C.A.A.F. 1997). SPCMA's reasons (maintain integrity of military justice system, prevent dissemination of evidence that might not be admissible at trial, and shield alleged victims from possible news reports about anticipated attempts to delve into each woman's sexual history) supporting decision to close *entire* investigation were unsubstantiated. The CAAF holds that the accused has a qualified right to an open Article 32 hearing.

a) Closure determination must be a "'reasoned,' not 'reflexive'" one, made on a "case-by-case, witness-by-witness, and circumstance-by-circumstance basis whether closure in a case in necessary to protect the welfare of a victim. . . ."

b) Absent cause shown that outweighs the value of openness (overriding interest articulated in the findings), the military accused is entitled to a public Article 32 hearing. The right is ***not*** absolute.

c) The press enjoys the same right to a public Article 32 and has standing to complain if access is denied.

2. *United States v. Davis*, 62 MJ. 645 (A.F. Ct. Crim. App. 2006), *aff'd*, 64 M.J. 445 (C.A.A.F. 2007). The IO closed the Article 32 hearing during testimony of two victims of alleged sexual assault "due to the sensitive and potentially embarrassing nature of the testimony and in order to encourage complete testimony about the alleged sexual offenses." The IO failed to speak to either witness and no evidence existed that the witnesses were reluctant to testify in a public hearing. The MJ held that the IO's decision was not supported by the evidence and was error, but the MJ declined to fashion any relief because he could determine no "articulable harm" to the accused. The AFCCA agreed that the IO erred in closing the hearing but held that once the MJ found that the accused's rights to a public hearing were violated, however, that "the [MJ]—without a showing of prejudice or articulable harm—. . . should have dismissed the affected charges to allow for reinvestigation under Article 32." The AFCCA, however, did not reverse or order a new Article 32 hearing because the closure did not adversely affect the accused's rights at trial so setting aside his conviction was not warranted. On appeal, CAAF affirmed, clarifying that, on appeal, Article 32 issues will be reviewed under Article 59(a). CAAF noted that the AFCCA was correct in holding that the MJ erred by requiring a showing of prejudice before providing a remedy.

3. *San Antonio Express-News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996) (cited with approval in *ABC, Inc. v. Powell*). Court denied newspaper's extraordinary writ to reverse by mandamus IO's decision to close hearing, over defense objection, concerning O-4 charged with murder of 11-year old girl. While Article 32 investigations are presumptively public hearings, the IO did not abuse discretion, and articulated good reasons supporting her action (citing a need to protect against the dissemination of information that might not be admissible in court; to prevent against contamination of a potential jury pool; to maintain a dignified, orderly, and thorough hearing; and to

encourage the complete candor of witnesses called to testify). The court reasoned that RCM 405(h)(3) is unclear how competing interests are to be weighed in deciding whether to close a hearing, or whether the entire hearing could be closed, so mandamus was not appropriate for this area of law that is "developing" and "subject to differing interpretations."

4. *See also United States v. Anderson*, 46 M.J. 728 (A. Ct. Crim. App. 1997) (adopting the "stringent test" for closure of court-martial proceedings (citing *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986)). A court-martial may be closed to the public provided the following test is met:

a) The party seeking closure must advance an overriding interest that is likely to be prejudiced;

b) The closure must be narrowly tailored to protect that interest;

c) The trial court must consider reasonable alternatives to closure;

d) And it must make adequate findings supporting the closure to aid in review.

5. There is no "national security" exception to these principles. The appointing authority must still conduct a case-by-case, witness-by-witness, circumstance-by-circumstance determination.

a) *Denver Post Corp. v. United States*, No. 20041215 (A. Ct. Crim. App. Feb. 23, 2005) (unpub.). The IO conducted preliminary matters in an open forum and then closed the proceeding to hear testimony from a security specialist regarding classified information. After receiving the security specialist's testimony, the IO closed the *entire* hearing. Additional witnesses testified to non-classified information in a closed session later in the day. *Denver Post* filed a writ demanding a stay of the proceeding until ACCA could rule on the hearing's closure. ACCA granted the stay and ruled that the IO erred in closing the entire proceeding. Closing a proceeding is only warranted when a "compelling showing [exists] that such was necessary to prevent the disclosure of classified information." *Id.* at *3 (quoting *United States v. Grunden*, 2 M.J. 116, 121 (C.M.A. 1977)). An IO may only close a proceeding "after consideration of the specific substance of the testimony of individual witnesses expected by the parties and a factual determination that all of the expected testimony of such a witness will reveal classified information." *Id.* at *6. Additionally, ACCA ordered the Government provide *The Denver Post* a verbatim transcript of the testimony, with classified information redacted.

b) *In re Halabi*, Misc Dkt. 2003-07 (A.F. Ct. Crim. App. Sep. 16, 2003) (unpub.) (granting writ of mandamus quashing blanket order excluding the public from entire investigation due to national security concerns).

6. For a good analysis of the case law in this area, *see* Major Mark Kulish, *The Public's Right of Access to Pretrial Proceedings Versus The Accused's Right to a Fair Trial*, ARMY LAW., Sept. 1998, at 1.

E. **TESTIMONY BY WITNESSES**. RCM 405(h)(1)(A).

1. All testimony must be under oath.

2. *Except* accused may make an unsworn statement.

IX. REPORT OF INVESTIGATION.

A. **AUTHORITY**. Per RCM 405(j), the IO must submit a timely report of investigation to the appointing authority.

B. **CONTENTS**. The report must include:

1. Names and organizations/address of defense counsel.

2. Whether defense counsel were present at proceedings, and if not, why.

3. Substance of the testimony. Usually summarized, though it may be verbatim. *See* D.A. PAM 27-17, *Procedural Guide for the Article 32(b) Investigating Officer*, paras. 3-3a(1) and 4-1, (16 Sep 90) (hereinafter DA Pam 27-17).

4. Any other evidence considered by the IO.

5. A statement regarding any belief that the accused was not mentally responsible at the time of the offense(s) or during the investigation.

6. A statement regarding availability of witnesses, including the reasons why any were unavailable.

7. IO's conclusion whether the charges and specifications are in proper form.

8. IO's conclusion whether reasonable grounds exist that the accused committed the offense(s).

9. Recommendation for disposition.

C. **FORM OF THE REPORT**. Usually consists of DD Form 457 (Investigating Officer's Report) and attached summarized testimony of witnesses and evidence considered. DA Pam 27-17, para 4-1.

D. **DISTRIBUTION OF THE REPORT**.

1. Original goes to the appointing authority.

2. One copy goes to the accused.

X. ACTION BY THE APPOINTING AUTHORITY.

A. **IN GENERAL**.

1. Dismiss the Charges.

2. Administrative Disposition.

3. Nonjudicial Punishment.

4. Referral to SCM or SPCM.

5. Forwarding with recommendations to GCMCA.

B. **REOPEN THE INVESTIGATION**.

XI. TREATMENT OF DEFECTS.

A. **OVERVIEW**. During post-trial appeal, relief for a defective may only be granted where an accused can show a timely objection and violation of his substantial rights. See Article 59(a), UCMJ ("A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error ***materially prejudices*** the ***substantial rights*** of the accused.").

1. It may be very difficult to show prejudice. *See United States v. Von Bergen*, 67 M.J. 290 (C.A.A.F. 2009) ("Article 32, UCMJ, errors are tested on direct review for prejudice as defined by Article 59(a)") (citing *United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007)). *Von Bergen* noted military courts have a long history of deciding that the Article 32 proceedings are "superseded" by the trial procedures, so the accused's rights at an Article 32 "merge into his rights at trial" (citing *United States v. Mickel*, 26 C.M.R. 104,

107 (C.M.A. 1958)). Because these rights merge, the court held the accused suffered no prejudice, even though he was erroneously denied his right to an Article 32 hearing.

2. "[I]n the event that a pretrial investigation, less complete than is provided here, is held and thereafter at the trial full and complete evidence is presented which establishes beyond a reasonable doubt the guilt of the accused, there doesn't seem to be any reason … that the case should be set aside if lack of full compliance doesn't materially prejudice his substantial rights …. Now, if it has, that is and should be grounds for a reversal of a verdict of guilty." *United States v. Allen,* 5 C.M.A. 626, 633, 18 C.M.R. 255, 257 (1955) (quoting testimony of Mr. Larkin at *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services,* 81st Cong., 1st Sess. 998 (1949)).

3. "[I]f an accused is deprived of a substantial pretrial right on a timely objection, he is entitled to judicial enforcement of his right, without regard to whether such enforcement will benefit him at trial. At that stage of the proceedings, he is perhaps the best judge of the benefits he can obtain from the pretrial right. Once the case comes to trial on the merits, the pretrial proceedings are superseded by the procedures at trial; the rights accorded to the accused at the pretrial stage merge into his rights at trial. If there is no timely objection to the pretrial proceedings or no indication that these proceedings adversely affected the accused's rights at the trial, there is no good reason in law or logic to set aside his conviction." *United States v. Mickel,* 26 C.M.R. 104 (C.M.A. 1958).

4. *United States v. Davis*, 64 M.J. 445 (C.A.A.F. 2007). Case involves closing an Article 32 and clarifies the standard for appellate review. "The time for correction of [procedural errors in the Article 32] is when the military judge can fashion an appropriate remedy . . . before it infects the trial . . . ." CAAF explains that, on appeal, the standard of review of Article 32 procedural errors is under Article 59(a), UCMJ, which states, "A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error *materially prejudices the substantial rights of the accused*."

B. **OBJECTIONS MUST BE TIMELY MADE**.

1. Defects discovered during the investigation. RCM 405(h)(2).

a) Must be raised promptly. Allows Government to take curative action.

b) Errors not promptly raised are waived absent a showing of good cause. RCM 405(k).

c) IO is not required to rule on the objection.

d) Objection must be noted in the report of investigation, if requested.

e) IO may require the objection to be in writing.

2. Defects in the report of investigation. RCM 405(j)(4).

a) Objections must be made to the appointing authority.

b) Must be made within five days of receipt of report by accused.

c) Failure to raise the objection within 5 days is a waiver absent good cause. RCM 405(k).

d) **NOTE:** Appointing authority not precluded from referring the charges or taking other action within the five days.

3. If error is alleged erroneous denial of witness, defense may be required to request deposition in order to preserve objection. *United States v. Chuculate,* 5 M.J. 143 (C.M.A. 1978).

C. **MOTION FOR APPROPRIATE RELIEF MUST BE MADE AT TRIAL**. RCM 905(b)(1).

1. Must be made before plea is entered.

2. Failure to raise before plea waives the error, absent good cause. RCM 405(k), RCM 905(b) and Discussion.

D. **STANDARDS FOR MOTION**.

1. ***Broad standards***.

a) "[N]o charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation . . . has been made in substantial compliance with this rule." RCM 405(a).

b) Failure to substantially comply with the requirements of Article 32, which failure prejudices the accused, may result in delay of disposition of the case or disapproval of the proceedings. RCM 405(a) Discussion.

c) Motions for appropriate relief (including a motion to correct defects in the Article 32 investigation) are designed to cure defects which deprive a party of a right or hinder a party from preparing for trial. RCM 906(a); RCM 906(b)(3).

2. ***Types of defects***.

a) Investigation improperly convened. Accused is denied a substantial pretrial right when the Article 32 investigation is ordered by an officer who lacks proper authority. *United States v. Donaldson*, 49 C.M.R. 542 (C.M.A. 1975) (jurisdictional error).

b) Partiality of the IO. Partiality of the IO will be *tested for prejudice*. *United States v. Cunningham*, 30 C.M.R. 402 (C.M.A. 1961).

c) Denial of right to counsel/ineffective assistance of counsel.

(1) The right to the assistance of counsel of one's own choice during the pretrial investigation is a substantial pretrial right of the accused. *United States v. Maness*, 48 C.M.R. 512 (C.M.A. 1974); *United States v. Miro*, 22 M.J. 509 (A.F.C.M.R. 1986) ("An unprepared counsel is tantamount to no counsel at all"). There is no requirement to demonstrate prejudice, *but*

(2) Improper denial of counsel and denial of effective assistance of counsel at the Art. 32 investigation should be tested for prejudice. *United States v. Davis*, 20 M.J. 61 (C.M.A. 1985); *United States v. Freedman*, 23 M.J. 820 (N.M.C.M.R. 1987).

d) Nonproduction of reasonably available witnesses.

(1) Failure to produce reasonably available defense requested witnesses is a denial of a *substantial pretrial right* of the accused. *United States v. Chestnut*, 2 M.J. 84 (C.M.A. 1976); *but*

(2) Nonproduction of reasonably available defense requested witnesses will be assessed for prejudice to the accused. *See United States v. Burfitt*, 43 M.J. 815 (1996) and *United States v. Marrie*, 43 M.J. 35 (1995). *See also United States v. Martinez*, 12 M.J. 801 (N.M.C.M.R. 1981).

e) Minor/technical irregularities. IO's improper limitation of defense counsel's right of cross-examination was an error that did not prejudice the accused at trial. *United States v. Harris*, 2 M.J. 1089 (A.C.M.R. 1977).

E. **REMEDY**.

1. Ordinarily the remedy is a continuance to re-open the investigation. RCM 906(b)(3) discussion.

2. If the charges have already been referred, re-referral is not required following a re-opening of the investigation; affirmance of the prior referral is sufficient. *United States v. Clark*, 11 M.J. 179 (C.M.A. 1981).

XII. WHAT IS ARTICLE 34 PRETRIAL ADVICE?

A. **PREREQUISITE TO GCM**. Per UCMJ art. 34, "The convening authority may not refer a specification under a charge to a general court-martial for trial unless he has been advised in writing by the staff judge advocate. . . ."

B. Formal document containing the SJA's written advice regarding the charges.

C. Not required for trial by special or summary court-martial. RCM 406(a) Discussion. ***But note:*** In the US Army SPCMs involving confinement in excess of 6 months, forfeitures of pay for more than 6 months, or bad-conduct discharges the "servicing staff judge advocate will prepare a pretrial advice, following generally the format of RCM 406(b)." AR 27-10, 5-28b.

D. No civilian equivalent.

XIII. WHAT ARE THE PURPOSES OF THE PRETRIAL ADVICE?

A. **SUBSTANTIAL PRETRIAL RIGHT OF THE ACCUSED**.

1. Protects accused against trial on *baseless charges*.

2. Protects accused against referral to an *inappropriate level of court-martial*.

3. Limited veto over convening authority's power to refer charges.

B. **PROSECUTORIAL TOOL**: provides *legal advice to the convening authority* regarding the charges.

XIV. CONTENTS OF PRETRIAL ADVICE

A. **MANDATORY CONTENTS**. UCMJ art. 34.

1. Although more may be included, the pretrial advice is streamlined and is only *required* to include:

a) Conclusions with respect to whether *each specification alleges an offense* under the code; **[binding]**

b) Conclusions with respect to whether the allegation of each offense is *warranted by the evidence* indicated in the report of investigation; the standard is probable cause. RCM 406(b) Discussion. **[binding]**

c) Conclusion with respect to whether a court-martial would have *jurisdiction over the accused* and the offense; and **[binding]**

d) *Recommendation* of the action to be taken by the convening authority. **[non-binding]**

2. The three legal conclusions are binding on the convening authority; the SJA's recommended disposition is not.

3. SJA need not set forth the underlying analysis or rationale for the conclusions. RCM 406(b) Discussion.

B. **OPTIONAL CONTENTS**. Per RCM 406(b) Discussion, "The pretrial advice should include when appropriate: a brief summary of the evidence; discussion of significant aggravating,

extenuating, or mitigating factors; and any previous recommendations, by commanders or others who have forwarded the charges, for disposition of the case."

1. Failure to include optional information is not error. RCM 406(b) Discussion.

2. Whatever matters are included in the advice should be accurate. RCM 406(b) Discussion. *United States v. Foley*, 37 M.J. 822 (A.F.C.M.R. 1993). SJA's advice inaccurately reported that unit commander recommended referral to GCM. Court found that error was harmless in light of accused's light sentence. *See also United States v. Murray*, 25 M.J. 445 (C.M.A. 1988). Pretrial advice omitted a charge. Procedural error tested for prejudice.

3. Reference to race is inappropriate for inclusion in court-martial records, including the pretrial advice. *United States v. Brice*, 33 M.J. 176 (C.M.A. 1991) (summary disposition); reference to accused's "Racial/ethnic identifier." *See also United States v. Holt* and *United States v. Phillips*, both at 27 M.J. 402 (C.M.A. 1988) (summary dispositions).

C. **CAPITAL CASES**. Use pretrial advice to give *notice of aggravating factors* prior to arraignment per RCM 1004(b)(1) and (c). Following *Ring v. Arizona*, 536 U.S. 584 (2003), aggravated factors may need to be charged and investigated. *The smart Government choice is to both charge and investigate the aggravating factors.*

XV. PREPARATION OF THE PRETRIAL ADVICE

A. **IN GENERAL**. SJA need not personally prepare the advice, but:

1. The SJA is personally responsible for it.

2. Disqualification of the SJA to Prepare Post-trial Recommendation.

a) Mere preparation of the pretrial advice is not enough to disqualify the SJA. However, under RCM 1106(b), the SJA may be disqualified from preparing the post-trial recommendation when the sufficiency or correctness of the earlier action (the pretrial advice) is placed in issue.

b) *United States v. Lynch*, 39 M.J. 223 (C.M.A. 1994). Accused questioned the pretrial advice in a motion prior to trial. "[W]here a legitimate factual controversy exists between the SJA and DC, the SJA must disqualify himself from participating in the post-trial recommendation."

c) *United States v. Engle*, 1 M.J. 387 (C.M.A. 1976). At trial DC moved for a new advice on the ground that the advice in question contained a material misstatement of the evidence and omitted matters that could have affected convening authority's referral decision. SJA should have recused himself.

d) Inappropriate comments by the SJA in the pretrial advice may disqualify the SJA from preparing the SJA Post-trial Recommendation. *United States v. Plumb*, 47 M.J. 771 (A.F. Ct. Crim. App. 1997). In the pretrial advice, the SJA referred to the accused, an Air Force OSI CPT, as a "shark in the waters, [who] goes after the weak and leaves the strong alone." The Air Force court said that such a comment was "so contrary to the integrity and fairness of the military justice system that it has no place in a pretrial advice." The comment (in conjunction with other errors) resulted in the findings and sentence being set aside.

3. The SJA must make an independent and informed appraisal of the charges; *SJA must personally sign the pretrial advice*. It may not be signed "For the SJA." *United States* v. *Hayes*, 24 M.J. 786 (A.C.M.R. 1987).

4. The trial counsel may *draft* the pretrial advice for the SJA's consideration. *See United States v. Smith*, 33 M.J. 527 (A.F.C.M.R. 1991), *aff'd*, 35 M.J. 138 (C.M.A. 1992).

B. **ENCLOSURES TO PRETRIAL ADVICE**.

1. Charge sheet.

2. Forwarding letters and endorsements.

3. Report of (Article 32) investigation, DD Form 457.

C. **DISTRIBUTION OF THE ADVICE**. A copy of the pretrial advice must be provided to the defense if the charges are referred to a GCM. RCM 406(c).

XVI. DEFECTS IN THE PRETRIAL ADVICE

A. **WAIVED IF NOT RAISED**. Objections are waived if not raised prior to entry of plea or if the accused pleads guilty. RCM 905(b) and (e); *see generally* RCM 910(j) (discussing waiver generally); *see also United States v. Packer*, 8 M.J. 785 (N.C.M.R. 1980); *United States v. Blakney*, 2 M.J. 1135 (C.G.C.M.R. 1976); *United States v. Henry*, 50 C.M.R. 685 (A.F.C.M.R. 1975).

B. **NON-JURISDICTIONAL**. Defects are not jurisdictional and must be raised by motion for appropriate relief at trial. RCM 905(b)(1) Discussion.

C. **STANDARDS FOR RELIEF**.

1. ***At trial***. Information which is so incomplete as to be misleading may result in a defective advice, necessitating appropriate relief. RCM 406(b) discussion; *see also* RCM 905(b)(1) and 906(b)(3).

2. ***Appellate review***. Is the advice so "incomplete, ill-considered, or misleading" as to a material matter that the convening authority might have made an erroneous referral? *United States v. Kemp*, 7 M.J. 760 (A.C.M.R. 1979).

D. **FAILURE TO PROVIDE PRETRIAL ADVICE**.

1. Failure to provide a written pretrial advice to the convening authority is error which will be tested for prejudice. *United States v. Murray*, 25 M.J. 445 (C.M.A. 1988).

2. *United States v. Green*, 44 M.J. 631 (C.A.A.F. 1996). Accused failed to raise absence of written pretrial advice at trial for wrongful appropriation of motor vehicle, larceny, and obtaining services by false pretenses. Waiver rule applied.

3. *United States v. Cook*, No. 200100254 (N-M. Ct. Crim. App. Feb. 28, 2005) (unpub.) (holding an accused must suffer actual prejudice to reverse a case for the government's failure to refer without Article 34 advice).

E. Where convening authority refers charge and specification despite fact that staff judge advocate's legal conclusions do not support referral, the proper remedy is to dismiss the charges rather than ordering an amendment to the pretrial advice. *United States v. Harrison*, 23 M.J. 907 (N.M.C.M.R. 1987). If Staff Judge Advocate neglects to state a conclusion as to jurisdiction, probable cause, or that the specification states an offense, the proper remedy is to return the case for a new pretrial advice. *Id*.

F. The absence of an Article 34 Pretrial Advice does not render a record nonverbatim within the meaning of RCM 1003(b)(2)(B) and 1003(b)(3), and Article 54, UCMJ. *United States v. Blaine*, 50 M.J. 854 (N-M. Ct. Crim. App. 1999).

XVII. CONCLUSION

APPENDIX – ARTICLE 32 & ARTICLE 34 SUMMARY

MAJOR POINT	*SUMMARY*
PRESERVATION AND ADMISSION OF 32 TESTIMONY	o Article 32 testimony may be admissible as substantive evidence at courts-martial (once the foundational elements for each provision are satisfied): • M.R.E. 801(d)(1) (prior inconsistent statement); • M.R.E. 804(b)(1) (former testimony); • M.R.E. 807 (residual hearsay).
PARTICIPANTS	o The appointing authority (AA) must be neutral and detached. An AA who is merely a statutory "accuser" has more options than an AA with an other than official interest in the case. *See United States v. Wojciechowski*, 19 M.J. 577 (N.M.C.M.R. 1984); *McKinney v. Jarvis*, 46 M.J. 870 (A. Ct. Crim. App. 1997); *see also United States v. Dinges*, 49 M.J. 232 (1998). The investigating officer must be "neutral and detached," and must avoid *ex parte* contact. The IO is bound by the ethical standards applicable to judges. IO actions that violate the above, upon appropriate motion, must be tested for prejudice to the accused.
PRODUCTION OF WITNESSES	o RCM 405(g)(1)(A) controls whether the Gov't must secure the physical presence of witnesses. A witness is reasonably available if within 100 miles of the situs of the investigation and the significance of the testimony and personal appearance outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witnesses' appearance. Relief from an IO's misapplication of the balancing test is granted only upon a showing of undue prejudice to the accused. Alternative means of obtaining the testimony (i.e. telephonic direct and cross examination) may negate prejudice. *United States v. Marrie*, 43 M.J. 35 (1995); *United States v. Burfitt*, 43 M.J. 815 (A.F. Ct. Crim. App. 1996).
PROCEDURE FOR CONDUCTING THE INVESTIGATION	o Speedy Trial Considerations: RCM 707 appears to vest authority to exclude article 32 delays from the speedy trial clock only in the AA. An IO does not have inherent authority to do the same, but it appears that the AA can delegate this authority to an IO. *United States v. Thompson*, 46 M.J. 472 (1997). o M.R.E. application: Only the rules on privileges, Rape Shield, and self-incrimination apply at the Article 32 investigation. RCM 405(i). o Standard for Closure: Whether there is cause that outweighs the value of openness. The cause must be an overriding interest articulated in the findings. This determination must be made on a case-by-case, witness-by-witness basis. *See generally ABC, Inc. v. Powell,* 47 M.J. 363 (C.A.A.F. 1997); RCM 405(h)(3).

TREATMENT OF DEFECTS AND REMEDY	o Objections to the investigation must be made "promptly upon discovery" or are waived, absent good cause. RCM 405(h)(2) and 405(k). o Objections to the report must be made "timely" (that is, within five days of service of the report on the accused) or are waived, absent good cause. RCM 405(j)(4) and 405(k). o Objections not made prior to entry of plea are waived, absent good cause. (Defects are nonjurisdictional). Objections are made by motion for appropriate relief. RCM 905(b), 905(e) and 906(b)(3). o If objection is to failure to produce a witness, accused may need to request deposition of witness in order to preserve objection. *United States v. Chuculate*, 5 M.J. 143 (C.M.A. 1978). o The burden of proof that the Government has not substantially complied with the provisions of Article 32, to the prejudice of the accused, is on the accused by a preponderance of the evidence. RCM 405(a), Discussion; RCMs 905(c)(1) and 905(c)(2). o The remedy to correct a defect is normally a continuance to correct the defect. RCM 906(b)(3), Discussion.
THE ARTICLE 34 PRETRIAL ADVICE	o The SJA or Acting SJA must sign the article 34 advice, which concludes that: • each specification alleges an offense, • the allegations are warranted by the evidence in the Art 32 report, and • there is jurisdiction over the accused and the charged offense. A negative conclusion on one of the above prohibits forwarding a charge to a GCM (they are binding on the CA). The SJA also makes a recommendation on disposition, which is NOT binding on the CA. o Defects in the Article 34 advice must be raised by motion for appropriate relief. Defects are nonjurisdictional and waived if not raised prior to plea or if the accused pleads guilty. RCM 406(b), Discussion; 905(b)(1) and 905(e). o The standard at trial is whether information which is so incomplete as to be misleading, that the convening authority may have made a different decision on referral. RCM 406(b), Discussion; *United States v. Kemp*, 7 M.J. 769 (A.C.M.R. 1979). o Remedy for referral over SJA advice is dismissal. *United States v. Harrison*, 23 M.J. 907 (N.M.C.M.R. 1987)

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MOTIONS

TAB R

Table of Contents

I. REFERENCES. 1

II. MOTIONS GENERALLY. R.C.M. 905. 1

III. MOTIONS FOR APPROPRIATE RELIEF. R.C.M. 906. 4

IV. MOTIONS TO SUPPRESS. 7

V. MOTIONS TO DISMISS. R.C.M. 907. 7

VI. MISTRIAL. R.C.M. 915. 9

VII. MOTIONS FOR FINDING OF NOT GUILTY. R.C.M. 917 10

VIII. POST-TRIAL SESSIONS. R.C.M. 1102. 11

IX. APPENDIX - MOTIONS WAIVER CHECKLIST 12

LtCol Derek Brostek, USMC

January 2011

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MOTIONS

Outline of Instruction

I. REFERENCES.

A. R.C.M. 905. Motions generally.

B. R.C.M. 906. Motions for appropriate relief.

C. R.C.M. 907. Motions to dismiss.

D. R.C.M. 915. Mistrial.

E. R.C.M. 917. Motion for a finding of not guilty.

F. R.C.M. 1102. Post-trial sessions.

G. M.R.E. 304. Confessions and admissions.

H. M.R.E. 311. Search and seizure.

I. M.R.E. 321. Eyewitness identification.

J. Appendix: Motions Waiver Checklist.

II. MOTIONS GENERALLY. R.C.M. 905.

A. Definition.

1. A motion is a request to the judge for *particular relief*.

2. Based on *specific grounds* (rule or case law).

3. *Notice* should be given to the judge and opposing counsel.

4. Litigated at an *Article 39(a) session*, usually after arraignment, before a plea is entered. (Other than with respect to privileges, military judge not bound by the rules of evidence, MRE 104(a)).

B. Preparation - Offer of proof.

1. *United States v. Hodge*, 26 M.J. 596 (A.C.M.R. 1988), *aff'd*, 29 M.J. 304 (C.M.A. 1989). An offer of proof should be specific and should include the names and addresses of witnesses and a summary of expected testimony.

2. *United States v. Stubbs*, 23 M.J. 188 (C.M.A. 1987), *cert. denied*, 484 U.S. 846 (1987). "[T]rial judges should not let the litigants lapse into a procedure whereby the moving party will state the motion and then launch right into argument without presenting any proof but buttressing his/her argument with the assertion that so and so would testify as indicated, if called. The other party then counters with his/her own argument and offers of proof ... Do not let counsel stray into stating what someone would say if they were called. Force them to call the witness, provide valid real and documentary evidence or provide a stipulation. Sticking to proper procedure will save you time and grief and provide a solid record." 23 M.J. at 195.

3. *United States v. Alexander*, 32 M.J. 664, (A.F.C.M.R. 1991), *aff'd*, 34 M.J. 121 (C.M.A. 1992). Court notes that "counsel based much of their argument on offers of proof; although opposing counsel frequently disagreed with the proffers, no additional *evidence* was tendered." Counsel and judges must be careful to establish a proper factual basis for evidentiary rulings. 32 M. J. at 667 n.3.

4. Notice.

a) Emphasis on prior notice to counsel and the military judge.

b) R.C.M. 905(i). Written motions shall be served on all parties. When? Exceptions?

c) Local judiciary rules. *United States v. Williams*, 23 M.J. 362 (C.M.A. 1987). A local rule is invalid if it conflicts with the Manual for Courts-Martial.

C. Timeliness.

1. Motions which must be made prior to the plea (or else they are waived). R.C.M. 905(b).

a) Defects in the charges and specifications.

b) Defects in preferral, forwarding, and referral.

c) Suppression of evidence.

d) Discovery and witness production.

e) Severance of charges, specifications, or accused.

f) Individual Military Counsel (IMC) requests.

2. Motions which should be made before final adjournment (or else waived).

a) Continuance. R.C.M. 906(b)(1).

b) Speedy trial. R.C.M. 907(b)(2)(A). Note: If speedy trial right alleges an Article 10 violation, a plea of guilty does not waive appellate review of this issue. Additionally, failure to raise an Article 10 motion prior to plea may not result in forfeiture of the issue for purposes of appeal. *See United States v. Mizgala*, 61 M.J. 122, 127 (2005) (stating that a speedy trial right under Article 10 should not be subject to rules of "waiver and forfeiture associated with guilty pleas").

c) Release from pretrial confinement. R.C.M. 906(b)(8).

d) Statute of limitations. R.C.M. 907(b)(2)(B).

e) Former jeopardy. R.C.M. 907(b)(2)(C).

f) Grant of immunity. R.C.M. 907(b)(2)(D).

3. Motions which may be made at any time, including appellate review.

a) Lack of jurisdiction over accused or offense. R.C.M. 905(e).

b) Failure to allege an offense. R.C.M. 905(e).

c) Improperly convened court.

d) Unlawful command influence. *But see United States v. Weasler*, 43 M.J. 15 (1995) Pretrial agreement initiated by accused waived any objection to UCI on appeal. Waiver of UCI in accusatory phase, as distinguished from adjudicative stage, is permissible.

D. Waiver – R.C.M. 905(e)

1. Failure to comply with timeliness requirements is generally considered a waiver *unless* the military judge finds *good cause* to consider the untimely motion.

2. *United States v. Coffin*, 25 M.J. 32, 34 (C.M.A. 1987) (finding that M.R.E. 311(d)(2) "should be liberally construed in favor of permitting an accused the right to be heard *fully* in his defense").

E. Burden of Proof – R.C.M. 905(c)

1. Who has the burden?

a) The moving party – R.C.M. 905(c)(1),

b) *Except*, the Government has the burden of proof for:

(1) Jurisdiction – R.C.M. 905(c)(2)(B).

(2) Speedy trial – R.C.M. 905(c)(2)(B).

(3) Statute of limitations – R.C.M. 905(c)(2)(B).

(4) Suppression motions: confessions, evidence, identifications – M.R.E. Sect. III.

(5) Unlawful command influence.

2. What is the standard?

a) Preponderance of evidence.

a) Clear and convincing evidence standard for subterfuge inspections (three triggers for higher standard) (M.R.E. 313(b)); consent searches (M.R.E. 314(e)(5)); and, "unlawful" identifications (M.R.E. 321).

b) Command influence. When defense raises an issue of UCI at trial by some evidence sufficient to render a reasonable conclusion in favor of the allegation, burden shifts to the Government to prove, beyond a reasonable doubt (*U.S. v. Biagase* 50 M.J. 143 (1999)) that command influence did not occur. If the Government is unable to do so, then the trial court (or the appellate court) must be satisfied beyond a reasonable doubt that the findings and sentence were unaffected. *See United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986), *cert. denied*, 479 U.S. 1085 (1987) (reviewing court may not affirm the findings and sentence unless it is persuaded **beyond a reasonable doubt** that the findings and sentence have not been affected by the existence of unlawful command influence).

F. Appeal of Rulings.

1. Defense: extraordinary writs.

2. Government appeals: R.C.M. 908.

G. Effect of a Guilty Plea.

1. *General rule:* guilty plea waives all issues which are not jurisdictional or do not deprive an accused of due process. Waived by guilty plea:

a) Suppression of evidence, confessions, identifications.

(1) *See, e.g., United States v. Cooper*, 32 M.J. 83 (C.M.A. 1991)(accused who pleaded guilty without condition or restriction to offense of adultery did not preserve for appellate review his motion to suppress items seized in an illegal search by pleading not guilty to rape of the same victim at the same place and time).

(2) *See, e.g., United States v. Hinojosa*, 33 M.J. 353 (C.M.A. 1991). Accused's motion to suppress statements to CID was denied.

Accused then entered guilty pleas to some of the offenses and not guilty to the remaining offenses. The government, however, elected to present no evidence on the contested allegations and those specifications were dismissed. Accused's guilty pleas foreclosed any appellate relief from the unsuccessful suppression motion.

b) Pretrial processing defects.

2. *Not* waived by guilty plea:

a) Jurisdiction. *United States v. Conklan*, 41 M.J. 800, 805 (Army Ct. Crim. App. 1995) (accused may not bargain away "non-frivolous, good faith claims of lack of jurisdiction and transactional immunity.")

b) Article 10 violation. *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005).

c) Failure to allege an offense.

d) Unlawful command influence. *But see United States v. Weasler*, 43 M.J. 15 (C.A.A.F. 1995) (condition in PTA waiving command influence motion, originating from defense, does not violate public policy).

e) Post-trial defects.

3. Another Exception. *United States v. Lippoldt*, 34 M.J. 523 (A.F.C.M.R. 1991). Prior to entry of plea, defense moved to require the prosecution to elect to proceed on either conspiracy to possess marijuana or distribution of same marijuana as an aider or abettor. Military judge wanted the pleas entered as a basis for development of the facts so that he could decide the motion. No waiver.

4. **Conditional Guilty Plea.** R.C.M. 910(a)(2). Will *not* waive pretrial motions made a part of the conditional guilty plea.

III. MOTIONS FOR APPROPRIATE RELIEF. R.C.M. 906.

A. General.

A motion for appropriate relief is a request for a ruling to cure a defect which deprives a party of a right or hinders a party from preparing or presenting its case.

B. Continuances. Some common grounds:

1. Witness unavailable. Continuance requested. *See, e.g.*, *United States v. Mow*, 22 M.J. 906 (N.M.C.M.R. 1986); *United States v. Maresca*, 28 M.J. 328 (C.M.A. 1989).

2. Obtaining civilian counsel.

a) Three tries you're out. *United States v. Thomas*, 22 M.J. 57 (C.M.A. 1986) (Military judge did not abuse discretion in refusing the accused a fourth continuance to permit attendance of civilian counsel where judge had gone to great lengths to accommodate accused's wishes and where civilian counsel failed to make even a written appearance.)

b) *Compare United States v. Wilson*, 28 M.J. 1054 (N.M.C.M.R. 1989) (Judge abused discretion in denying civilian counsel's **only** request for delay after he had made a personal appearance and could not try case earlier due to "existing professional obligations.")

3. Illness of counsel, judge, witness, member.

4. Order of trial of related cases.

5. Insufficient opportunity to prepare. *United States v. Galinato*, 28 M.J. 1049 (N.M.C.M.R. 1989) (After military judge denied request for delay, defense counsel went "on strike" and refused to participate in case. Held: Accused denied assistance of counsel.)

C. Motions Concerning Charges and Specifications. R.C.M. 307; 906.

1. Amend charges or specifications. R.C.M. 603, 906(b)(4).

2. Bill of particulars. R.C.M. 906(b)(6).

3. Multiplicity. R.C.M. 307, 906(b)(12), 907(b)(3)(B), 1003(c)(1)(c).

4. Sever duplicitous specifications. R.C.M. 307, 906(b)(5).

5. Sever offenses, *but* only to prevent manifest injustice. R.C.M. 906(b)(10). In *United States v. Giles*, 59 M.J. 374 (2004), the CAAF held that a military judge abused his discretion in denying the appellant's motion for severance of new perjury charges on a rehearing of an earlier drug-related attempt offense. In order to prove the perjury charge, the Government had to prove a materiality element, which required evidence of the earlier conviction. The CAAF stated that the MJ's ruling caused actual prejudice to the accused and prevented a fair trial.

D. Defective Article 32 Investigation or Pretrial Advice. R.C.M. 405, 406.

E. Discovery. R.C.M. 701, 914.

F. Witness Production. R.C.M. 703, 1001.

G. Individual Military Counsel or Detailed Counsel Request. R.C.M. 506.

H. Pretrial Restraint. R.C.M. 305.

I. Mentally Incompetent to Stand Trial. R.C.M. 706; 909; 916.

J. Change Location of Trial. R.C.M. 906(b)(11).

K. Sever Accused. R.C.M. 307; 906(b)(9).

L. Reopen Case. R.C.M. 913(c)(5). *United States v. Fisiorek*, 43 M.J. 244 (1995).

M. Miscellaneous. *See, e.g.*, *United States v. Stubbs*, 23 M.J. 188 (C.M.A. 1986), *cert. denied*, 484 U.S. 846 (1987). Defense moved to recuse entire prosecution office because of prior contact between one prosecutor and accused on a legal assistance matter.

N. Motion *in limine* (M.R.E. 906(b)(13)).

1. Definition. A preliminary ruling on the admissibility of evidence made outside the presence of members.

2. Procedure. Government or defense may make a motion *in limine*.

3. Rulings. The decision when to rule on a motion *in limine* is left to the discretion of the military judge. Discussion to R.C.M. 906(b)(13). Judicial economy and judicial accuracy constitute "good cause" which, under R.C.M. 905(d), allows a military judge to defer ruling on an *in limine* motion until presentation of the merits.

a) *See, e.g.*, *United States v. Helweg*, 32 M.J. 129 (C.M.A. 1991) (separate litigation of motion would have replicated large segments of a trial on the merits and in the judge-alone format; the judge is not required to hear the case twice).

b) *See also United States v. Cannon*, 33 M.J. 376 (C.M.A. 1991) (it is appropriate to defer ruling on the admissibility of evidence until such time as it becomes an issue).

4. Common uses of a motion *in limine*.

a) Admissibility of uncharged misconduct. *See, e.g., United States v. Thompson*, 30 M.J. 99 (C.M.A. 1990). Defense moved *in limine* to suppress a sworn statement accused made one year before charged offenses wherein accused admitted to bad checks, extramarital affair and financial problems. Trial counsel intended to use statement as evidence of scheme or plan under M.R.E. 404(b).

b) Motions to keep out M.R.E. 413/414 evidence should be made *in limine*.

c) Admissibility of prior conviction for impeachment.

d) Admissibility of impeachment evidence as to credibility.

e) Admissibility of witness's out-of-court statements.

f) Admissibility of a victim's sexual behavior or predisposition under M.R.E. 412(b).

g) Motions to suppress evidence other than confessions, seizures, or identifications. *See* R.C.M. 905(b)(3) (discussion).

h) Preemptive strike by the government to exclude anticipated favorable defense evidence. Examples:

(1) *United States v. Huet-Vaughn*, 43 M.J. 105 (1995). The Government made 2 motions *in limine* and prevented the accused, an Army physician, from presenting evidence of motives and reasons for refusing to support Desert Shield and views on unlawfulness of the war on charge of desertion with intent to avoid hazardous duty.

(2) *United States v. West*, 27 M.J. 223 (C.M.A. 1988). The Government's motion *in limine* limited the defendant's testimony on his request for a polygraph and for sodium pentothal.

(3) *United States v. Rivera*, 24 M.J. 156 (C.M.A. 1987). Defense failure to make an offer of proof does not constitute appellate waiver where Government makes a preemptive strike to exclude evidence and evidentiary issue is apparent from the record.

i) Preservation for appellate review of issue raised by motion *in limine*.

(1) The accused must testify to preserve review of a denied motion *in limine* on the admissibility of accused's prior conviction. *United States v. Sutton*, 31 M.J. 11, 21 (C.M.A. 1990). This holding reverses prior military practice and adopts the U.S. Supreme Court ruling in *Luce v. United States*, 469 U.S. 38 (1984). *See also United States v. Gee*, 39 M.J. 311 (C.M.A. 1994) (character testimony) and *United States v. Williams*, 43 M.J. 348 (1995).

(2) *United States v. Sheridan*, 43 M.J. 682 (A.F. Ct. Crim. App. 1995). Counsel do not have to repeat objections during trial if they first obtain unconditional, unfavorable rulings from the military judge in out-of-court sessions. *See* M.R.E. 103(a)(2); R.C.M. 801(e)(1)(A) (finality of ruling); R.C.M. 906(b)(13). However, a

preliminary, tentative ruling may require a subsequent objection to preserve issue for appeal. *United States v. Jones*, 43 M.J. 708 (A.F. Ct. Crim. App. 1995).

5. Time. Rulings are generally made at the earliest possible time unless the military judge, for good cause, defers ruling until later in the trial. Written motions may be disposed of before arraignment and without an Article 39(a) session. A party may request oral argument or an evidentiary hearing concerning disposition of the motion. R.C.M. 905(h).

6. Essential findings. R.C.M. 905(d). Where factual issues are involved, the military judge *shall* state essential findings on the record.

7. Reconsideration. R.C.M. 905(f). The military judge on his or her own, or at the request of either party, may reconsider any ruling not amounting to a finding of not guilty any time before authentication of the record. Read in conjunction with R.C.M. 917(f). Motion for a Finding of Not Guilty. Reconsideration of a granted motion for a finding of not guilty is not permitted.

IV. MOTIONS TO SUPPRESS.

A. General.

A motion to suppress is based on an alleged constitutional violation.

B. Procedure. M.R.E. 304(d) [pretrial statements], 311(d) [search & seizure], 321(c) [eyewitness identification].

1. Disclosure by the Government.

2. Notice of motion by defense.

3. Specific grounds for objection.

a) *United States v. Miller*, 31 M.J. 247 (C.M.A. 1990). Motion to suppress statement under M.R.E. 304(d)(2)(A) must be made prior to plea. Absent motion, no burden on prosecution to prove admissibility; no requirement for specific findings by MJ; and, no duty to conduct a voluntariness hearing.

b) *United States v. Vaughters*, 42 M.J. 564 (A.F. Ct. Crim. App. 1995) *aff'd*, 44 M.J. 377 (C.A.A.F. 1996). Accused challenged admissibility solely on technical *Edwards* violations. On appeal, asserts AFOSI also coerced confession by threatening to tell neighbors and alleged drug dealers that he had informed on them. As motion to suppress did not raise coercion issue, court held accused had forfeited or "waived" issue on appeal.

4. Burden on the prosecution by preponderance. If the underlying facts involve an alleged subterfuge inspection, the standard is higher for the government. Under M.R.E. 313(b), the burden is clear and convincing if the purpose of the inspection is to discover contraband *and* is directed immediately following report of specific offense, specific individuals are selected, *or* persons examined are subject to substantially different intrusions; if none of the three factors are present, the burden remains by preponderance). *See United States v. Shover*, 45 M.J. 119 (C.A.A.F. 1996) (finding clear and convincing standard met by the government).

5. Essential findings of fact, prior to plea.

6. Guilty plea waives, except conditional guilty plea.

V. MOTIONS TO DISMISS. R.C.M. 907.

A. General. A motion to dismiss is a request that the trial judge terminate the proceedings as to those charges and specifications without a trial on the merits.

B. Nonwaivable Grounds**.** Can be raised anytime, including appellate review.

1. Lack of Jurisdiction.

2. Failure to Allege an Offense.

3. Unlawful Command Influence.

4. Improperly Convened Court.

C. Waivable Grounds**.** Must be raised before final adjournment of trial.

1. Speedy Trial. *But see United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005) (stating that court will not apply forfeiture of Article 10 issues).

2. Statute of Limitations.

a) Unlimited - capital offenses, AWOL in time of war.

b) Five years - all other offenses.

c) Child Abuse offenses – life of child, or within five years of date crime committed, whichever is longer

d) Two years - Article 15 nonjudicial punishment.

3. Former Jeopardy.

4. Presidential Pardon.

5. Grant of Immunity.

6. Constructive Condonation of Desertion.

7. Prior Article 15 Punishment for same, *minor* offense. *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989). Prior Article 15 punishment for *serious* offense does not bar subsequent trial for same offense, but the accused must be given complete sentence credit for any punishment resulting from the Article 15 proceeding. *United States v. Edwards*, 42 M.J. 381 (C.A.A.F. 1995). The military judge may apply the required credit in fashioning a sentence.

D. Permissible Grounds. *May* be dismissed upon timely motion by the accused.

1. Misleading Specification.

2. Multiplicity.

E. Other Grounds.

1. Vindictive or Selective Prosecution.

2. Constitutional Challenges.

a) Equal protection.

b) First Amendment.

c) Privacy rights. *Unger v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989). Direct observation of urine collection during urinalysis is not *per se* an unreasonable invasion of privacy.

d) Lack of notice.

e) Ex post facto laws.

VI. MISTRIAL. R.C.M. 915.

A. General

1. A drastic remedy. The judge should declare a mistrial only when "*manifestly necessary* in the interest of justice" due to circumstances which "cast substantial doubt upon the fairness or impartiality of the trial." *United States v. Waldron*, 36 C.M.R. 126, 129 (C.M.A. 1966). *United States v. Brooks*, 42 M.J. 484 (1995) (MJ should not have declared mistrial based on his improper inquiry into members' deliberative process).

a) *See, e.g.*, *United States v. King*, 32 M.J. 709 (A.C.M.R. 1991), *rev'd on other grounds*, 35 M.J. 337 (C.M.A. 1992). Mistrial not required even though trial counsel improperly communicated to civilian psychologist who was defense representative. Factors considered by the court: the psychologist would have eventually asked for the background information provided by the trial counsel; any advantage to the trial counsel from the information was minimal; and there was no bad faith on the part of the trial counsel.

b) *But see United States v. Diaz*, 59 M.J. 79 (C.A.A.F. 2003), in which the CAAF held that a military judge abused his discretion in denying a motion for a mistrial when two witnesses --one of them an expert -- testified they believed death of appellant's daughter was a homicide and appellant was the perpetrator. The combined prejudicial impact of the testimony could not be overcome by a curative instruction, particularly since the testimony went to the two main issues of the case: the cause of the death and the identity of the perpetrator.

2. Effect. A declaration of a mistrial shall have the effect of withdrawing the affected charges and specifications from the court-martial.

3. First consider alternative measures.

a) *United States v. Balagna*, 33 M.J. 54 (C.M.A. 1991). Witness testimony before panel included reference to accused's submission of Chapter 10 request. The MJ gave *curative instruction* immediately. Defense motion for mistrial was denied. MJ gave second curative instruction during findings. Held no error to deny motion for mistrial.

b) *United States v. Taylor*, 53 M.J. 195 (C.A.A.F. 2000). Military Judge did not abuse his discretion in denying a defense request for mistrial where trial counsel made several impermissible references to accused's gang affiliation in his opening statement. Curative instruction to members was sufficient, in spite of the fact that during the trial several members asked questions about the accused's gang affiliation.

c) *United States v. Mobley*, 34 M.J. 527 (A.F.C.M.R. 1991), *aff'd*, 36 M.J. 34 (C.M.A. 1992). Instructions advising members of accused's right to remain silent; that they could not draw any adverse inference from accused's failure to testify; and, that trial counsel's exposition of the facts was argument and not evidence ameliorated any prejudice caused by trial counsel's comments during closing argument that called attention to the accused's failure to testify.

d) *United States v. Skerrett*, 40 M.J. 331 (C.M.A. 1994)(no mistrial warranted where MJ admonished panel twice to disregard testimony concerning dismissed specification and each member individually assured MJ that excluded testimony would not influence consideration of remaining specifications.

4. Government can usually re-refer charges. *See United States v. Mora*, 26 M.J. 122 (C.M.A. 1988) (upholding new referral after a mistrial in a military judge alone case).

B. Retrial barred if mistrial declared after jeopardy attaches and before findings under R.C.M. 915(c)(2) if:

1. Defense objects and judge abuses discretion. *Burtt v. Schick*, 23 M.J. 140 (C.M.A. 1986). Trial counsel requested mistrial when defense divulged accomplice's sentence. Granted over defense objection; abuse of discretion, double jeopardy barred retrial.

- - or -

2. Intentional prosecution misconduct induces mistrial. *United States v. DiAngelo*, 31 M.J. 135 (C.M.A. 1990). Trial counsel's cross examination of accused elicited juvenile arrest record. Fact of arrest record had not previously been disclosed to defense despite discovery request. Trial court granted mistrial. CMA holds that conduct of trial counsel did not amount to prosecutorial misconduct and therefore, under R.C.M. 915(c)(2)(B), retrial of the accused was not barred.

C. Defense Motion for Mistrial. Examples of grounds raised in motions for mistrial:

1. Court members' actions.

a) *United States v. Johnson*, 23 M.J. 327 (C.M.A. 1987). Two motions for mistrial based on a member inadvertently seeing autopsy photos and a Government witness riding with a member.

b) *United States v. West*, 27 M.J. 223 (C.M.A. 1988). A motion for a mistrial based on an inattentive or sleeping court member.

c) *United States v. Knight*, 41 M.J. 867 (Army Ct. Crim. App. 1995)(extensive, frequent and member initiated communications with third party intended to gain improper and extrajudicial information relevant to key issues in case warranted mistrial).

d) *United States v. Hamilton*, 41 M.J. 22 (C.M.A. 1994) (mistrial not required by trial counsel's inadvertent, but improper, social conversation with president of court where no information regarding accused's case was discussed and president was removed for cause).

2. Military judge's actions.

a) *United States v. Burnett*, 27 M.J. 99 (C.M.A. 1988). "From early in the trial the relations between the military judge and the civilian defense counsel had been less than harmonious." Defense counsel held in contempt. Trial proceeded. Motion for mistrial denied.

b) *United States v. Donley*, 33 M.J. 44 (C.M.A. 1991). Military judge did not err when he failed, *sua sponte*, to declare a mistrial over a defense objection. During general court-martial for premeditated murder of accused's wife the president of court-martial over-heard sidebar conference during which military judge and counsel discussed inadmissible hearsay. Military judge offered to declare a mistrial but defense counsel objected.

c) Noncompliance with discovery rules. *United States v. Palumbo*, 27 M.J. 565 (A.C.M.R. 1988), *pet. denied*, 28 M.J. 265 (C.M.A. 1989). Mistrial not necessary as trial judge gave proper curative instructions after the trial counsel elicited statements made by the accused which were not disclosed to the defense before trial and also elicited testimony that the accused had invoked his rights.

VII. MOTIONS FOR FINDING OF NOT GUILTY. R.C.M. 917.

A. Procedure.

1. *Sua sponte* or defense motion.

2. Defense must specifically state where evidence is insufficient.

3. Opposing counsel shall be given an opportunity to be heard.

4. After the evidence on either side is closed and before findings are announced.

B. Standard.

1. Deny motion if there is *any* evidence which, together with all reasonable inferences and presumptions, could reasonably tend to establish every element of the offense.

2. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses. *See, e.g., United States v. Felix*, 25 M.J. 509 (A.F.C.M.R. 1987). Allegations of deviation from standard operating procedure at a drug-testing lab. Trial judge did not abuse his discretion when he denied the defense motion for a finding of not guilty.

3. Grant motion if the government has introduced no evidence at all of an offense occurring during the charged dates of the offense. In *United States v. Parker*, 59 M.J. 195 (C.A.A.F. 2004), the Government charged the accused with raping a woman in 1995. At trial, the woman testified that the rape had actually occurred in 1993. The Government unsuccessfully moved to amend the charge, but persuaded the military judge give a variance instruction that would permit the members to substitute 1993 for 1995. The CAAF held the military judge erred in denying the defense's R.C.M. 917 motion for the 1995 rape offense; the Government had introduced no evidence of any sexual interaction between the accused and the victim in 1995.

C. Effect.

1. If motion is granted only as to part of a specification, a lesser included offense may remain.

2. If motion is denied, it may be reconsidered at any time before authentication of the Record of Trial. R.C.M. 917(f). *See also United States v. Griffith*, 27 M.J. 42 (C.M.A. 1988). Trial judge stated he had no power to set aside findings of guilty by court members. (He had previously denied a motion for a finding of not guilty due to the lower standard for such motions.) HELD: "We are convinced that, if before authenticating the record of trial, a military judge becomes aware of an error which has prejudiced the rights of the accused—whether this error involves jury misconduct, misleading instructions, or *insufficient evidence*—he may take remedial action." 27 M.J. at 47.

3. If motion is granted, it may not be reconsidered.

VIII. POST-TRIAL SESSIONS. R.C.M. 1102.

A. Purpose. Corrective, clean-up the record, fix obvious errors, and inquire into new matters affecting findings or sentence.

B. Hearing. Article 39(a) session or proceeding in revision directed by the military judge or the convening authority.

C. Time. Military judge - any time before the record is authenticated. Convening Authority - before initial action or if directed by a reviewing authority. R.C.M. 1102(b)(2) & (d).

D. Grounds

1. Investigate alleged court member misconduct. *United States v. Stone*, 26 M.J. 401 (C.M.A. 1988). Post-trial allegations by appellant's father concerning laughter and festive

atmosphere within the deliberation room and an improper comment by a court-member made during a recess. A post-trial hearing was not required in this case, but court indicates that it is an appropriate mechanism in such cases.

2. Change plea when alleged cocaine was caffeine. *United States v. Washington*, 23 M.J. 679 (A.C.M.R. 1986), *rev. denied*, 25 M.J. 197 (C.M.A. 1987). Cocaine was caffeine. A post-trial session was appropriate.

3. Lost tapes of the announcement of findings and sentencing proceedings. *United States v. Crowell*, 21 M.J. 760 (N.M.C.M.R. 1985), *rev. denied*, 23 M.J. 281 (C.M.A. 1986). A post-trial session, before authentication of the record, was appropriate to recreate lost verbatim tapes.

4. Newly discovered evidence.

a) *United States v. Scaff*, 29 M.J. 60 (C.M.A. 1989). "Article permitting MJ to call court into session without presence of members at any time after referral of charges to court-martial empowers judge to convene post-trial session to consider newly discovered evidence and to take whatever remedial action is appropriate." Until he authenticates the record, the MJ can set aside the findings of guilt and sentence. If the convening authority disagrees with the MJ, the only remedy is to direct trial counsel to move for reconsideration or to initiate government appeal. *See United States v. Meghdadi*, 60 M.J. 438 (C.A.A.F. 2005) (military judge abused his discretion in denying appellant's motion for a post-trial 39(a) session to inquiry into newly discovered evidence and fraud on the court).

b) *United States v. Fisiorek*, 43 M.J. 244 (C.A.A.F. 1995) (MJ applied incorrect legal standard in denying accused opportunity to reopen case to present newly discovered evidence).

IX. APPENDIX - MOTIONS WAIVER CHECKLIST

MOTION	HOW WAIVED
Suppression of Confession or Admission.	1. Failure to raise before submission of plea [after proper disclosure by trial counsel under MRE 304(d)(1)], except for good cause shown, as permitted by the military judge. MRE 304(d)(2)(A)]. 2. Plea of guilty regardless of whether the motion was raised prior to plea, unless conditional plea. MRE 304(d)(5). 3. When a specific motion or objection has been made, the burden on the prosecution extends only to the grounds upon which the defense moved to suppress the evidence. MRE 304(e).

Suppression of evidence seized from the accused or believed owned by the accused.	1. Failure to raise before submission of plea [after proper disclosure by trial counsel under MRE 311(d)(1)], except for good cause shown, as permitted by the military judge. MRE 311(d)(2). 2. Plea of guilty, regardless of whether the motion was raised prior to plea. MRE. 311(i). 3. When a specific motion or objection has been made, the burden on the prosecution extends only to grounds upon which the defense moved to suppress. MRE 311(e)(3).
Suppression of Eyewitness ID.	1. Failure to raise before submission of plea [after proper disclosure by trial counsel under MRE 321(c)(1)], except for good cause shown, as permitted by the military judge. MRE 321(c)(2)(A). 2. Plea of guilty, regardless of whether the motion was raised prior to plea. MRE 321(g). 3. When a specific motion or objection has been made, the burden on the prosecution extends only to grounds upon which the defense moved to suppress. MRE 321(d).
Defects (other than jurisdiction) in preferral, forwarding, investigation, or referral of charges.	Failure to raise before plea is entered. R.C.M. 905(b)(1).
Motions for discovery (RCM 701), or for production of witnesses or evidence.	Failure to raise before plea is entered. R.C.M. 905(b)(4).
Defects in Charges or Specs (other than juris. or stating offense).	Failure to raise before plea is entered. R.C.M. 905(b)(2).
Motions for severance of charges or accused.	Failure to raise before plea is entered. R.C.M. 905(b)(5).
Objections to denial of IMC request or for retention of detailed counsel when IMC granted.	Failure to raise before plea is entered. R.C.M. 905(b)(6).
Lack of jurisdiction over accused.	Not Waivable. R.C.M. 907(b)(1)(A).
Command Influence	Generally Not Waivable. But see *U.S. v. Weasler*, 43 M.J. 15 (1995). (Defense initiated waiver of UCI in accusatory phase for favorable PTA is permissible), and *U.S. v. Drayton*, 45 M.J. 180 (1996). (Failure to raise accusatory UCI constitutes waiver.)
Failure to State Offense	Not Waivable. RCM 907(b)(1)(B).
Improperly Convened CM (Incorrect Member Subst.)	Not Waivable.

Speedy Trial	1. Waived if not raised before final adjournment. R.C.M. 907(b)(2)(A), and 905(e). 2. Plea of guilty, except as provided in R.C.M. 910(a)(2). R.C.M. 707(e); note: Article 10 issues not waived by GP.
Statute of Limitations	Waived if not raised before final adjournment, provided it appears that the accused is aware of his right to assert the statute, otherwise the judge must inform the accused of the right. R.C.M. 907(b)(2)(B).
Use of Victims Past Sexual Behavior or Predisposition.	Failure to file written motion 5 days before trial. MRE 412(c)(1)(A).
Former Jeopardy	Waived if not raised before final adjournment of the court. R.C.M .907(b)(2)(C).
Pardon, grant of immunity, condonation of desertion or prior punishment under Articles 13 & 15.	Waived if not raised before final adjournment of the court. R.C.M. 907(b)(2)(D).

NOTE: RCM 910(j) provides that [except for a conditional guilty plea under RCM 910(a)(2)] a plea of guilty which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offenses to which the plea was made.

RCM 910(a)(2) provides that, with the approval of the military judge and the consent of the government, an accused may enter a conditional plea of guilty, reserving in writing the right, on further review or appeal, to review the adverse determination of any specified pretrial motion.

TAB S

PLEAS & PRETRIAL AGREEMENTS

Table of Contents

I. PLEAS.....1

A. Five (5) Recognized Pleas. RCM 910(A)(1).....1

B. How to Enter Pleas.....1

C. Effect of Pleas.....1

D. Conditional Guilty Plea. RCM 910(A)(2).....4

E. Pleading Procedure – Guilty Plea and Providence Inquiry.....6

F. Factual Predicate – Specific Offenses.....11

G. Failure to Resolve Potential Defenses.....20

H. Inquiry into Pretrial Agreement.....26

I. Undisclosed Terms ("*Sub Rosa*" Agreements) are Prohibited.....27

J. Inquiry into Stipulation of Fact.....28

K. Acceptance of Pleas and Entering Findings.....29

L. Refusal of Military Judge to Accept Pleas.....29

M. Effect of Refusal to Accept Guilty Plea.....30

N. Inability to Recall Facts.....31

O. Use of Guilty Pleas in Mixed Plea Cases.....31

P. Reopening the Providence Inquiry.....32

Q. Use of Providence Inquiry Admissions in Mixed Pleas.....33

R. Accused's Withdrawal of Guilty Plea. RCM 910(H)(1).....35

MAJ S. CHARLES NEILL

JANUARY 2011

II. PRETRIAL AGREEMENTS 35

A. Agreement Between Convening Authority and Accused 35

B. Typical and Simplest Agreement 35

C. Nature of Agreement. RCM 705(b). 35

D. Procedure. RCM 705(d) 36

E. Withdrawal from the Pretrial Agreement 37

F. Permissible Terms or Conditions 39

G. Prohibited Terms or Conditions 43

H. Problematic Terms or Conditions 45

I. Remedy for Unenforceable Terms 46

J. Inquiry into Quantum and Resolution of Ambiguous Terms 46

K. Post-Trial Re-Negotiation of Pretrial Agreement. 49

L. Stipulations of Fact (Pretrial Agreement Cases). RCM 811 50

M. Unitary Nature Of Pretrial Agreement 51

N. Post-Trial 51

III. CONCLUSION 53

IV. APPENDIX – PLEAS & PTAs SUMMARY 54

PLEAS AND PRETRIAL AGREEMENTS

Outline of Instruction

I. PLEAS.

A. **FIVE (5) RECOGNIZED PLEAS**. RCM 910(a)(1).

1. ***Not Guilty***: "Your honor, the accused, SPC Snuffy, pleads, to all Charges and Specifications, Not Guilty."

**** Not Guilty Only by Reason of Lack of Mental Responsibility***: Not recognized in RCM 910(a)(1); treated as irregular plea under RCM 910(b), which equates to a plea of not guilty. "The accused , SPC Snuffy, pleads as follows: To the Specification: Not Guilty only by reason of lack of mental responsibility."

2. ***Guilty***: "Your honor, the accused, SPC Snuffy, pleads as follows: To the Specification and to The Charge: Guilty."

3. ***Guilty by Exceptions***: "Your honor, the accused, Specialist Snuffy, pleads as follows: To the Specification: Guilty except the words, 'he was apprehended.' To the excepted words: Not Guilty. To the Charge: Guilty."

4. ***Guilty by Exceptions and Substitutions***: "Your honor, the accused, SPC Snuffy, pleads as follows: To the Specification: Guilty, except the word 'steal,' substituting therefor the words 'wrongfully appropriate.' To the excepted word: Not Guilty; to the substituted words: Guilty. To the Charge: Guilty."

5. ***Guilty to a Named Lesser Included Offense***: "Your honor the accused, SPC Snuffy, pleads as follows: To the Specification: Not Guilty, but guilty to the lesser included offense of wrongful appropriation."

B. **HOW TO ENTER PLEAS**.

1. Step 1: Plead to the Specification;
2. Step 2: Plead to the excepted words or figures (if applicable);
3. Step 3: Plead to the substituted words or figures (if applicable); and
4. Step 4: Plead to the Charge.

C. **EFFECT OF PLEAS**.

1. ***Government's burden of proof***. Plea of not guilty places burden upon government to prove elements of the charges offense(s). A guilty plea relieves government of burden to prove elements of offense(s).

RCM 910. Pleas

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(j) *Waiver*. Except as provided in subsection (a)(2) of this rule [conditional pleas], a plea of guilty which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offense(s) to which the plea was made.

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2. ***Waiver***. Under RCM 910(j), a plea of guilty that results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt. A provident plea of guilty waives appellate review of all defects not raised at trial that are neither jurisdictional nor tantamount to a denial of due process. A plea of guilty will *not* cure a fatally defective specification or waive defective court composition.

a) ***Overview***. A plea of guilty that results in a finding of guilty waives any objection regarding an accused's guilt to that offense. This waiver also applies to motions to suppress evidence (even those fully litigated at trial). A plea of guilty does not waive jurisdictional defects or issues tantamount to a denial of due process.

b) ***Waiver of factual disputes relating to guilt***. In *United States v. Stokes*, 65 M.J. 651 (A. Ct. Crim. App. 2007), accused pled guilty to stealing military property; on appeal, defense attempted to present evidence that property was not "military" so the accused was not guilty of the offense. Government and defense agreed that the credit card obligations at issue were not "military property." ACCA confined its evaluation of the factual predicate for the plea to the record of trial itself. While the court relied on Article 66(c), which limits appellate review to the "entire record," as opposed to RCM 916(j), the result is the same. *See also United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980) ("[E]vidence from outside the record will not be considered by appellate authorities to determine anew the providence of the plea. . . . [P]rovidence of a tendered plea of guilty is a matter to be established one way or the other at trial.").

3. ***Broad scope of waiver***. *United States v. Ferguson*, 68 M.J. 431 (C.A.A.F. 2010). Accused communicated on-line with a police officer posing as a fourteen-year-old boy. Over several weeks, the accused sent the agent sexually-explicit messages and pictures. He also masturbated and ejaculated in front a webcam, intentionally sending the images to the undercover officer's screen name. For the last offense, the accused pled guilty to indecent exposure. On appeal, defense argued the exposure was not "in public view" because it was in a private setting and there was no evidence that a third person or that the accused intended anyone other than the undercover officer to view the exposure. In affirming, CAAF reasoned that in guilty plea cases: (1) The factual predicate for a guilty plea is sufficiently established if "the factual circumstances" as presented by the accused objectively support the plea; (2) A military judge's acceptance of a plea will not be reversed based on a "mere possibility" of a defense; and (3) The court will not "speculate" post-trial about the existence of facts that might invalidate an accused's guilty plea.

a) ***Rule applied***. The defense presented two military cases that discussed the "willful" and "public view" elements, respectfully. In strong language, CAAF noted the accused in those cases chose to plead not guilty and "contested the government's theory of the case," as opposed to the accused in this case who elected to plead guilty. Had the accused pled not guilty, the government would have had to prove beyond a reasonable doubt that the accused "ejaculated in public view," and the issue would have been litigated.

b) ***Effect of plea***. Because the accused agreed that his actions were in public view, he "relinquished his right to contest the prosecution's theory on appeal, unless the record discloses matter inconsistent with the plea." Without more analysis, the majority concluded the military judge did not abuse his discretion by accepting the accused's plea.

4. ***Other issues waived by unconditional guilty plea***.

a) ***Motion to suppress confession***. M.R.E. 304(d)(5) (unconditional guilty plea "waives and all privileges against self incrimination and all motions and objections under this rule with respect to that offense regardless of whether raised prior to plea"); *United States v. Hinojosa*, 33 M.J. 353 (C.M.A. 1991) (guilty plea waived right to contest motion denying suppression of confession).

b) ***Speedy trial***. *United States v. Tippit*, 65 M.J. 69 (C.A.A.F. 2007) (unconditional guilty plea waives speedy trial rights provided under Sixth Amendment and RCM 707 as well as Article 10 challenges not raised at trial; however, properly-litigated Article 10 motion is *not* waived); RCM 707(e) (unconditional guilty plea "waives any speedy trial issue as to that offense").

c) ***Trial counsel disqualification***. *United States v. Bradley*, 68 M.J. 279 (C.A.A.F. 2010). Accused entered into a pretrial agreement, which required him to testify against co-accused under a grant of immunity. Before pleading guilty, the accused met with assistant trial counsel (ATC) five times to prepare his testimony. The accused testified in one companion case and then withdrew from the pretrial agreement. The ATC was assigned as "lead counsel" in the accused's case. The defense moved to dismiss all charges and specifications, arguing the Government had made derivative use of his immunized statements and testimony, in violation of *United States v. Kastigar*, 406 U.S. 441 (1972). The military judge denied the motion to dismiss and then overruled civilian defense counsel's objection to the ATC remaining as trial counsel on the case. The accused then entered into a second pretrial agreement with the Government. On appeal, defense argued the trial counsel should have been recused from the case. The CAAF held the unconditional guilty plea waived the issue, adding, "While the waiver doctrine is not without limits, those limits are narrow and relate to situations in which, on its face, the prosecution may not constitutionally be maintained." (citing *United States v. Broce*, 488 U.S. 563, 574-76 (1989) (double jeopardy); *Menna v. New York*, 423 U.S. 61, 61-63 (1975) (same)).

5. ***Issues <u>not</u> waived by unconditional guilty plea***.

a) ***Unlawful command influence***. *United States v. Johnston*, 39 M.J. 242 (C.M.A. 1994) (UCI issues not waived by guilty plea).

b) ***Jurisdiction***. *United States v. Coffey*, 38 M.J. 290 (C.M.A. 1993) (jurisdictional issues not waived by accused's failure to raise them at trial).

c) ***Ineffective assistance of counsel***.

d) ***Properly-litigated Article 10 motion***. *United States v. Mizgala*, 61 M.J. 122 (C.A.A.F. 2005). After being held in pretrial confinement for 117 days the military judge, applying an erroneous test, denied the accused's Article 10 speedy trial motion. After this ruling, the accused entered an unconditional guilty plea to all charges. CAAF ruled that waiver does not apply where an accused unsuccessfully litigates an Article 10 speedy trial motion at court-martial because of Article 10's unique nature and legislative importance. "A fundamental, substantial, personal right . . . should not be diminished by applying ordinary rules of waiver and forfeiture associated with guilty pleas." *See also United States v. Dubouchet*, 63 M.J. 586 (N-M. Ct. Crim. App. 2006) (holding that *Mizgala* "stands for the proposition that only litigated Article 10 issues survive a waiver stemming from a guilty plea, and thus does not affect our decision in this case where the [accused] . . . never raised or litigated the issue of speedy trial and pled guilty unconditionally")

e) ***Multiplicious charging***. *United States v. Lloyd*, 46 M.J. 19 (C.A.A.F. 1997) (waiver of multiplicity issues that are not facially duplicative); *United States v. McMillian*, 33 M.J. 257 (C.M.A. 1991) (multiplicious charges made during sentencing not waived by guilty plea to the charges); *United States v. Rhine*, 67 M.J. 646 (A.F. Ct. Crim. App. 2009) ("Ordinarily, an unconditional guilty plea waives a multiplicity issue, unless it rises to the level of plain error. The appellant

bears the burden of showing that such an error occurred." (citing *United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998)); *United States v. Purdy*, 67 M.J. 780 (N-M. Ct. Crim. App. 2009) ("A guilty plea waives a multiplicity issue absent plain error.") (citing *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000)).

f) ***Statute of limitations***. *United States v. Province*, 42 M.J. 821 (N-M. Ct. Crim. App. 1996) (no waiver of statute of limitation defense "unless an accused, on the record, voluntarily and expressly waives the statute of limitations as bar to trial").

g) ***Selective prosecution***. *United States v. Henry*, 42 M.J. 231 (C.A.A.F. 1995) (selective prosecution not waived where facts necessary to make claim not fully developed at time of plea).

D. **CONDITIONAL GUILTY PLEA**. RCM 910(a)(2).

RCM 910. Pleas

(a)(2) *Conditional pleas.* With the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails on further review or appeal, the accused shall be allowed to withdraw the plea of guilty. The Secretary concerned may prescribe who may consent for Government; unless otherwise prescribed by the Secretary concerned, the trial counsel may consent on behalf of the Government.

1. ***Overview***. Accused and Government in a guilty plea (with consent of the military judge) can agree to preserve a litigated issue for appeal, even if the issue would normally be waived by a guilty plea. In practice, conditional guilty pleas are very rare.

2. ***Coordination with OTJAG***. In the Army, SJAs should consult with the Criminal Law Division, OTJAG, prior to the government's consent to an accused entering a conditional plea of guilty. AR 27-10, para. 5-26b ("Because conditional guilty pleas subject the government to substantial risks of appellate reversal and the expense of retrial, SJAs should consult with the Chief, Criminal Law Division, ATTN: DAJA–CL, Office of The Judge Advocate General, HQDA, prior to the government's consent regarding an accused entering a conditional guilty plea at court-martial. Once this coordination is complete, the Trial Counsel may consent, on behalf of the government, to the entering of the conditional guilty plea by the accused in accordance with R.C.M. 910(a)(2)."). *See generally* RCM 910(a)(2) ("The Secretary concerned may prescribe who may consent for Government . . .").

3. ***Case-dispositive issues***. The motion (or issue) in question should be case-dispositive. This rule comes from the Analysis to RCM 910, which notes that the rule as applied in federal civilian practice requires a case dispositive issue. However, only the Air Force *requires* that the issue be case dispositive. *See* AFI 51-201, para. 8.3 ("When approving a guilty plea conditioned on preserving review of an adverse determination of a pretrial motion, the military judge should make the following findings on the record: (1) the offer is in writing and clearly details the motion that the accused wishes to preserve on appeal; (2) the government's consent is in writing and signed by an official authorized to consent; (3) the particular motion was fully litigated before the military judge; and, (4) *the motion is case dispositive*."); *United States v. Phillips*, 32 M.J. 955, 957 (A.F.C.M.R. 1991) ("Staff judge advocates and military judges should not permit conditional pleas that only preserve issues that would not terminate the prosecution because to do so invites piecemeal appeals and the kind of appellate confusion suffered in this case."). As a practice point, where a conditional guilty plea is not case dispositive as to either the issue preserved for appeal or to all of the charges in a case, the military judge should address as

part of the providence inquiry the understanding of the accused and the parties as to the result of the accused prevailing on appeal.

4. ***Military judge and government counsel must consent***. See MCM, RCM 910 analysis, at A21-60 ("There is no right to enter a conditional guilty plea. The military judge and the Government each have complete discretion whether to permit or consent to a conditional guilty plea.").

5. ***Issue must be raised at trial***. *United States v. Forbes*, 19 M.J. 953 (A.F.C.M.R. 1985) (accused's failure to make motion to suppress drug test waived issue despite conditional plea).

6. ***Scope***. Conditional guilty pleas have nothing to do with (and are legally inconsistent with) fact-based or affirmative defenses.

7. ***Cases discussing conditional pleas***.

a) *United States v. Lawrence*, 43 M.J. 677 (A.F. Ct. Crim. App. 1995) (excellent discussion of the policy reasons behind conditional pleas).

b) *United States v. Proctor*, 58 M.J. 792 (A.F. Ct. Crim. App. 2003). Accused spent 107 days in pretrial confinement prior to preferral of charges, and a total of 161 days prior to arraignment. Accused entered a conditional plea of guilty, preserving the speedy trial issues for appeal. Court reversed and dismissed several charges and specifications with prejudice due to a violation of RCM 707 grounds, but found no Sixth Amendment or Article 10 violation, and did not dismiss those offenses discovered after the imposition of pretrial confinement. The court noted that because of the "all-or-nothing effect" of RCM 910, allowing an accused who enters a conditional plea to withdraw the plea if he prevails on appeal, "staff judge advocates are cautioned not to enter into conditional pleas unless the matter is case dispositive. . . . In this case, [accused]'s speedy trial issue was not case dispositive, because it did not require dismissal of those charges for which the [accused] was not placed into pretrial confinement. However, because the conditional plea was authorized for all the offenses, we must allow the [accused] to withdraw his pleas." The speedy trial clock for offenses discovered after the imposition of pretrial confinement began on the date of preferral of those charges. Note, an unconditional guilty plea following a litigated Article 10 motion does not waive the issue for appeal. *United States v. Mizgala*, 61 M.J. 122 (C.A.A.F. 2005). The N-M.C.C.A has held that an Article 10 motion that is not litigated at trial is waived by an unconditional guilty plea. *United States v. Dubouchet*, 63 M.J. 586 (N-M.C.C.A. 2006).

c) *United States v. Mapes*, 59 M.J. 60 (C.A.A.F. 2003). Accused convicted of involuntary manslaughter and various other offenses arising from his injection of a fellow soldier with a fatal dose of heroin. Accused entered into a pretrial agreement that permitted him to enter a conditional plea pursuant to RCM 910(a)(2) that preserved his "right to appeal all adverse determinations resulting from pretrial motions." At trial, accused moved to dismiss all charges due to improper use of immunized testimony and evidence derived from that immunized testimony in violation of *Kastigar v. United States*, 406 U.S. 441 (1972). Although the CAAF dismissed most of the charges and specifications due to the *Kastigar* violation, accused was permitted to withdraw his plea to those remaining offenses which were not directly tainted by that violation, as the violation caused or played a substantial role in the GCM referral of those offenses. In so doing, CAAF noted that although military practice, unlike its federal civilian counterpart, does not limit conditional pleas to issues that are dispositive, there should be

d) *United States v. Shelton*, 59 M.J. 727 (A. Ct. Crim. App. 2004). Pretrial agreement broadly preserved for appellate review "any adverse determinations made by the military judge of any of the pretrial motions made at [the accused's] court-martial." Defense made a motion to suppress accused's confession based on the clergy privilege, and also made a discovery motion seeking CID Agent Activity Summaries. "Based on the lack of emphasis given to the discovery motion at the trial level, the convening authority and staff judge advocate, and the parties at trial, may not all have been aware that accused's conditional guilty plea preserved the discovery motion." Also, the military judge mentioned that only the clergy privilege motion was preserved by the plea. Citing *Mapes*, the court found that "the military judge failed to thoroughly address the parameters of the conditional guilty plea's impact." Accordingly, both motions were preserved for appeal. Subsequently, CAAF held that the accused's confessions to his pastor were protected by the clergy privilege under M.R.E. 503 and determined that the accused was allowed to withdraw his conditional guilty plea. *See United States v. Shelton***,** 64 M.J. 32 (C.A.A.F. 2006) ("[W]hat is at stake is the ability of an accused to put the Government to its burden of proving him guilty, beyond a reasonable doubt, using only legally competent evidence. As the evidence available to the Government did not meet that criterion, appellant is entitled, in accordance with his agreement with the Government and under the provisions of the *Manual*, to withdraw his plea of guilty.") (quoting *United States v. Barror*, 23 M.J. 370 (C.M.A. 1987)).

E. **PLEADING PROCEDURE – GUILTY PLEA AND PROVIDENCE INQUIRY**.

1. ***In general***. After the accused is arraigned under RCM 904, the military judge will call on accused and counsel to enter a plea. If the accused pleads guilty to any offense, the military judge will follow this procedure to ensure the plea is voluntary and accurate. In the military system, an accused must admit his own guilt in open court. *See* RCM 910(d)-(e). As a result, *Alford* pleas or nolo contendere pleas are not allowed.

RCM 910. Pleas

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(d) *Ensuring that the plea is voluntary.* The military judge shall not accept a plea of guilty without first, by addressing the accused personally, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement under R.C.M. 705. The military judge shall also inquire whether the accused's willingness to plead guilty results from prior discussions between the convening authority, a representative of the convening authority, or trial counsel, and the accused or defense counsel.

(e) *Determining accuracy of plea.* The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea. The accused shall be questioned under oath about the offenses.

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2. ***The origin***. *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969). The record "must reflect not only that the elements of each offense charged have been explained to the accused but also that the military trial judge or the president has questioned the accused about what he did or did not do, and what he intended (where this is pertinent), to make clear the basis for a determination by the military trial judge or president whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty."

3. ***Elements of providence inquiry***. RCM 910(c)-(e). *See also Boykin v. Alabama*, 395 U.S. 238 (1969). Providence inquiry must include the military judge's explanation of the offenses and ensure the accused:

a) Understands that the accused waives certain rights: specifically the right against self-incrimination; trial of facts by court; and right of confrontation;

b) Understands the elements of offense;

c) Agrees that the plea admits every element, act or omission, and relevant intent;

d) Understands that the accused may be convicted on plea alone without further proof;

e) Is advised of the maximum sentence available based on the plea alone;

f) Has had the opportunity to consult with counsel;

g) Is entering the plea knowingly and voluntarily.

4. ***Military judge must advise the accused of his rights***. RCM 910(c).

a) "The gravity of pleading guilty is such that the Supreme Court mandated the Constitutional requirement that any guilty plea must be entered into voluntarily, knowingly, and with an understanding of the surrounding circumstances and likely consequences." *United States v. Grisham*, 66 M.J. 501, 504 (A. Ct. Crim. App. 2008) (citing *Santobello v. New York*, 404 U.S. 257, 262-63 (1971)).

b) Military judge must expressly advise accused of rights on the record. *United States v. Hansen*, 59 M.J. 410 (C.A.A.F. 2004) (setting aside findings and sentence in guilty plea because military judge failed to apprise accused of his right to confront witnesses and right against self-incrimination). CAAF refused to infer the accused understood these rights, noting that "where bedrock constitutional rights are at issue and are waived, we should not settle for inference and presumption when certainty is so readily obtained." *Id.* at 413.

c) Civilian standard is more stringent, requiring defense show: (1) plain error in rights advisement and (2) "reasonable probability that, but for the error, [defendant] would not have pled guilty." *United States v. Dominguez-Benitez*, 542 U.S. 74 (2004). Military system only requires a showing that Military Judge did not advise the accused of the rights waived in a guilty plea.

5. ***The military judge must advise the accused of his elements of the offense***. RCM 910(c)(1) and Discussion.

a) ***In general***. Under RCM 910(c), "Before accepting a plea of guilty, the military judge shall address the accused personally and inform the accused of, and determine that the accused understands, the following: (1) The nature of the offense to which the plea is offered, the mandatory minimum penalty, if any, provided by law, and the maximum possible penalty provided by law; . . . (3) That the accused has the right to plead not guilty or to persist in that plea if already made, and that the accused has the right to be tried by a court-martial, and that at such trial the accused has the right to confront and cross-examine witnesses against the accused, and the right against self-incrimination; (4) That if the accused pleads guilty, there will not be a trial of any kind as to those offenses to which the accused has so pleaded, so that by pleading guilty the accused waives the rights described in subsection (c)(3) of this Rule."

b) ***Challenges in defining terms***. *United States v. Craig*, 67 M.J. 742 (N-M. Ct. Crim. App. 2009). Accused pled guilty to distributing child pornography in violation of 18 U.S.C. § 2252A(a)(2), charged under Clause 3 of Article 134, UCMJ. The military judge correctly advised the accused of the statutory elements of the offense as well as several applicable definitions provided under 18 U.S.C. §

2256.[1] The term "distribute" is not defined under 18 U.S.C. §§ 2252A or 2256, so the military judge defined the term during the providence inquiry using the definition under Article 112a, UCMJ. On appeal, the defense argued the accused's plea was improvident, as the military judge did not provide an accurate explanation of "distribute" and (alternatively) the accused's inquiry did not satisfy that definition. Relying on *United States v. Kuemmerle*, 67 M.J. 141 (C.A.A.F. 2009), the court noted three sources to find the meaning of terms not defined in statute: "(1) the plain meaning of the term; (2) the manner in which Article III courts have construed the term; and (3) the guidance gleaned from any parallel UCMJ provisions." In *Kuemmerle*, the CAAF affirmed a military judge's explanation of "distribute" as derived from *Black's Law Dictionary* and *Webster's Third New International Dictionary Unabridged.* The N-MCCA noted this guidance, and then considered the definition of "distribute" from the Model Federal Jury Instructions. The court upheld the military judge's definition of "distribute" that had been taken from Article 112a.

c) ***Defining terms of art (like attempt)***. *United States v. Redlinski*, 58 M.J. 117 (C.A.A.F. 2003). Military judge erred by failing to adequately explain elements of attempted distribution of marijuana; plea improvident and set aside. Military judge failed to advise appellant that the offense requires an overt act done with specific intent, and that the act amounted to more than mere preparation and apparently tended to effect the commission of the intended offense, the four elements of an attempt offense. In order for plea to be knowing and voluntary, the record of trial must reflect that the elements of each offense charged have been *explained to the accused by the military judge*. If the judge fails to do so, the plea must be set aside unless "it is clear from the entire record that the accused knew the elements, admitted them freely, and pled guilty because he was guilty." The court "looks to the context of the entire record to determine whether an accused is aware of the elements, either explicitly or inferentially." For a plea to an attempt offense, "the record must objectively reflect that the appellant understood that his conduct, in order to be criminal, needed to go beyond preparatory steps and be a direct movement toward the commission of the intended offense." *See also United States v. Burris*, 59 M.J. 700 (C.G. Ct. Crim. App. 2004) (plea to dishonorable failure to pay just debt improvident due to military judge's failure to define term "dishonor").

d) ***Higher standard than civilian courts***. *Bradshaw v. Stumpf*, 545 U.S. 175 (2005). Judge did not advise defendant on specific intent element for the offense of aggravated murder in a capital case. The defense attorney, however, represented at the plea hearing that he had explained the intent element and the accused agreed with his counsel's representation. The Supreme Court stated that a judge is not required to advise the accused of the elements himself; "[r]ather, constitutional requirements may be satisfied where the record accurately reflects that the charge's nature and the crime's elements were explained to the defendant by his own, competent counsel."

e) ***Minimal requirements***. *United States v. Morris*, 58 M.J. 739 (A. Ct. Crim. App. 2003). During plea colloquy concerning wrongful appropriation, military judge "failed to follow the usual practice of Army military judges in that he did not read to appellant applicable definitions from the [*Benchbook*]," including the definitions of the terms "possession," "owner," "belongs," and "took." As for the

[1] These included "definitions of child pornography, minor, sexually explicit conduct, and visual depiction, which, he said, includes data stored on a computer."

colloquy concerning the forgery offense, the military judge likewise failed to provide any definitions from the *Benchbook*, including those for the terms, "falsely made or altered" and "intent to defraud." Nonetheless, ACCA affirmed the findings and sentence. For practitioners, in most complex offenses (such as conspiracy or accessory after the fact) failure to explain the elements will generally result in reversal; however, a plea is not "automatically rendered improvident by the military judge's failure to identify or explain the elements of the offense 'if the accused admits facts which establish that all the elements were true.'" Despite finding the military judge's failure reflects a "lack of attention to detail," the three most critical requirements for a provident guilty plea were met. Accused admitted facts necessary to establish the charges, expressed a belief in his own guilt, and there were no inconsistencies between the facts and the pleas.

6. ***Factual predicate for plea.*** RCMs 910(c)(5), 910(e). The accused shall be questioned under oath about the offense(s) as part of the guilty plea inquiry. The military judge must ascertain why the accused believes he is guilty and advise the accused of the elements of the offense. As noted below, military practice requires the military judge to advise the accused of the elements of the offense(s) or risk reversal. This contrasts sharply with Supreme Court precedent.

a) ***Leading questions generally disfavored***. *United States v. Nance*, 67 M.J. 362 (C.A.A.F. 2009). "Although this Court has stressed that the use of leading questions that do no more than elicit 'yes' and 'no' responses during the providence inquiry is disfavored, it has never been the law that a military judge's use of leading questions automatically results in an improvident plea." Accused had pled guilty, among other things, to wrongful use of Coricidin HBP Cough and Cold Medicine (CCC) on divers occasions, in violation of Article 134, as conduct prejudicial to good order and discipline. The CAAF noted with approval the military judge only used leading questions to amplify three points that were already on the record: (1) objective facts from the stipulation of fact; (2) objective facts already elicited from the accused earlier in the plea inquiry; and (3) the accused's "explicit agreement" that his conduct was prejudicial to good order and discipline. The court also noted that whether factual circumstances amount to "prejudicial to good order and discipline" is a "legal conclusion that remains within the discretion of the military judge in guilty plea cases" (citing *United States v. Jordan*, 57 M.J. 236 (C.A.A.F. 2002)).

b) *United States v. Negron*, 60 M.J. 136 (C.A.A.F. 2004). Accused pled guilty to depositing obscene matters in the mail in violation of Article 134, UCMJ. During the providency inquiry, military judge failed to provide the correct definition of "obscene." An accused is not provident to an offense when military judge uses a substantially different definition of "obscene" from that proscribed by the offense charged. Additionally, CAAF cautioned judges "regarding the use of conclusions and leading questions that merely extract from the [accused] 'yes' and 'no' responses during the providency inquiry."

c) *United States v. Barton*, 60 M.J. 62 (C.A.A.F. 2004). Military judge did not repeat larceny elements for each larceny and conspiracy to commit larceny offense but rather cross-referenced his predicate statement of elements. For one specification, the accused failed to state and the stipulation of fact failed to mention that the value of the stolen property exceeded $100. The only admission regarding value existed in the accused's acknowledgement that he understood the elements of the larceny offense based on the judge's cross-reference. In affirming the providency of the plea, CAAF reasoned that the value determination is not a complex legal element and military judge made the accused look at the charge

sheet for each specification and the specification in issue clearly stated the stolen property exceeded $100. CAAF cautioned, however, "we may have doubts that a similar methodology of cross-reference will work generally."

d) ***Higher standard than civilian courts***. *Bradshaw v. Stumpf*, 545 U.S. 175 (2005) (holding that a judge is not required to advise the accused of the elements himself; "[r]ather, constitutional requirements may be satisfied where the record accurately reflects that the charge's nature and the crime's elements were explained to the defendant by his own, competent counsel").

e) *United States v. Hardeman*, 59 M.J. 389 (C.A.A.F. 2004). Plea improvident because a definitive report date is necessary for an AWOL specification. The providency inquiry did not ultimately reveal the date on which the accused was willing to admit he went AWOL.

f) *United States v. McCrimmon*, 60 M.J. 145 (C.A.A.F. 2004). Accused drill instructor pled guilty to bribery for asking for and receiving money from trainees to protect them from receiving an Article 15 for going to the post exchange (PX) without authorization. At the time of the bribe, the accused knew the Article 15 was a scare tactic by the first sergeant. ACCA questioned whether the accused could intend for the bribe to influence his official actions, an element of bribery, if he knew the Article 15 was merely a scare tactic. Although the first sergeant's threat of the Article 15 was a bluff, CAAF held the bribe could still influence the accused in his official actions because he still possessed the power to recommend an Article 15 to the company commander. In upholding the bribery conviction, CAAF focused on the detailed dialogue between the MJ and the accused regarding bribery and its intent element and the detailed stipulation of fact explicitly establishing the accused's intent to be influenced by the bribe.

g) If the military judge conducts too little inquiry, the case may be set aside. *United States v. Bailey*, 20 M.J. 703 (A.C.M.R. 1985). Military judge must advise the accused regarding the meaning and effect of a guilty plea and the rights waived by pleading guilty. "Reliance upon assurances from counsel [that accused understood his rights] . . . is insufficient." *See also United States v. Frederick*, 23 M.J. 561 (A.C.M.R. 1986) (military judge's inquiry requiring simple yes or no answers when asked whether he did that which the specifications alleged was inadequate).

h) *United States v. Hitchman*, 29 M.J. 951 (A.C.M.R. 1990). (plea improvident when judge failed to elicit accused's admission that conduct was prejudicial to good order and discipline or was service discrediting regarding Article 134 wrongful discharge of firearm offense).

i) *United States v. Duval*, 31 M.J. 650 (A.C.M.R. 1990) (factual basis not sufficient if elicited in terms of legal conclusions, e.g., "Was your failure to pay the debt dishonorable?").

7. ***Factual predicate for plea – appellate review and "substantial basis" test***. *United States v. Inabinette*, 66 M.J. 320 (C.A.A.F. 2008). In reviewing a military judge's acceptance of a plea under the abuse of discretion standard, appellate courts apply a "substantial basis" test: Does the record as a whole show a substantial basis in law *or* fact for questioning the guilty plea? [2]

[2] CAAF seemingly departed from prior caselaw and provided the following explanation regarding the substantial basis test, which now expressly requires *either* a substantial basis in law *or* a substantial basis in fact for questioning the providence of a guilty plea:

a) ***Questions of fact***. "[T]he standard for reviewing a military judge's decision to accept a plea of guilty is an abuse of discretion." The court added, "A military judge abuses his discretion if he accepts a guilty plea without an adequate factual basis to support the plea."

b) ***Issues of law.*** "[T]he military judge's determinations of questions of law arising during or after the plea inquiry are reviewed de novo."

c) ***Practice tip – when is there a "substantial basis" in law?*** The CAAF provided this example: an accused who knowingly admitted the facts necessary to prove he or she met all the elements of an offense, but was not advised of an available defense. There would also be a substantial basis in law if the accused stated matters inconsistent with the plea that were not resolved by the military judge. By contrast, there would be a substantial basis in fact where the factual predicate for the guilty plea "falls short."

8. ***Inquiry into pretrial agreement (PTA)***. The military judge must fully explore the terms of the PTA with the accused to ensure (s)he understands them. There are two separate documents that constitute the PTA. First, the "offer" portion of the PTA sets the terms and conditions of the accused's plea. Second, the "quantum" portion of the PTA provides for a cap on the accused's sentence. If the military judge is sentencing the accused, the judge does not review the quantum portion of the PTA until after sentence is announced.

9. ***Inquiry into stipulation of fact***. Military judge must conduct inquiry into the stipulation of fact (the document that reinforces the accused's plea and embraces what both parties agree are the facts of the case). The PTA normally requires the accused agrees to enter into a stipulation of fact; it may form a basis for admitting aggravating evidence (e.g., accused will agree to stipulate to admissibility to ensure favorable pretrial agreement).

10. ***Acceptance of pleas and entering findings***. Military judge generally enters findings at the close of providency, however, it is error to do so if the trial counsel intends to prove a greater offense and the accused pled guilty to the lesser offense. *See United States v. Baker*, 28 M.J. 900 (A.C.M.R. 1989) (government intended to prove rape and MJ improperly entered findings pursuant to pleas of guilty to lesser included offense of carnal knowledge).

F. **FACTUAL PREDICATE – SPECIFIC OFFENSES**.

1. ***In General***. Pleas may be improvident if they are inconsistent with factual and legal guilt. The MJ must reopen the providence inquiry and resolve a conflict between the facts and the plea where facts brought out during the court-martial are inconsistent with the accused's plea.

a) *United States v. Outhier*, 45 M.J. 326 (1996). The accused was charged with aggravated assault likely to cause death or grievous bodily harm by binding the victim's hands and feet and allowing him to jump into the deep area of a swimming pool as a practice exercise after accused had falsely asserted his qualification as a Navy SEAL and hospital corpsman. The accused's plea was improvident because the facts revealed during sentencing negated the "means

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Does the record as a whole show "'a substantial basis' in law and fact for questioning the guilty plea." *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

Traditionally, this test is presented in the conjunctive (i.e., law *and* fact) . . . however, the test is better considered in the disjunctive (i.e., law *or* fact). That is because it is possible to have a factually supportable plea yet still have a substantial basis in law for questioning it.

likely to produce death or grievous bodily harm" element: the accused remained nearby with life preserver; had trained with victim the entire day; victim was not a novice swimmer; victim indicated desire to train while off duty, understood danger, and was aware he was not obligated to participate in exercise

b) *United States v. Jordan*, 57 M.J. 236 (2002). Conviction for unlawful entry onto a ship was reversed because accused's providence inquiry did not establish a basis for concluding that his conduct was prejudicial to good order and discipline or was of a nature to bring discredit upon the armed forces. The accused's "yes" response to the MJ's legally conclusive question as to whether his conduct was prejudicial or service discrediting does not establish a sufficient factual predicate.

2. ***Aiding and abetting offenses***. *United States v. Gosselin*, 62 M.J. 349 (C.A.A.F. 2006). Accused was approached by another airman about driving to the Netherlands to purchase hallucinogenic mushrooms. During providence inquiry for wrongful introduction of the mushrooms onto a base, accused admitted that he and his co-accused drove to the Netherlands to purchase mushrooms, that he was present when the mushrooms were purchased, that he knew the mushrooms were in the co-accused's car when they reached the base gate, and that he used mushrooms that night from roughly the same bag in which the mushrooms were purchased. However, he also mentioned his desire to travel to the Netherlands to buy a dragon statue. MJ repeatedly asked the accused to describe the original purpose of the trip and advised him that mere presence at a crime scene did not establish liability as a co-conspirator or an aider and abettor. MJ recessed the trial twice for the accused to discuss his case with counsel. After the second recess, the defense counsel stated that the accused was guilty under the aiding and abetting theory but accused never affirmatively agreed with his counsel. CAAF found the plea was improvident: "The providence inquiry failed to establish that [the accused] intended to facilitate [the] introduction of mushrooms onto a military installation or assisted or participated in the commission of the offense."

3. ***Assault and battery offenses***.

a) *United States v. Richards*, 63 M.J. 622 (A. Ct. Crim. App. 2006). Accused got into a mutual fight with another Soldier. Two other Soldiers joined the fight against the accused. At that point, accused stated "he was 'out numbered' so he reached into his pocket and took out [a] pocket knife." Accused made thrusting motions with his knife cutting two of the soldiers resulting in his plea to the offense of aggravated assault. ACCA held the MJ failed to establish on the record whether the accused had a right to use deadly force to protect himself against three assailants and if the accused used more force than authorized whether his offer to use the force could otherwise be combined with the defense of accident. The court recognized that "if a lawful offer of . . . force results in an unintentional injury to the victim, the defense of accident may apply in conjunction with self-defense." The MJ provided a recess for the defense counsel to explain these concepts to the accused, and discussed these issues with both counsel off the record, but the record failed to establish the accused's understanding of the legal concepts or that the facts did not otherwise lead to a defense to the aggravated assault. *Cf. United States v. Smith*, 44 M.J. 387 (C.A.A.F. 1996) (military judge's failure to fully explain self-defense and defense of another did not render plea improvident where providence inquiry indicated a mutual affray which was jointly escalated, and appellant did not fear physical injury and utilized excessive force).

b) *United States v. Axelson*, 65 M.J. 501 (A. Ct. Crim. App. 2007). Accused (an Army O-4) pled guilty to aggravated assault with a dangerous weapon or other means or force likely to cause death or grievous bodily harm. Accused admitted

beating his wife with a club, but stated during the providence inquiry that he did not recall striking her repeatedly (though he read reports indicating that there was more than one blow and agreed that the reports were accurate). A panel convicted accused, contrary to his pleas, of attempted premeditated murder and other military-related offenses. During the trial on the merits, the defense introduced evidence from a psychiatrist who testified that he suffered from general anxiety disorder, but there was no reason why the accused might lack mental responsibility for his actions. On appeal, accused claimed that his pleas and the subsequent trial on the merits raised evidence of partial mental responsibility and automatism, and his pleas were not knowing because the MJ did not instruct him on those defenses. ACCA concluded that the plea was knowing and no additional instructions on defenses were required because aggravated assault is a general intent crime to which partial mental responsibility is not a defense. Further, automatism is not a defense under RCM 916 or other caselaw, and there was no evidence of automatism raised either in the providence inquiry or on the merits.

4. ***Attempt offenses***. *United States v. Bates*, 40 M.J. 362 (C.M.A. 1994). Accused in carnal knowledge prosecution told judge, "I had attempted intercourse with my daughter. I touched my penis to her vagina. She had said that it hurt. I stopped . . . ." The court indicates "attempt" in context of providence inquiry was a "term of art." Plea not improvident. However this seemed like a close call. Judge Wiss dissented: "The providence inquiry is a model of inadequacy," particularly the judge's failure to advise accused of "penetration" requirement.

5. ***AWOL and related offenses***.

a) *United States v. Gaston*, 62 M.J. 411 (C.A.A.F. 2006). During the providence inquiry, the accused, a Senior Airman, told the military judge that his 13-17 January 2003 AWOL was terminated by apprehension because his dorm manager came to his room and told him that his squadron was looking for him. On review, CAAF noted that this providence inquiry was "bare bones" and looked to the entire record, to include the accused's testimony during a pretrial motion, to clarify the facts surrounding the accused's interaction with his dorm manager. During a pretrial motion, the accused said the dorm manager told him that his squadron was looking for him, the accused told the manager he would get dressed and meet him down front, and the manager said he would call the accused's first sergeant to pick him up. CAAF, reversing, held that the record did not show that the accused's contact with the dorm manager established his return to military control. "Nothing in the record establishes that the dorm manager believed Gaston had committed an offense or that the dorm manager had the authority to take him into custody. Without this authority, the mere fact that the dorm manager made contact with Gaston while he was on base and in his dormitory room is not sufficient to establish that Gaston was under military control." Finding amended to the lesser offense of AWOL.

b) *United States v. Pinero*, 60 M.J. 31 (C.A.A.F. 2004) (overturning plea to unauthorized 53-day absence where accused submitted to a fitness for duty screening at approximately Day 7 of the alleged 53-day AWOL).

c) *United States v. Hardeman*, 59 M.J. 389 (C.A.A.F. 2004) (plea improvident because a definitive report date is necessary for an AWOL specification; providence inquiry did not ultimately reveal the date on which the accused was willing to admit he went AWOL).

d) *United States v. Estes*, 62 M.J. 544 (A. Ct. Crim. App. 2005). Accused pled guilty to an AWOL from 7-11 June 2002. During the providence inquiry, the

accused told the military judge that he remained in his barracks' room from 7-11 June 2002 but that he took some side trips to the dining facility (DFAC) and post exchange (PX). On appeal, defense argued the accused was not "absent from his unit" because he remained in his barracks, citing *United States v. Smith*, 37 M.J. 583, 586 (N.M.C.M.R. 1993) (holding that a servicemember who remains in their unit barracks is not AWOL). ACCA, affirming, stated that "the essence of [the accused's] offense was that he was not present with his fellow soldiers, i.e., his 'unit,' performing military duties during the work day." Accused told the military judge that he missed several formations from 7-11 June 2002, that his fellow Soldiers were working, and that he was not working but was "goofing off." ACCA stated, "We decline to take our sister court's position that ownership or control of a barracks building is the determining factor in whether a soldier is absent from his unit while remaining in those barracks . . . [a] unit is comprised of soldiers, not buildings."

e) *United States v. Scott*, 59 M.J. 718 (A. Ct. Crim. App. 2004). Plea to AWOL from 16 August through 5 November 2002 improvident because accused signed in with CQ on 11 September 2002. Court divided one longer period of absence into two shorter AWOLs and affirmed the findings and sentence.

f) *United States v. Duncan*, 60 M.J. 973 (A. Ct. Crim. App. 2005). The accused received permission from his squad leader to miss formation under the false pretense that the accused needed to take his son to the hospital. On appeal for his FTR conviction, the accused asserted he had authority to miss formation, "albeit authority obtained by making a false statement," so his plea was improvident as to the element of "without proper authority." ACCA, affirming the case, ruled that authority obtained by a false statement "goes against the plain meaning of 'without proper authority.'" An FTR or AWOL occurs if it is "preceded by the use of false statements, false documents, or false information provided by or on behalf of an accused."

g) *United States v. Malone*, 34 M.J. 213 (C.M.A. 1992). Guilty plea to unauthorized absence improvident when MJ failed to resolve the issue as to whether the accused's command had turned him over to civilian authorities to serve a civilian sentence.

h) FTR under Article 86–The Deliberate Avoidance Doctrine. *United States v. Adams*, 63 M.J. 223 (C.A.A.F. 2006). Military judge did not accept the accused's plea to AWOL but did accept his plea by exceptions and substitutions to failing to go to his appointed place of duty. During the providence inquiry for failing to go to his appointed place of duty, the accused testified he did not know the location of his unit's formation but that he purposefully avoided determining the location. N-MCCA, acknowledging that the accused's knowledge of the report location is an element of the offense, held his "deliberate and conscious efforts to avoid learning of his duty nevertheless rendered his guilty plea to failing to go to his reported place of duty provident." Under a "deliberate avoidance or ignorance" theory a finder of fact may "rely on upon a permissive inference that the accused had knowledge of the fact that the accused deliberately avoided." CAAF, affirming, held that a "deliberate avoidance" theory is available for Article 86, UCMJ offenses. The test is whether the accused "was subjectively aware of a high probability of the existence of illegal conduct, and purposely contrived to avoid learning of the illegal conduct." This doctrine is consistent with federal practice and "a literal application of actual knowledge to Article 86, UCMJ, offenses would result in absurd results in a military context . . . – [s]ervicemembers might avoid their duties and criminal sanction by hunkering

down in their barracks rooms or off-base housing, taking care to decline all opportunity to learn of their appointed place of duty at formation or through the receipt of orders."

i) *United States v. Gilchrist*, 61 M.J. 785 (A. Ct. Crim. App. 2005) (reversing accused's conviction for going from his appointed place of duty when record failed to establish that accused knew he was required to report).

6. ***Bad check cases***. *United States v. Mixon*, No. 35363, 2005 CCA LEXIS 27 (A.F. Ct. Crim. App. Jan. 28, 2005) (unpub.). During the providence inquiry, the accused pled guilty to numerous specifications of dishonorably failing to maintain sufficient funds to pay his checks. The accused, however, made statements that he attempted to pay off some checks and negligently failed to check funds on other checks. The court held "[t]he recurring characterizations by the [accused] that his conduct was negligent warranted further inquiry by the military judge, which never occurred."

7. ***Communicating a threat***. *United States v. Greig*, 44 M.J. 356 (C.A.A.F. 1996). Plea to communicating a threat provident even though accused testified he only made the threats "to stay in the hospital" and attending psychiatrist did take threats seriously (psychiatrist testified that "he was suspicious [of accused] at the time and felt it probably an effort at manipulation in order to maintain hospitalization"). CAAF held: the accused need not entertain the "intent expressed in the utterances"; accused stated during providence inquiry that he was not joking; and in a guilty plea, accused's statements, and not witnesses, are the focal point for resolving any inconsistency.

8. ***Conspiracy***.

a) *United States v. McClary*, 68 M.J. 606 (C.G. Ct. Crim. App. 2010), *review denied*, 69 M.J. 164 (C.A.A.F. 2010). Accused pled guilty to conspiring with his girlfriend to make false official statements by submitting a false marriage certificate and other related documents to obtain military benefits. The military judge defined "intent to deceive" to the accused but the accused never stated that he and his girlfriend shared this intent, as required for conspiracy. The military judge did not discuss the term "official" in any manner, thought the accused said the "false official statement" was the marriage certificate. The "official" nature of the marriage certificate was similarly not discussed. In reversing, the court held that because the accused never stated that he and his girlfriend shared an intent to deceive, his plea to conspiracy was not provident. The court further noted that a marriage certificate (without more) is not an "official" statement, as it is not related to military duties or any official military function.

b) *United States v. Linteau*, No. 20010926 (A. Ct. Crim App. Mar. 20, 2007) (unpub.). The accused challenged guilty plea to conspiracy, alleging that the facts raised the defense of withdrawal and the military judge did not explain the defense during the providence inquiry. The court held the plea provident because the accused "did not sufficiently raise the defense of withdrawal to substantially conflict with his pleas." The accused provided sufficient facts on the record to establish that the withdrawal defense did not apply. Although the accused did not participate in the crimes, he did not comply with the legal requirements for withdrawal and believed that he was still part of the agreement to commit the crime. While the court notes that it might have been prudent for the military judge to explain the defense to the accused, the MJ recognized the potentially inconsistent matter and asked a series of open-ended questions that elicited sufficient facts to foreclose the defense. Affirmed.

c) *United States v. Dal*, No. S20957, 2007 CCA LEXIS 291 (A.F. Ct. Crim. App. Feb. 13, 2007) (unpub.), *rev. denied*, 65 M.J. 478 (C.A.A.F. 2007). The accused pled guilty to conspiracy to commit arson based on a scheme where he and another airman planned to set a fire in the barracks and then "heroically resolve the crisis" in order to secure an early promotion. When it came time to execute the plan, the accused sought to confirm the participation of the other airman, who said, "Whatever" or "Do what you gotta do." Yet when the accused started the fire, the other airman appeared "very shocked and speechless." Accused argued on appeal that the providence inquiry failed to show an agreement because, although the accused believed there was an agreement, his testimony that the other airman appeared shocked and surprised "casts substantial doubt on whether such an agreement actually existed." The AFCCA found the accused plea to conspiracy to be improvident but guilty of attempted conspiracy. *See also United States v. Brewster*, No. 200602269, 2007 CCA LEXIS 315 (N-M. Ct. Crim. App. Aug. 14, 2007) (unpub.) (accused's plea to larceny as a co-conspirator was improvident where the record established that the co-conspirator stole the vehicle *before* the conspiracy was formed).

9. ***Drug/alcohol cases***.

a) *See United States v. Gosselin*, 62 M.J. 349 (C.A.A.F. 2006), discussed in aiding and abetting section, *supra*.

b) *United States v. Lee*, 61 M.J. 627 (C.G. Ct. Crim. App. 2005) (holding that "merely planting [mushroom] spores which were not a controlled substance, even with the intent to grow the mushrooms, did not constitute the manufacture of the mushrooms in the absence of any controlled substance in the planting . . . [h]owever, the planting did support the offense of attempting to manufacture a controlled substance."); *United States v. Eckhardt*, No. 20021377 (A. Ct. Crim. App. July 15, 2005) (unpub.) (amending a wrongful use of MDA specification to use of MDMA).

c) *United States v. Pinero*, No. 200101373, 2005 CCA LEXIS 8 (N-M. Ct. Crim. App. Jan. 14, 2005) (unpub.). On remand from CAAF regarding the providence of an AWOL offense, the N-MCAA found the accused's plea to marijuana use was improvident. Accused was charged with using marijuana on 15 December 2000 but during the providence inquiry the military judge asked the accused to discuss his usage on 29 August 2000 (relating to a methamphetamine usage). The colloquy between the judge and the accused did not clarify this inconsistency and there was "a failure of the record to reflect any discussion of the [accused's] involvement with marijuana on or about 15 December 2000."

d) *United States v. Denaro*, 62 M.J. 633 (C.G. Ct. Crim. App. 2006). The accused assisted a coworker by providing her a masking agent to avoid a positive urinalysis for cocaine. Accused intended to undermine the urinalysis to prevent his co-worker's administrative discharge. The accused's plea to wrongfully interfering with an adverse administrative proceeding (and conspiracy to do so) was provident because it was reasonable to conclude that an adverse administrative proceeding would commence against his coworker based on a positive cocaine urinalysis and the accused intended to assist his coworker in masking her results.

e) *United States v. Thomas*, 65 M.J. 132 (C.A.A.F. 2007). The accused, a Navy Seaman Recruit, drove his car onto Fort Lewis about 45 minutes after smoking a marijuana cigarette that he had prepared from marijuana in his possession. After executing an illegal u-turn, military police pulled him over and discovered trace

amounts of marijuana in a bag in his car. The accused pled guilty to wrongful introduction of a controlled substance onto a military installation. In the stipulation of fact, the government and the accused agreed that the accused "did *not* pass through a security gate and was *unaware* that he was driving on military property." Concluding that the offense was one of "strict liability," the N-MCCA had affirmed. CAAF reversed, finding that the offense required "actual knowledge that he was entering onto the installation. "[T]he stipulated fact that [the accused] did not know that he was entering the installation renders his plea to wrongful introduction improvident." However, the court affirmed a finding of the lesser-included offense of wrongful possession of marijuana, and affirmed the sentence.

10. ***Fleeing the scene of an accident***. *United States v. Littleton*, 60 M.J. 753 (N-M. Ct. Crim. App. 2004). The *Manual*'s explanation to the offense of fleeing the accident scene states it "covers 'hit and run' situations where there is damage to property other than the driver's vehicle or injury to someone other than the driver or a passenger in the driver's vehicle." The accused, driving in a borrowed vehicle, hit a curb while intoxicated resulting in damage to his vehicle but no other damage to property or persons; he then fled the accident scene. Based on these facts, the accused's plea to fleeing the accident scene was improvident.

11. ***Fraternization***. *United States v. Jackson*, 61 M.J. 731 (N-M. Ct. Crim. App. 2005). Accused pled guilty to violating a lawful general regulation by fraternizing with four junior enlisted female marines. In the process of organizing a fund raiser fashion show, the accused requested the four marines to provide him with their measurements in the hopes that his contacts with the women would result in sexual relationships. The Navy's fraternization regulation requires a showing that a "personal relationship" existed between the parties. The N-MCCA held that a "personal relationship" did not occur between the parties from the accused asking the type of questions discussed above. Findings on the lawful general regulation violation overturned and sentence set aside.

12. ***Indecent acts with another and similar offenses***.

a) *United States v. Johnson*, 60 M.J. 988 (N-M. Ct. Crim. App. 2005) (accused's plea to an indecent act with another was provident where he voluntarily observed another Marine engaging in sex and stated to him "that's my dog").

b) *United States v. White*, 62 M.J. 639 (N-M. Ct. Crim. App. 2006) (affirming accused's conviction to communicating a threat to injure reputation when he told a 15-year-old girl that he would tell "her parents, her boyfriend's parents and/or anyone else who would listen" about their sexual encounters; accused acknowledged that he made the statement and his purpose was to frighten the girl into silence involving their sexual activities).

13. ***Kidnapping***. *United States v. Newbold*, 45 M.J. 109 (C.A.A.F. 1996). Guilty plea to kidnapping (based on the victim being moved no more than 12 feet within the same room, and detained only long enough to complete rape, forcible sodomy, indecent assault, and indecent acts) was *provident* where facts indicated that the victim was physically detained from leaving room, exit was blocked, the victim continued to try to leave, a loaded firearm was pointed at victim, the victim was physically assaulted to prevent departure, and sexual offenses were committed during the confinement period.

14. ***Larceny***.

a) *United States v. Harding*, 61 M.J. 526 (A. Ct. Crim. App. 2005). Accused pled guilty to two larceny specifications charging him, on divers occasions, with stealing currency of a value of more than $1,000 dollars. During providence

inquiry, accused stated he took over $1,000 dollars but he never admitted that he took over $100 at any given time as needed to authorize a higher maximum sentence based on property value (case occurred prior to the $500 value change in 2002). Findings amended and sentence re-adjusted from 21 months to 6 months confinement.

b) *United States v. Sierra*, 62 M.J. 539 (A. Ct. Crim. App. 2005), *aff'd*, 64 M.J. 179 (C.A.A.F. 2006). Accused was charged with wrongfully stealing services of a value of less than $100 from Priceline.com, a website for airline tickets. The record of trial, however, contained no evidence that the Priceline.com services had "any" value. There was no indication "that Priceline.com ever charged a service fee in connection with its operation. [The accused] cannot be found guilty of wrongfully obtaining free services by false pretenses." Finding set aside.

c) *United States v. Ezelle*, No. 200301560 (N-M. Ct. Crim. App. Nov. 29, 2004) (unpub.). Accused, a Lieutenant Commander Supply Officer, pled guilty to numerous larceny related offenses, to include stealing two military autofryers and a frozen drink machine for his personally owned bar. Because of the lack of an operable supply system, over $200,000 in lost and stolen equipment accrued during the accused's and previous supply officers' tenures. During the providence inquiry for the offense of wrongful disposition of military property through neglect, the exact amount of property lost or stolen during the accused's tenure as supply officer was never stated. While the court determined the property was of "some" value, the failure to specifically assert on the record that the value exceed $500 made the plea improvident as to the aggravating element of an amount over $500. *See United States v. West*, No. 20030277 (A. Ct. Crim. App. Feb. 23, 2005) (unpub.) (reversing the accused's conviction for larceny of an amount over $500 where the stipulation of fact and the record of trial failed to establish the amount of the approximately fifteen pieces of luggage stolen by accused in Pittsburgh International airport).

d) *United States v. Irby*, No. 35424, 2004 CCA LEXIS 293 (A.F. Ct. Crim. App. Dec. 30, 2004) (unpub.) (finding the accused's plea to larceny improvident but affirming the offense of wrongful appropriation where the accused stated she intended to pay back the credit card company but the MJ failed to resolve this inconsistency).

e) *United States v. Hughes*, 45 M.J. 137 (C.A.A.F. 1996). Plea to wrongful appropriation improvident as there was no taking or withholding of property. Victim continually placed personal items in accused's wall locker after being told not to do so; accused placed a lock on the wall locker to teach victim a lesson.

15. ***Lawful order***.

a) *United States v. Stapp*, 60 M.J. 795 (A. Ct. Crim. App. 2004) (reversing accused's guilty plea for violating a general order at Fort Lewis prohibiting minors from sleeping overnight at barracks; stipulation and accused's testimony established he did not know the two girls who slept in his room were under eighteen until two days after the offense).

b) *United States v. Rokey*, 62 M.J. 516 (A. Ct. Crim. App. 2005). The accused attempted to cut his own hair, without significant success; his NCO ordered him to take off his cover in the front of formation, an order the accused disobeyed fearing public humiliation. The military judge advised the accused that if the NCO's purpose was to humiliate him than the order was not lawful. The military judge then asked the accused a series of leading questions to solicit a factual basis

for the offense. ACCA held that the military judge did not sufficiently resolve the inconsistency regarding the accused's perception of humiliation when the MJ followed by only asking a series of leading questions.

16. ***Element of "prejudicial to good order and discipline"***.

a) *United States v. Jordan*, 57 M.J. 236 (C.A.A.F. 2002). Conviction for unlawful entry onto a ship reversed because accused's providence inquiry did not establish a basis for concluding that his conduct was prejudicial to good order and discipline or was of a nature to bring discredit upon the armed forces. The accused's "yes" response to the military judge's legally conclusive question as to whether his conduct was prejudicial or service discrediting does not establish a sufficient factual predicate.

b) *United States v. Erickson*, 61 M.J. 230 (C.A.A.F. 2005). The accused was charged with wrongfully inhaling nitrous oxide (laughing gas) in violation of Article 134. The accused admitted that his conduct was prejudicial to good order or was service discrediting because: (1) he was "high" for ten seconds, and (2) nitrous oxide destroys brain cells and as an airman he was "supposed to be on [his] toes." CAAF, affirming, stated that the accused admitted that his conduct would "undermine his capability and readiness to perform military duties—a direct and palpable effect on good order and discipline." CAAF noted that the decision does not preclude an accused from challenging, in the future, whether inhaling nitrous oxide is prejudicial to good order or service discrediting.

c) *United States v. Sweeting*, No. 20020720 (A. Ct. Crim. App. Sept. 9, 2004) (unpub.). Military judge explained the elements of adultery and obstruction of justice and included a lengthy description regarding the element of prejudicial to good order and service discrediting with the accused, who was a sergeant first class (E-7) with over sixteen years in service. Accused stated he understood the elements of both offenses and that the elements and definitions, taken together, correctly described his actions, but failed to specifically tell the military judge why his conduct was prejudicial and discrediting on the obstruction of justice charge. The court stated even though the accused did not specifically state his conduct was prejudicial and discrediting he did provide sufficient objective factual statements to conclude his conduct was prejudicial and discrediting. "While this providence inquiry was not a model *Care* inquiry, under the facts and circumstances of this case, the record of trial does not raise a substantial, unresolved question of law and fact as to the providence of [the accused's] guilty pleas to obstruction of justice."

17. ***Sale of military property***. *United States v. Aleman*, 62 M.J. 281 (C.A.A.F. 2006). Accused pled guilty to, among other offenses, willfully suffering the sale of military property. An element of this offense requires that the accused allowed or permitted the property's sale by a certain omission or disregard of a duty. In the stipulation of fact and providence inquiry, the accused admitted that he assisted a co-accused by driving him to pawnshops, by loaning him his car to take to pawnshops, by keeping lookout while the co-accused stole property, and by helping the co-accused carry stolen equipment into the pawnshops. CAAF held that "[t]he military judge did not elicit any testimony from [the accused] regarding any duty he may have had to safeguard the property, and [the accused] did not articulate such a duty." Failure to obtain this evidence created a substantial basis in law and fact to question the plea. The findings as to the suffering the sale of military property were set aside.

18. ***Sodomy***. For sodomy offenses, the "[p]rovidence inquiry must now establish a factual predicate which objectively supports a finding that an accused's conduct was outside the

19. ***Unlawful entry cases***.

a) *United States v. Rockwell*, No. 20011057 (A. Ct. Crim. App. June 28, 2004) (unpub.) (accused's plea to unlawful entry not provident when the MJ failed to refute claim that the accused was an invited guest).

b) *United States v. Speed*, No. 20020573 (A. Ct. Crim. App. Feb. 2, 2005) (unpub.). Accused charged with numerous offenses related to sexually harassing and stalking junior enlisted women. One evening, the accused (while drunk) convinced the Staff Duty NCO to provide him the barracks' master key. With the master key, the accused entered PFC C.R.'s barracks room and attempted to enter PV2 A.M.'s room but another Soldier visiting PV2 A.M. placed the security chain on the door just as the accused attempted to enter. Accused's plea to unlawful entry into PV2 A.M.'s room was not provident in that he never actually entered the room but the court found a "sufficient factual basis to support [accused's] conviction to an attempt to commit an unlawful entry."

G. **FAILURE TO RESOLVE POTENTIAL DEFENSES**.

1. ***In general***. Under Article 45(a), "If an accused . . . after a plea of guilty sets up a matter inconsistent with the plea . . . a plea of not guilty shall be entered."

a) ***Military judge must resolve potential defenses***. The Discussion to RCM 910(e) reads, "If any potential defense is raised by the accused's account of the offense or by other matter presented to the military judge, the military judge should explain such a defense to the accused and should not accept the plea unless the accused admits facts which negate the defense."

b) ***Military judge must re-open inquiry if defense is raised after findings***. Under RCM 910(h)(2), "If after findings but before the sentence is announced the accused makes a statement to the court-martial, in testimony or otherwise, or presents evidence which is inconsistent with a plea of guilty on which a finding is based, the military judge shall inquire into the providence of the plea."

2. ***Attempt offenses–larceny***. *United States v. Thornsbury*, 59 M.J. 767 (A. Ct. Crim. App. 2004). Accused's statements during providence inquiry into attempted larceny by breaking into a car did not reasonably raise potential defense of voluntary abandonment where accused had caused substantial harm to the victim as a result of the attempt (specifically cutting the back window out of the convertible top of the vehicle).

3. ***Attempt offenses–bigamy***. *United States v. Davis*, No. 20010678 (A. Ct. Crim. App. Nov. 25, 2003) (unpub.). Accused abandoned attempted bigamy by manifesting a "change of heart." Finding set aside where military judge did not explain the defense and resolve the conflict or reject the plea.

4. ***AWOL–voluntary termination***.

a) *United States v. Scott*, 59 M.J. 718 (A. Ct. Crim. App. 2004). Plea to AWOL from 16 August through 5 November 2002 improvident because accused signed in with CQ on 11 September 2002. Court reiterated holding in *Rogers*, *infra*, which

held that if, "during a plea inquiry, evidence is adduced indicating the accused's casual presence in the unit area during the AWOL period alleged on the charge sheet, then before accepting the plea the military judge should explain voluntary termination and ensure that no factual basis exists for it. In doing so, the military judge should focus on . . . presentment, with intent to return, presentment to a military authority, identification and disclosure of status, and submission to actual or constructive control."

b) *United States v. Rogers*, 59 M.J. 584 (A. Ct. Crim. App. 2003). Plea to AWOL provident even though accused remained at or near the post and saw some NCOs in her unit. This casual presence did not rise to the level of voluntary termination of the AWOL. Court sets four-part test that must be satisfied to voluntarily terminate an AWOL.

c) *United States v. Phillippe*, 63 M.J. 307 (C.A.A.F. 2006). Accused pled guilty to an AWOL from 24 July 2001 to 31 March 2004. However, during his unsworn statement, accused stated he attempted to turn himself in right after the 9/11 bombing to an Air Force base in Montana and in Summer 2002 he tried to meet up with his hometown recruiter in Illinois. CAAF held that the accused's statement regarding his attempt to return right after 9/11 raised a matter inconsistent with pleading guilty to an almost three year AWOL. CAAF affirmed an AWOL for a shorter period (24 July 2001 to 11 September 2001) and set aside the sentence.

5. ***AWOL–duress***.

a) *United States v. Barnes*, 60 M.J. 950 (N-M. Ct. Crim. App. 2005). During a motion in limine the accused testified to facts establishing a potential duress defense to his AWOL. The accused alleged that he went AWOL from his ship after receiving beatings that his chain of command failed to stop. The accused returned to his ship after a few weeks but was told he was returning to the same section and additional threats of abuse were lodged causing the accused to again go AWOL for 52 months. The MJ granted the government's motion in limine to preclude the accused from raising a duress defense and the accused pled guilty to a 52-month AWOL. During the providence inquiry, the MJ did not advise the accused on the defense of duress and the accused did not discuss the facts surrounding his duress defense. On appeal, the N-MCCA held that the MJ erred in failing to advise the accused on the defense of duress particularly in light of the accused's "extensive testimony" on that issue in the court-martial motion's stage.

b) *United States v. Phong T. Le*, 59 M.J. 859 (A. Ct. Crim. App. 2004). Military judge failed to resolve conflict between plea of guilty to desertion and statements indicating accused deserted under duress. Court finds the threat that resulted in duress dissipated within four days, when accused was safely away from the threat, and affirmed the desertion time period running from four days after initial date of desertion through the termination period of the desertion. *See United States v. Whiteside*, 59 M.J. 903 (C.G. Ct. Crim. App. 2004).

c) *United States v. Southard*, No. 20021317 (A. Ct. Crim. App. Feb. 8, 2005) (unpub.). The accused's team leader told him he was going to kill him. On 8 May 2001, the accused went AWOL and called his company commander a few days later. After talking to the commander, accused stated he no longer felt threatened but he remained absent until mid-October 2002. The MJ did not adequately address a duress defense by failing to resolve the immediacy of the threat and failing to determine whether the accused has a reasonable opportunity to avoid the AWOL without subjecting himself to harm. The court amended the

AWOL specification finding "that the duress ceased to be a motivating factor for [accused's] AWOL by 19 MAY 01."

6. ***AWOL–mental responsibility defense***.

a) *United States v. Harrow*, 62 M.J. 649 (A.F. Ct. Crim. App. 2006). The accused was on authorized leave, but on the day she was to return her parents took her to a civilian mental health center. Accused told the center that she was in the military: "I told them to call, sir, to let my unit know where I was, but I didn't plan on coming back [to the base]. I planned to stay at the hospital." Accused's AWOL specification overturned because a "substantial conflict" existed as to "whether the accused's mental health status precluded her ability to report to her place of duty."

b) *United States v. Coleman*, No. 20030173 (A. Ct. Crim. App. Feb. 2, 2005) (unpub.). During providence inquiry the accused pled guilty to a five day AWOL. On the second day of the AWOL the accused went to the psychiatric clinic for depression and during providence inquiry asserted he was "mentally" prevented from going to work. Failure to advise the accused of the mental responsibility defense results in reversible error for that finding.

7. ***AWOL–inability***.

a) *United States v. Jones*, 64 M.J. 621 (C.G. Ct. Crim. App. 2007). Accused pled guilty to an AWOL offense, but stated during the providence inquiry that he was unable to return to his unit because he was confined by civilian authorities. He returned to his unit shortly after release from the civilian incarceration. While incarceration due to an accused's own misconduct does not excuse an absence offense, detention that is *not* the result of an accused's misconduct does excuse such an offense. In this case, the providence inquiry did not resolve the issue of whether the civilian incarceration was the result of the accused's misconduct, and therefore, there was an "unresolved matter inconsistent with the plea." The finding as to the AWOL specification was set aside and the sentence was reassessed.

b) *United States v. Kinchen*, No. 20040707 (A. Ct. Crim App. Oct. 31, 2006) (unpub.). Guilty pleas to four specifications of failing to report to accused's appointed place of duty were held to be improvident due to the military judge's failure to address the physical impossibility defense raised during his unsworn statement. During the unsworn statement, accused stated that his prescribed medication prevented him from waking up, thus raising the defense and leaving "substantial, unresolved questions of law and fact."

c) *United States v. Boyd*, No. 20021264 (A. Ct. Crim. App. June 16, 2004) (unpub.) (military judge erred by accepting accused's plea without explaining the inability defense to the accused).

8. ***Entrapment***. *United States v. Williams*, 61 M.J. 854 (N-M. Ct. Crim. App. 2005). Accused pled guilty to distributing ketamine to two uncover female NCIS agents after their request for drugs. While the plea inquiry established that the accused distributed ketamine based on an inducement from the NCIS agents, the accused did not otherwise indicate that he lacked a predisposition to distribute so the defense of entrapment was not raised. *See also United States v. Ricottone*, No. 30337, 2005 CCA LEXIS 226 (A.F. Ct. Crim. App. June 15, 2005) (unpub.) (affirming the plea because of the military judge's inquiry into whether an entrapment defense existed and the lack of factual basis to support the defense even though the military judge failed to advise the accused of the elements of the entrapment defense).

9. ***Larceny–Abandonment of Property***. *United States v. Coffman*, 62 M.J. 677 (N-M. Ct. Crim. App. 2006). The accused pled guilty to stealing a force vest, canteen covers, and a duty belt while serving in Iraq. During the providence inquiry, accused told military judge that he found the equipment while in a room he had been ordered to clean out, that there were items in the room "that people just never went and got . . . [t]hey just left it there for trash," that he had been ordered to get rid of the gear in the room and the stolen equipment was from a box in the room, and that he had attempted to determine the owner of the equipment. Accused used the gear for about a month until his section leader inquired about how he procured the property. MJ did not advise the accused of the mistake of fact defense or give the legal definition of abandoned property. The N-MCCA, reversing, held "[b]y not explaining the relevant legal terms, the military judge denied the [accused] the ability to make an informed decision concerning the answers he provided." The N-MCCA also provided a reminder that it is not only the military judge's job to conduct a proper providence inquiry but that the trial counsel is also charged with safeguarding the proceeding: "Trial counsel, in particular, should be ever vigilant during the plea providence inquiry and assist the military judge by suggesting areas of further inquiry concerning the elements of the offense or potential defenses."

10. ***Mental responsibility***. "We do not see how an accused can make an informed plea without knowledge that he suffered a severe mental disease or defect at the time of the offense. Nor is it possible for a military judge to conduct the necessary *Care* inquiry into an accused's pleas without exploring the impact of any potential mental health issues on those pleas." *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005).

a) *United States v. Glenn*, 66 M.J. 64 (C.A.A.F. 2008). The accused pled guilty to wrongful use of ecstasy and an unauthorized absence. presentencing, the accused made a sworn statement to members. He claimed he "always had the bipolar disorder" and "always fought depression . . . [and] extreme mood swings." He said that before his unauthorized absence, he was admitted to an Army hospital and diagnosed with "borderline personality disorder." The defense called a social worker and forensic counselor who screened the accused before he was placed in pretrial confinement. Based on this screening, she concluded the accused had a "mood disorder, not otherwise specified," based on "some ups and downs in his mood." The social worker added that a psychiatrist later diagnosed the accused with cyclothymic disorder, a condition characterized by rapid cycling of moods that would not normally affect day-to-day activities. The defense then called the accused's sister, who testified that their family had a history of bipolar disorder. The court noted "two important and longstanding principles," that the accused is "presumed to be sane" and that counsel is "presumed to be competent." On appeal, a guilty plea will not be set aside unless there is a substantial basis in law or fact for questioning the plea. The accused's passing comment about bipolar disorder, balanced against the other testimony that he actually suffered from a less-serious mental condition, was not enough to raise a substantial basis in law or fact to question the plea. To the contrary, the passing reference to a mental disorder only raised a "mere possibility" of conflict with the plea.

b) *United States v. Johnson*, 65 M.J. 919 (C.G. Ct. Crim. App. 2008). Accused pled guilty to wrongful use of cocaine and several other offenses pursuant to an approved pretrial agreement. On appeal, the defense argued the accused's pleas were improvident because the military judge failed to resolve the defense of lack of mental responsibility. During the presentencing phase of trial, defense called a clinical social worker who had been treating the accused for substance abuse. The social worker testified that he had been told by a Tricare psychologist that the accused had been diagnosed with major depressive disorder and schizophrenia,

and that the accused suffered from "full-blown panic attacks" and "hallucinations." When questioned about the accused's "ability to determine right from wrong," the social worker replied, "Most of the time, yes. He does have a schizophrenic piece to him that could sometimes take precedent." Relying on *United States v. McGuire*, 63 M.J. 678, 681 (A. Ct. Crim. App. 2006), the Coast Guard court noted the military judge must re-open the providence inquiry even if mental health professionals had previously decided the accused was mentally responsible for the charged offenses. The court noted that if such a defense is raised, the military judge must explain the affirmative defense to the accused, who must then "demonstrate an understanding of the defense" and give a "factual basis for why it does not apply to him." Consistent with other cases dealing with defenses in guilty plea, it is not enough for the accused to summarily state that the defense does not apply: "Defense counsel's naked concessions are not a substitute for the requirement to conduct a meaningful inquiry into any affirmative defense raised by the record, and to ascertain from the accused himself whether his pleas are fully informed and voluntary."

c) *United States v. McGuire*, 63 M.J. 678 (A. Ct. Crim. App. 2006). Accused pled guilty to several specifications of indecent exposure related to masturbating at Target, K-Mart, Wal-Mart, and the PX. Two of these incidents occurred days prior to his court-martial. Several times on the record the accused laughed when answering the judge's questions, cried once, and stated he was seeking "psychiatric therapy and taking medication." During sentencing, the defense introduced a psychiatric evaluation stating, among other things, that the accused could appreciate the wrongfulness of his actions. On appeal, defense argued that the military judge erroneously failed to explain the defense of lack of mental responsibility to the accused. ACCA affirmed, finding "nothing to indicate that [the accused] was suffering from a *severe* mental disease or defect" and "declin[ing] to conclude that any reference to psychiatric treatment or problems, no matter how vague or oblique, is sufficient to create a substantial basis for questioning a guilty plea."

11. ***Mistake-of-fact defense***.

a) *United States v. Zachary*, 61 M.J. 663 (A. Ct. Crim. App. 2005), *aff'd*, 63 M.J. 438 (C.A.A.F. 2006). During providence inquiry for indecent acts with a child under the age of sixteen, accused stated that he did not know the child was under the age of sixteen until notified by CID and no other facts were introduced during guilty plea to show that the accused's mistake as to the child's age was unreasonable. On appeal, ACCA and CAAF rejected the accused's plea to indecent acts with a child under the age of sixteen based on his mistake as to the child's age but affirmed a finding of guilt as to the lesser included offense of indecent acts with another.

b) *United States v. Thomas*, 45 M.J. 661 (A. Ct. Crim. App. 1997). Military judge committed reversible error in providence inquiry by misstating that force and lack of consent could be established by mere fact that sodomy victims were under age 16, and by failing to inquire into mistake of fact defense regarding consent of victims. Accused was charged with forcible sodomy and indecent acts with a child (a 12-year-old and a 13-year-old). Accused's responses raised issues of reasonable and honest mistake, and military judge's misstatements about legal effect of girls' ages effectively foreclosed development of additional facts which might have supported or negated the defense. The stipulation of fact also contained contradictory paragraphs containing the accused's version (no force and consent) and the victims' version (force and without consent). ACCA cautioned

against "including conflicting 'stipulated testimony' as part of a stipulation of fact supporting a plea of guilty."

c) *United States v. Pitre*, No. 20010258 (A. Ct. Crim. App. Aug. 20, 2004) (unpub.). During the drill sergeant accused's providence inquiry for indecent assault against a trainee, the military judge asked the civilian defense counsel if the mistake-of-fact defense applied. The defense attorney erroneously responded that an indecent assault offense turns on the apprehension of the victim and the elements of the assault were met if the victim believed an assault occurred. The mistake-of-fact defense, however, can exist for an indecent assault specification if the accused believed the individual consented to his acts and his belief was reasonable under all the circumstances. Based on the defense counsel's response, the military judge did not read the elements of the mistake-of-fact defense to the accused and did not resolve the factual inconsistency as to whether a mistake-of-fact defense existed.

d) *United States v. Clanton*, No. 20020279 (A. Ct. Crim. App. Dec. 20, 2004) (unpub.) (holding plea for failing to go to appointed place of duty improvident when the MJ failed to explain the mistake of fact defense raised by the accused during providence inquiry). *See also United States v. Coleman*, No. 20030173 (A. Ct. Crim. App. Feb. 2, 2005) (determining MJ erred for failing to advise the accused of the mistake of fact defense when the accused stated his first sergeant frequently released soldiers from duty for similar reasons and the first sergeant retroactively gave the accused a two-day pass).

12. ***Self-defense***. *United States v. Yanger*, 67 M.J. 56 (C.A.A.F. 2008) (per curiam). Accused pled guilty to involuntarily manslaughter for killing his wife during an argument about his cocaine use. According to the accused's providence inquiry, his wife had a broken stem from a stemware glass in her hand; he tried to take a cell phone she was holding and accidentally cut his hand on the stemware. The accused said his wife approached him aggressively, with her shoulders hunched, and the accused shoved her. She stumbled and stabbed herself in the neck with the glass stem, which caused her to bleed to death. The accused said, "In–in the situation I was in, sir, I just wanted–I just wanted her out of my face with the glass." In a per curiam opinion, the CAAF reversed and upheld the accused's guilty plea. The CAAF noted that once the "possibility" of a defense was raised, the military judge properly questioned the accused to decide if a defense was raised. Specifically, the military judge clarified that the accused was not scared, was not concerned his wife would use the stemware against another person, and did not believe he was acting in self-defense. Based on the accused's responses, the military judge was not required to explain the elements of self-defense to the accused.

13. ***Voluntary intoxication***.

a) *United States v. Brown*, No. 35837, 2004 CCA LEXIS 209 (A.F. Ct. Crim. App. Aug. 30, 2004) (unpub.). Accused pled guilty to cocaine use but did not mention alcohol use on the night in question during his providence inquiry. During sentencing phase, trial counsel introduced substantial evidence of accused's abundant use of alcohol by admitting the verbatim Article 32 testimony of two Air Force agents who stated that on the night in question the accused told them the cocaine "made his tongue 'numb' but that he was 'too drunk' to feel any other effects of the cocaine." Trial counsel also admitted the verbatim Article 32 testimony of the accused's girlfriend in which she stated that he was "getting pretty drunk." Accused, during his unsworn statement, stated he was "pretty buzzed." Military judge erroneously failed to reopen the providence inquiry (despite the numerous statements regarding the accused's level of intoxication) to

determine if his use of cocaine was with actual knowledge. Findings and sentence set aside.

b) *United States v. Metivier*, No. 20050615 (A. Ct. Crim App. July 24, 2007) (unpub.). The accused was charged with several offenses relating to his consumption of alcohol while deployed in Iraq. He was charged, *inter alia*, with drunk on duty, drunken driving, willfully discharging a firearm, and attempting to flee from apprehension. He pled guilty to all of the charges and provided facts during the providence inquiry related to the offenses. However, as all of the offenses occurred relatively close in time, it was clear that the accused was intoxicated at the time he committed the offenses. In addition, the accused stated, "Everything that happened that night, I blame it on that drink." Both willfully discharging a firearm and attempted flight from apprehension are specific intent offenses, and voluntary intoxication provides a defense to both offenses. The charge sheet, the providence inquiry, and the stipulation of fact all raise the issue of voluntary intoxication, yet the military judge failed to address this defense with the accused. He "failed to advise [the accused] of the existence of the defense and failed to resolve the applicability of the defense to [the accused's] plea of guilt." As such, the court found that there was a "substantial basis in law or fact" to question accused's plea to these specific intent offenses.

H. **INQUIRY INTO PRETRIAL AGREEMENT**.

1. *United States v. King*, 3 M.J. 458 (C.M.A. 1977) (military judge must secure from trial and defense counsel "confirmation that the written agreement encompasse[s] all of the understandings of the parties, and that the judge's interpretation of the agreement comport[s] with their understanding both as to the meaning and effect of the plea bargain").

2. *United States v. Green*, 1 M.J. 453 (C.M.A. 1976) (military judge must establish "on the record that the accused understands the meaning and effect of each provision in the pretrial agreement").

3. *United States v. Felder*, 59 M.J. 444 (C.A.A.F. 2004). Military judge did not inquire into a term of the PTA regarding defense's waiver of any motions for sentence credit based on Article 13 and/or restriction tantamount to confinement. Defense counsel did inform the MJ that no punishment under Article 13 or restriction tantamount to confinement had occurred. While the MJ's failure to discuss the term was error, the accused failed to show the error materially prejudiced a substantial right.

4. *United States v. Sheehan*, 62 M.J. 568 (C.G. Ct. Crim. App. 2005). Military judge failed to cover a misconduct clause and "specially negotiated provisions" of the accused's PTA and provided an incorrect explanation as to another provision. CGCCA found that the military judge erred but that his omissions and misleading explanation did not prejudice the accused's substantial personal rights.

5. *United States v. Whetstone*. No. 9500619, (A. Ct. Crim. App. Apr. 8, 1996) (unpub.). PTA provided that any confinement in excess of 24 months would be suspended for 24 months. MJ adjudged a $10,000 fine with proviso that if not paid by end of 24 months confinement, then accused would serve additional 12 months confinement. CA approved adjudged sentence. PTA ambiguous on suspension of confinement resulting from an adjudged fine. Ambiguity resolved in favor of accused by suspending the confinement resulting from the fine.

6. *United States v. Acevedo*, 50 M.J. 169 (C.A.A.F. 1999). A term in a pretrial agreement requiring the Government to suspend for 12 months and then remit a dishonorable discharge did not preclude approval of an adjudged bad conduct discharge.

See also United States v. Gilbert, 50 M.J. 176 (C.A.A.F. 1999) (identical holding in companion case).

7. ***Military judge cannot expand PTA terms***. *United States v. Brehm*, ARMY 20070688, [*not available on Westlaw*] (A. Ct. Crim. App. May 13, 2009) (unpublished). Accused pled guilty to indecent liberties with a child for an offense committed in 1999; charges were not forwarded until October 2006. At that time, the CAAF had not released its opinion in *United States v. Lopez de Victoria*, 66 M.J. 67 (C.A.A.F. 2008), which held that the 2003 amendment to Article 43, UCMJ (excepting child abuse offenses from the five-year statute of limitations) did not apply retroactively. At the guilty plea, the military judge asked the accused if he intended to waive a possible statute of limitations challenge from "any hypothetical ruling" by the CAAF. The ACCA ruled that the military judge exceeded his authority by adding an additional term to the pretrial agreement (specifically, waiver of a potential statute of limitation defense). The court noted it would have "less concern" if the pretrial agreement expressly discussed a "bargained-for waiver of a hypothetical future defense."

I. **UNDISCLOSED TERMS (*"SUB ROSA"* AGREEMENTS) ARE PROHIBITED**. *See* RCM 705(d)(2), RCM 910(f)(2) Discussion; *United States v. Jones*, 52 M.J. 60, 66 (C.A.A.F. 1999) ("The terms of the agreement should be understood by all parties to the agreement to permit full disclosure at trial and to allow a full inquiry by a judge. The substance of these agreements must be in writing. Thus, the primary goal of RCM 705 is to preclude misunderstandings about the terms of an agreement and to prohibit *sub rosa* agreements.").

1. *United States v. Rhule*, 53 M.J. 647 (A. Ct. Crim. App. 2000). Accused attempted to plead guilty to several bad check offenses under Article 123a. He was also charged with larceny and forgery, to which he pled not guilty. After the MJ rejected the pleas as improvident, the defense announced the accused requested trial by military judge alone, and the government moved to dismiss the larceny and forgery specifications. Post-trial affidavits showed there was a *sub rosa* agreement for the government to dismiss the larceny and forgery offenses in exchange for the accused's election for trial by military judge alone and for proceeding to trial that day. This agreement was governed by RCM 705 and it should have been in writing and disclosed at trial so that the judge could ensure on the record that the waiver was knowing and voluntary. Moreover, the TC should not have acted to bind the convening authority. It was clear, however, that the accused's waiver of a panel was knowing, voluntary, and intelligent. There was no prejudice to the accused. The court makes clear that while not all *sub rosa* agreements require corrective action and will be examined for their effect on the trial, all pretrial agreements should be disclosed to the trial judge.

2. *United States v. Sherman*, 51 M.J. 73 (C.A.A.F. 1999). Accused pled guilty to offenses stemming from his insubordinate behavior at an off-duty dinner. After trial, accused told his appellate defense counsel that unlawful command influence had affected his pretrial confinement and his trial but was told that if the defense raised the issue they would lose the favorable pretrial agreement. TC's affidavit noted that he recalled defense raising the possibility of pretrial motions, to include an issue of command influence, but they never discussed waiving those issues as part of a pretrial agreement, and that his understanding was that even after the government agreed to the PTA, "the defense was free to raise the issues it was concerned with without fear of losing the benefits of the agreement." DC's affidavit noted that the TC had implied that he might not recommend a pretrial agreement if the UCI motions were raised, particularly since motions would require delay and the deal would be contingent to going to trial on a date certain. CAAF set aside the ACCA decision and directed a *DuBay* hearing on whether there was a *sub rosa* agreement.

3. *United States v. Bartley*, 47 M.J. 182 (C.A.A.F. 1997) (setting aside case based on *sub rosa* agreement to waive claim of unlawful command influence).

4. *United States v. Allen*, 39 M.J. 581 (N.M.C.M.R. 1993) (waiver of Article 32 and the admissibility of uncharged misconduct in stipulation of fact were undisclosed terms of pretrial agreement; court expresses concern over assurances from trial and defense counsel to military judge that his inquiry covered all terms).

J. **INQUIRY INTO STIPULATION OF FACT**. *United States v. Resch*, 65 M.J. 233 (C.A.A.F. 2007). Accused was charged with desertion terminated on 17 March 2003 and pled guilty to lesser-included offense of unauthorized absence terminating on 22 January 2003. In accordance with his pretrial agreement, accused entered into a stipulation of fact that included the "circumstances surrounding his two arrests in Michigan . . . [and] how [he] was returned to military control." The stipulation of fact also contained the following: "These facts may be considered by the Military Judge in *determining the providence of the accused's plea of guilty*, and they *may be considered by the sentencing authority* . . . even if the evidence of such facts is deemed otherwise admissible." (emphasis supplied by the court). The stipulation also included a "Stipulation to Admissibility of Evidence," stating, "the following evidence is *admissible at trial*, may be considered by the military judge *in determining the providence of the accused's plea of guilty*, and may *be considered by the sentencing authority* . . . ." (emphasis supplied by the court). The paragraph then listed several exhibits, including the stipulation of fact. During the providence inquiry, military judge advised the accused as to how the stipulation of fact would be used, stating that it would be used to determine guilt of the offenses to which the accused plead guilty and to determine an appropriate sentence. After the military judge accepted the accused's plea, the government presented evidence for the desertion charge; trial counsel called only one witness, who testified that he did not know the accused and was surprised to see him in his company formation on 17 March 2003, the alleged termination date of the accused's AWOL. After both sides rested, trial counsel sought to clarify that the providence inquiry *would not be considered* by the court in proving defenses to the alleged desertion. The defense counsel stated, "We believe the contents of the providence inquiry can be used for proving the elements of the greater offense . . . and the defense can also used anything exculpatory elicited I the providence inquiry as well." MJ said he would "consider the stipulation of fact and everything I have heard up to now in determining the guilt or innocence of [the accused] on the greater offense." During argument, trial counsel used the facts in the stipulation of fact and the providence inquiry to argue that the accused had formed the intent to remain away permanently. On appeal, CAAF concluded that it was error to use the providence inquiry statements in determining guilt of the contested offense. During providence inquiry, military judge advised the accused that he was giving up his right to self-incrimination, but only to the offenses to which he was pleading guilty. Therefore, to use admissions from the providence inquiry during the contested portion of the trial was inconsistent with the advice the military judge gave the accused. As such, there was an "insufficient basis to determine that [the accused] knowingly consented to the use of the stipulation and the adjoining exhibits in the Government's case on the merits."

1. ***Stipulations of fact and polygraphs***. *United States v. Clark*, 53 M.J. 280 (C.A.A.F. 2000). Accused submitted a false claim, then took a polygraph (which he failed). He was charged and elected to plead guilty. Accused and convening authority agreed to PTA which included a promise to enter into a "reasonable stipulations concerning the facts and circumstances" of his case. MJ at trial noticed the polygraph in the stipulation, noted that accused had agreed to take a polygraph test and that the "test results revealed deception." There was no objection to the stipulation and he admitted the stipulation into evidence. Applying M.R.E. 707 and *United States v. Glazier*, 26 M.J. 268, 270 (C.M.A. 1988), CAAF held it was plain error for military judge to admit the evidence of the polygraph, even via a stipulation.

K. **ACCEPTANCE OF PLEAS AND ENTERING FINDINGS**. *United States v. Baker*, 28 M.J. 900 (A.C.M.R. 1989) (military judge who knew that trial counsel intended to prove rape improperly entered findings pursuant to pleas of guilty to lesser included offense of carnal knowledge).

L. **REFUSAL OF MILITARY JUDGE TO ACCEPT PLEAS**.

1. ***Improvident pleas***. For a plea to be inconsistent with factual and legal guilt, there must be more than the possibility of a defense; however, if the accused raises an inconsistency the MJ must resolve it. *United States v. Johnson*, 25 M.J. 553 (C.M.A. 1987). If accused's comments or any other evidence reasonably raises a defense, military judge must explain elements of defense to accused. It is not relevant that comments are not credible; the sole question is whether accused made a statement during the trial that was in conflict with his plea.

a) *United States v. Outhier*, 45 M.J. 326 (C.A.A.F. 1996). A military judge must reopen providence and resolve a conflict between the facts and the plea where facts brought out during sentencing were inconsistent with accused plea. The accused was charged with aggravated assault likely to cause death or grievous bodily harm by binding the victim's hands and feet and allowing him to jump into the deep area of swimming pool as a practice exercise after accused had falsely asserted his qualification as a Navy SEAL and hospital corpsman. The accused's plea was improvident because the facts revealed during sentencing negated the "means likely to produce death or grievous bodily harm" element. Specifically, the accused remained nearby with life preserver and had trained with victim the entire day; the victim was not a novice swimmer, indicated desire to train while off duty, understood danger, and was aware he was not obligated to participate in exercise.

b) *United States v. Handy*, 48 M.J. 590 (A.F. Ct. Crim. App. 1998) (mere possibility that the accused could have used his mental condition to dispute knowledge elements of the drug related offense was waived by pleading guilty).

c) *United States v. White*, 46 M.J. 529 (N-M. Ct. Crim. App. 1997). Plea to dereliction of duty (failure to notify finance section of wrongful receipt of allowances) was improvident where MJ failed to factually establish and elicit source of duty to account from accused during providence inquiry.

2. ***Irregular pleas***. RCM 910(b).

a) ***Plea that does not admit guilt***. *Alford* and nolo contendre pleas are not recognized under the UCMJ. If the accused attempts to enter such a plea (which purports to be a guilty plea without admitting guilt) military judge is required to enter a plea of not guilty on the accused's behalf.

b) ***Guilty plea in capital case***. *United States v. Fricke*, 53 M.J. 149 (C.A.A.F. 2000). Military judge did not err in accepting accused's plea to premeditated murder where there was no written record of CA withdrawing capital referral and re-referring as non-capital case. Military judge noted noncapital referral on record with no objection of parties.

3. ***Voluntary and intelligent pleas***.

a) *United States v. Redlinski*, 58 M.J. 117 (C.A.A.F. 2003). CAAF examined the record of trial to determine if the military judge ensured the accused's plea was knowing and voluntary. Court held the military judge erred by failing to adequately explain the elements of attempted distribution of marijuana. Guilty pleas were improvident.

b) *United States v. Roeseler*, 55 M.J. 286 (C.A.A.F. 2001). Under the terms of a PTA, the accused pled guilty to conspiracy to murder and attempted murder of a Soldier in his unit and two people who in fact did not exist. On appeal, accused argued his guilty pleas regarding the fictitious individuals were improvident because the MJ failed to instruct on the defense of impossibility and one of the conspirators knew the targets did not exist. CAAF noted that guilty pleas in the military justice system must be both voluntary and intelligent, and the military judge is tasked with ensuring that the military accused understands the nature of the offenses to which guilty pleas are accepted. Noting that some leeway must be afforded the trial judge concerning the exercise of her judicial responsibility to explain a criminal offense to an accused, the court held that the MJ's explanations in this case were sufficient.

c) *Redlinski* does not overrule *Roeseler*. *Redlinski* stands for the proposition that, to be provident, a guilty plea must be supported by a record of trial that shows the military judge adequately explained the elements of each offense. If the military judge fails to do so, there is reversible error, unless it is clear from the entire record that the accused knew the elements, admitted them freely, and pled guilty because he was guilty. *Roeseler* continues to stand for the proposition that the accused is not entitled to a "law school lecture" on the technicalities of the law. Taken together, both opinions show that CAAF will look at the context of the entire record to determine whether an accused is aware of the elements, either explicitly or inferentially, rather than focusing on a technical listing of the elements of an offense.

4. ***Misunderstanding of maximum possible sentence***.

a. ***Confusion about maximum sentence may render plea improvident***. *United States v. Castrillion-Moreno*, 7 M.J. 414 (C.M.A. 1979). *But see United States v. Hunt*, 10 M.J. 222 (C.M.A. 1981) (all factors are examined to determine if misapprehension of maximum punishment affected guilty plea, or whether the factor was insubstantial in accused's decision). *See also United States v. Poole*, 26 M.J. 272 (C.M.A. 1987); *United States v. Kyle*, 32 M.J. 724 (A.F.C.M.R. 1991); *United States v. Hemingway*, 36 M.J. 349 (C.M.A. 1993).

b. *United States v. Silver*, 40 M.J. 351 (C.M.A 1994). After findings in provident guilty plea, military judge noticed that maximum punishment was five years more than he had previously advised the accused. Military judge asked accused if he still wished to plead guilty. Accused indicated he did. No error on part of judge by failing to expressly advise accused (per the *Benchbook*) of his right to withdraw his plea.

c. *United States v. Ontiveros*, 59 M.J. 639 (C.G. Ct. Crim. App. 2003) (incorrect advice as to maximum sentence did not render plea improvident where evaluation of all the circumstances of the case revealed that it was "an insubstantial factor in the decision to plead guilty).

d. *United States v. Mincey*, 42 M.J. 376 (C.A.A.F. 1995). Accused charged with writing bad checks and wrongful appropriation. Military judge advised accused that maximum punishment included 6½ years and ***Dishonorable Discharge***. Pretrial agreement was 39 months. Correct maximum was 109 months (9 years and 1 month) and ***BCD***. No prejudice.

M. **EFFECT OF REFUSAL TO ACCEPT GUILTY PLEA**.

1. Plea(s) of not guilty entered on behalf of accused.

2. No automatic recusal of military judge; however, in a trial by military judge alone, refusal of the request for trial by military judge alone will normally be necessary when a plea is rejected or withdrawn after findings. RCM 910(h)(2) Discussion; *United States v. Rhule*, 53 M.J. 647 (A. Ct. Crim. App. 2000) (finding the Army preference is for the MJ to recuse himself); *United States v. Winter*, 32 M.J. 901 (A.F.C.M.R. 1991). S*ee also United States v. Flynn*, 11 M.J. 634 (A.F.C.M.R. 1981) (after rejecting guilty plea because accused raised entrapment issue, military judge advised accused of his right to challenge the judge for cause; defense did not challenge the military judge, who made findings of fact that he would remain impartial, so no prejudice).

N. INABILITY TO RECALL FACTS.

1. ***Lack of personal recollection not a bar to pleading guilty***. *United States v. Moglia*, 3 M.J. 216 (C.M.A. 1977). Accused need not describe from personal recollection all the circumstances necessary to establish a factual basis for the plea.

2. ***Nevertheless the accused must be convinced of, and able to describe all the facts necessary to establish guilt***. *See also* RCM 910(e) Discussion; *United States v. Wiles*, 30 M.J. 1097 (N.M.C.M.R. 1989).

O. **USE OF GUILTY PLEAS IN MIXED PLEA CASES**.

1. ***Panel not notified***. Generally, panel will not be informed when the accused enters mixed pleas. RCM 910(g) Discussion; RCM 913(a) (if mixed pleas have been entered, the military judge should ordinarily defer informing the members of the offenses to which the accused pled guilty until after the findings on the remaining contested offenses have been entered). Thus, where an accused pleads guilty to offense A, but not guilty to offense B, military judge should defer informing court members of the plea to offense A until *after* findings are announced on contested offense B. *United States v. Smith*, 23 M.J. 118, 120 (C.M.A. 1987). *See also United States v. Hamilton*, 36 M.J. 723 (A.C.M.R. 1993) (reversible error to advise members that accused had pled guilty to other offenses).

2. ***Entering findings***. Typically, the military judge will enter findings immediately after acceptance of a plea. RCM 910(g). However, where the accused pleads guilty to a lesser included offense and the prosecution intends to go forward on the contested charge: (1) the military judge should *not* enter findings after the accused pleads pursuant to RCM 910(g)(2); and (2) prior to commencement of trial on the merits, military judge will instruct the members that they should "accept as proved the matters admitted in the plea, but must determine whether the remaining elements are established" pursuant to RCM 920(e) Discussion.

3. ***Exceptions***: (a) If the accused requests members be informed of guilty pleas, or (b) if guilty plea is to a lesser included offense and the trial counsel intends to prove the greater offense. RCM 913(a), Discussion. *United States v. Irons*, 34 M.J. 807 (N.M.C.M.R. 1992) (military judge committed error in not cleaning up flyer, which reflected greater offense to which the accused pled not guilty and which the government did not intend to pursue, was not waived by accused's failure to object; sentence set aside).

a) Where an accused pleads guilty to Offense A, which is a lesser included offense of offense B, and the government intends to try to prove offense B before a panel, the military judge should instruct the panel that they may accept certain previously admitted elements of the greater offense as proven. RCM 913(a) Discussion.

b) In cases of multiple offenses, however, the military judge should instruct the panel that it may not use the plea of guilty to one offense to establish the elements

of a separate offense. RCM 920(e) Discussion. *Cf. United States v. Hamilton*, 36 M.J. 723 (A.C.M.R. 1993).

4. *United States v. Kaiser*, 58 M.J. 146 (C.A.A.F. 2003). Accused, an instructor at the Defense Language Institute, was charged with numerous violations arising from improper relationships with students. Accused pled guilty to some of the offenses; military judge informed the panel of the guilty plea prior to commencement of trial on the merits. When the defense raised a question as to why the offenses to which the accused pled guilty were on the flyer that the members would see, the military judge mistakenly replied that the *Benchbook* required him to inform the members of the guilty pleas. The panel convicted accused of two additional offenses, and found him not guilty of other offenses. Held: "The law in this area is clear—in a mixed plea case, in the absence of a specific request made by the accused on the record, members of a court-martial should not be informed of any prior pleas of guilty until after the findings on the remaining contested offenses are made. This rule is long standing and embodied in the *Benchbook*." Error was prejudicial and required reversal of findings and sentence, as it directly impacted the presumption of innocence and the fundamental right to a fair trial.

5. *United States v. Smith*, 50 M.J. 451 (C.A.A.F. 1999). The accused was charged with raping and sodomizing H, his stepdaughter, and with committing indecent acts with her. He pled guilty by exceptions and substitutions to the indecent acts offense (which alleged that he had placed his fingers into—and is penis upon—H's vagina and anus; accused claimed he had penetrated her anus and vagina with his fingers and that he had placed his penis on her vulva, but that he had not placed his penis on her anus). He denied ever raping her or attempting to sodomize her. Accused further stated that the actions took place on three different occasions in June, July, and August (he was charged with committing the indecent acts "from . . . June 1995 to . . . August 1995"). Military judge instructed the panel that they could consider that the accused's plea to Charge III established certain elements of Charge III, as well as certain elements of Charge I and Charge II (the rape and sodomy offenses). CAAF treated the issue on appeal as one of instructional error, and, applying the waiver provision of RCM 920(f), found the defense counsel's actions amounted to an affirmative waiver of the requirement for the prophylactic instruction concerning the use of the accused's plea. *See* Colonel Ferdinand D. Clervi, *Annual Review of Developments In Instructions–1999*, ARMY LAW., Apr. 2000, at 108 (*Smith* "is important in emphasizing the need for all parties to be clear and unambiguous when discussing proposed instructions").

P. **REOPENING THE PROVIDENCE INQUIRY**.

1. *United States v. Marcy*, 62 M.J. 611 (N-M. Ct. Crim. App. 2005). Accused pled guilty to possessing child pornography. During sentencing, the prosecution called two witnesses who testified that the accused had previously told them that the "pictures 'are just pictures, they are not really people.'" During the accused's unsworn statement he apologized to the children in the photos and described them as victims. On appeal, defense argued that the military judge erred by failing to reopen the providence inquiry to clarify the accused's previous statements. The N-MCCA affirmed, finding that the accused's unsworn statement showed his conviction that the children in the pictures were real. The court discussed a military judge's discretion to reopen a providence inquiry stating that "we do not believe the drafters intended—and we hereby decline to adopt —a per se rule requiring them to do so every time the prosecution offers an accused's pre-plea denials, excuses, or rationalizations." The court further focused on the fact that these additional statements were not matters raised by the defense.

2. *United States v. Crain*, 63 M.J. 607 (N-M. Ct. Crim. App. 2006). Accused was charged with two unauthorized absences (UAs) and one larceny specification and pled

guilty to one of the UA specifications at one court-martial session. At a later session, the accused agreed to plead guilty to all charges and specifications. The MJ conducted a providence inquiry into the larceny specification but failed to conduct a hearing on the second UA specification. Subsequently, the MJ found the accused guilty of all charges and specifications. Prior to the record's authentication, the MJ caught the omission and convened a post-trial 39a session to conduct a hearing on the second UA. Defense counsel and the accused agreed that they perceived no material prejudice to the accused's rights in conducting this post-trial session. On appeal, defense asserted that the post-trial session changed the MJ's announcement of findings in violation of RCM 922(d). The court held it did not change the MJ's findings but "[r]ather, it affected the underlying factual basis for the findings announced." In this case the MJ "correctly identified a deficiency in the record and sought to resolve the issue as expeditiously as possible and in a manner consistent with the [accused's] rights . . . —to hold otherwise would elevate form over substance."

3. *United States v. Kawai*, 63 M.J. 591 (A.F. Ct. Crim. App. 2006). Accused pled guilty to attempted unpremeditated murder and obstruction of justice. The government proceeded to a contested MJ alone case for premeditated murder which resulted in a conviction. During the contested portion of the trial, the accused, for the first time, testified that a third party told him to kill the victim or the accused and his girlfriend would be harmed. The accused also said he slit the victim's wrist after killing him because of this duress in contrast to his providence inquiry statements that the wrist was slit to cover the crime and to make the police think the victim committed suicide. Accused's statement raised the issue of duress as to the attempted unpremeditated murder and obstruction of justice plea and the MJ should have reopened the providence inquiry to discuss the potential defense. The MJ's error was harmless as to the attempted unpremeditated murder offense because the government presented overwhelming evidence to support the more serious conviction of premeditated murder. The unresolved inconsistent statements as to the slitting of the victim's wrist, however, required reversal as to the obstruction of justice plea.

Q. **USE OF PROVIDENCE INQUIRY ADMISSIONS IN MIXED PLEAS**.

1. ***Use of providence inquiry during merits phase in mixed plea***.

a) *United States v. Grijalva*, 55 M.J. 223 (C.A.A.F. 2001). Accused shot his wife. At trial, MJ rejected the accused's plea of guilty to attempted premeditated murder, but accepted his plea to the lesser-included offense of aggravated assault by intentional infliction of grievous bodily harm. On the merits (of the greater offense) the MJ used not only the accused's plea to the lesser offense, but also his admissions during the GP inquiry. The MJ then convicted the accused of attempted premeditated murder. Following settled case law, CAAF held the MJ properly used the accused's plea to the lesser-included offense, but erred by considering statements made by the accused during the plea inquiry.

b) *United States v. Ramelb*, 44 M.J. 625 (A. Ct. Crim. App. 1996). Providence inquiry can be used only to establish common elements between LIO and greater offenses. After accused pled guilty to LIO of wrongful appropriation, TC proved greater offense of larceny through testimony about what accused said in providence inquiry concerning intent. TC must obtain independent evidence to prove greater offense.

c) *United States v. Nelson*, 51 M.J. 399 (C.A.A.F. 1999). Accused sought to enter a plea of guilty to the AWOL, but moved to preclude the use of his statements during providence inquiry on the merits of the other offenses. Military judge denied the motion, accused entered pleas of not guilty, and was convicted of

all charges. ACCA affirmed the findings and sentence without opinion. CAAF ruled the accused had not preserved for appeal the issue of whether the military judge erred in ruling that the accused's providence inquiry admissions could be used against him on the merits of the other offenses.

2. ***Use of providence inquiry admissions on sentencing***.

a) ***Rule***. *United States v. Holt*, 27 M.J. 57 (C.M.A. 1988). Sworn testimony given by accused during providence inquiry may be received as admission at sentencing hearing and can be provided either by properly authenticated transcript or by testimony of court reporter or other persons who heard what accused said during providence inquiry.

b) *United States v. Dukes*, 30 M.J. 793 (N.M.C.M.R. 1990). Court indicated that *Holt* permits the trial counsel to offer an accused's responses during the providence inquiry into evidence, "but that such responses are not automatically in evidence . . . an accused must be given notice of what matters are being considered against him . . . opportunity to object . . . on grounds of improper aggravation, undue prejudice, or whatever." *See also United States v. Irwin*, 42 M.J. 479 (C.A.A.F. 1995) (accused's description of his misconduct–AWOL, rape, sodomy, indecent acts, kidnapping, threats, and unlawful entry–was so detailed and graphic that trial counsel played tape to members; tape was proper aggravation under RCM 1001(b)(4) and not cumulative because there was no stipulation of fact).

c) *United States v. Figura*, 44 M.J. 308 (C.A.A.F. 1996). CID agent charged with forgery. Trial counsel sought to use providence inquiry to establish the dates of checks, where written, and where the checks were cashed because information did not appear in stipulation of fact. Parties agreed to have MJ summarize for court members the information stated during providence inquiry, rather than have a written stipulation of spectator testify. Court held there is no demonstrative right or wrong way to introduce evidence taken during providence inquiry, and that MJ giving summary to members was probably to accused's advantage.

d) ***Exclusion of witnesses from providence inquiry***.

(1) *United States v. Langston*, 53 M.J. 335 (C.A.A.F. 2000). Defense requested exclusion of witnesses from courtroom during providence inquiry. Military judge refused the request, ruling incorrectly that M.R.E. 615 did not apply to providence inquiry. CAAF held the accused was not prejudiced, however, as the bulk of the witnesses' testimony went to victim impact.

(2) *See* M.R.E. 615 on excluding "victims" from trial proceedings.

3. ***Use of testimony gained from "busted" (unsuccessful) providence inquiry***.

a) RCM 910(e) allows for accused to be prosecuted for making false statements during a providence inquiry.

b) M.R.E. 410(a) addresses the "Inadmissibility of Pleas, Plea Discussions, and Related Statements" made during the course of "any judicial inquiry" regarding a plea of guilty which is later withdrawn. M.R.E. 410(a) goes on to state, however, that such statement(s) are admissible "in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it." *See United States v. Doran*, 564 F.2d 1176 (5th Cir. 1977), *cert. denied*, 435 U.S. 928 (1978). *See also United States v. Mezzanato*, 513 U.S. 196 (1995)

(statements made during plea negotiations admissible where accused decided to plead not guilty and understood the nature of agreement).

c) *United States v. Seward*, 48 M.J. 1 (C.A.A.F. 1998). After accused had undergone *Care* inquiry and court-martial was terminated by mistrial, it was error for the military judge to incorporate by reference the previous *Care* inquiry to establish the factual predicate for the guilty plea in the subsequent court-martial. *See generally Mitchell v. United States*, 526 U.S. 314 (defendant's right under the Self-Incrimination Clause of the Fifth Amendment applies during sentencing in a criminal case).

R. **ACCUSED'S WITHDRAWAL OF GUILTY PLEA**. RCM 910(h)(1).

1. Prior to acceptance by military judge—A matter of right.

2. Prior to announcement of sentence—For good cause only.

II. PRETRIAL AGREEMENTS

A. **AGREEMENT BETWEEN CONVENING AUTHORITY AND ACCUSED**. *Only* the convening authority can bind government. *But see United States v. Manley*, 25 M.J. 346 (C.M.A. 1987). Once accused completed performance of pretrial agreement, as modified by parties at trial, the convening authority was not authorized to unilaterally withdraw from the agreement.

B. **TYPICAL AND SIMPLEST AGREEMENT**.

1. Accused promises to plead guilty; convening authority agrees when case reaches him for review he or she will limit sentence to that specified in agreement.

2. Guilty plea entered.

3. Military judge examines agreement, insures accused understands.

4. ***"Two Bites at the Apple."*** Sentencing authority (military judge or members) proceeds unaware of limitation in agreement. If announced sentence is lower than agreement, accused gets the lower sentence.

C. **NATURE OF AGREEMENT**. RCM 705(b).

RCM 705. Pretrial agreements

. . . .

(b) *Nature of agreement.* A pretrial agreement may include:

(1) A promise by the accused to plead guilty to, or to enter a confessional stipulation as to one or more charges and specifications, and to fulfill such additional terms or conditions which may be included in the agreement and which are not prohibited under this rule; and

(2) A promise by the convening authority to do one or more of the following:

(A) Refer the charges to a certain type of court-martial;

(B) Refer a capital offense as noncapital;

(C) Withdraw one or more charges or specifications from the court-martial;

(D) Have the trial counsel present no evidence as to one or more specifications or portions thereof; and

(E) Take specified action on the sentence adjudged by the court-martial.

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1. An accused may: "[P]lead guilty to, or enter a confessional stipulation as to one or more charges and specifications, and to fulfill such additional terms or conditions which may be included in the agreement which are not prohibited under this rule . . ."

2. The convening authority may promise to do one or more of the following:

a. Refer the case to a certain level of court-martial;

b. Refer a capital offense as noncapital;

c. Withdraw one or more charges or specifications from the court-martial;

d. Have the trial counsel present no evidence as to one or more specifications or portions thereof; and

e. Take specified action on the sentence adjudged by the court-martial.

D. **PROCEDURE**. RCM 705(d).

RCM 705. Pretrial agreements

. . . .

(d) *Procedure.*

(1) *Negotiation*. Pretrial agreement negotiations may be initiated by the accused, defense counsel, trial counsel, the staff judge advocate, convening authority, or their duly authorized representatives. Either the defense or the government may propose any term or condition not prohibited by law or public policy. Government representatives shall negotiate with defense counsel unless the accused has waived the right to counsel.

(2) *Formal submission.* After negotiation, if any, under subsection (d)(1) of this rule, if the accused elects to propose a pretrial agreement, the defense shall submit a written offer. All terms, conditions, and promises between the parties shall be written. The proposed agreement shall be signed by the accused and defense counsel, if any. If the agreement contains any specified action on the adjudged sentence, such action shall be set forth on a page separate from the other portions of the agreement.

(3) *Acceptance.* The convening authority may either accept or reject an offer of the accused to enter into a pretrial agreement or may propose by counteroffer any terms or conditions not prohibited by law or public policy. The decision whether to accept or reject an offer is within the sole discretion of the convening authority. When the convening authority has accepted a pretrial agreement, the agreement shall be signed by the convening authority or by a person, such as the staff judge advocate or trial counsel, who has been authorized by the convening authority to sign.

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1. ***Offer/negotiation***. Either side may propose any term or condition not prohibited by law or public policy.

2. ***Formal submission***. Must be in writing, encompassing all terms, and signed by accused and defense counsel.

a. ***No oral pretrial agreements***. *United States v. Mooney*, 47 M.J. 496 (C.A.A.F. 1997). Military judge erred by accepting accused's guilty plea and pretrial agreement after it was clear that the pretrial agreement was not in writing as required by RCM 705(d)(2). However, while CAAF criticized counsels' and the judge's disregard for the rule, court held that reversal of conviction not required where the specific terms of the oral agreement were placed on the record, all parties acknowledged and complied with terms of agreement, and accused conceded that he received the benefit of the bargain.

b. *United States v. Forrester*, 48 M.J. 1 (C.A.A.F. 1998). Term in *stipulation of fact* which required the accused to waive his right to "any and all defenses" did not violate RCM 705 or public policy. CAAF cautions the Government not to attempt to avoid the requirements of RCM 705(c)(1)(B) by including terms in a document other than the pretrial agreement itself (terms must not be in a stipulation of fact).

3. ***Acceptance***. Is within sole discretion of convening authority; must be signed by CA or person authorized by CA to do so.

4. ***Military judge's inquiry at trial***.

a. *United States v. Felder*, 59 M.J. 444 (C.A.A.F. 2004). Military judge did not inquire into a term of the PTA regarding defense's waiver of any motions for sentence credit based on Article 13 and/or restriction tantamount to confinement. Accused's counsel did inform the military judge that no punishment under Article 13 or restriction tantamount to confinement had occurred. While the judge's failure to discuss the term was error, the accused failed to show the error materially prejudiced a substantial right.

b. *United States v. Dunbar*, 60 M.J. 748 (A. Ct. Crim. App. 2004). The accused's PTA stated "[a]ny adjudged confinement of three (3) months or more

shall be converted into a [BCD], which may be approved; any adjudged confinement of less than three (3) months shall be disapproved upon submission by the accused [of a Chapter 10]" with a handwritten annotation stating "with an Other Than Honorable (OTH) discharge." The MJ sentenced the accused to a BCD, two months confinement, and reduction to PFC, causing the parties to disagree whether the convening authority could approve the BCD. Defense argued the convening authority could not approve both an OTH and a BCD discharge. The government's position was that the accused could submit a Chapter 10 and the convening authority must disapprove the two months confinement but the PTA did not require the convening authority's approval of the Chapter 10. RCM 910(h)(3) provides, after the sentence is announced, if the parties disagree with the PTA terms the MJ shall "conform, with the consent of the Government, the agreement to the accused's understanding or permit the accused to withdraw the plea." The MJ did not clarify the accused's understanding or attempt to conform the agreement. Findings and sentence set aside.

c. *United States v. Sheehan*, 62 M.J. 568 (C.G. Ct. Crim. App. 2005). Military judge failed to cover a misconduct clause and "specially negotiated provisions" of the accused's PTA and provided an incorrect explanation as to another provision. CGCCA found that the military judge erred but that his omissions and misleading explanation did not prejudice the accused's substantial personal rights.

d. *United States v. Sharper*, 17 M.J. 803 (A.C.M.R. 1984) ("While the military judge may not have the authority to directly intervene in the pretrial negotiations between an accused and a convening authority, he does have the responsibility to police the terms of pretrial agreements to insure compliance with statutory and decisional law as well as adherence to basic motions of fundamental fairness.").

E. **WITHDRAWAL FROM THE PRETRIAL AGREEMENT**.

1. ***By the accused***. Under RCM 705(d)(5)(a), "The accused may withdraw from a pretrial agreement at any time; however, the accused may withdraw a plea of guilty or a confessional stipulation entered pursuant to a pretrial agreement only as provided in RCM 910(h) or 811(d), respectively."

a. *United States v. Bray*, 49 M.J. 300 (C.A.A.F. 1998). A convening authority may increase the sentence cap of a pretrial agreement when an accused withdraws a guilty plea after successful completion of a providence inquiry and, in the same court-martial, later reenters pleas of guilty to the same charges. The accused entered guilty pleas to assault and battery on a child, communicating a threat, and drunk driving. During extenuation and mitigation, a defense witness testified that the accused could have committed the offenses after being exposed to insecticide poisoning. Accused withdrew his guilty plea and from the pretrial agreement, which limited confinement to 20 years to pursue the "bug spray" defense. Accused obtained a new pretrial agreement after changing his mind. The sentence cap under the new PTA limited confinement to 30 years. Neither case law nor RCM 705 prohibit a convening authority from increasing a sentence cap in a new pretrial agreement after the convening authority properly withdraws from the original pretrial agreement. Accused chose to reopen the initial providence inquiry based on the "bug spray" defense and voluntarily withdrew from the original agreement after full consultation with counsel. The consequences of withdrawal were addressed in the original agreement, explained on the record, and the accused failed to object at trial.

b. *United States v. Olson*, 25 M.J. 293 (C.M.A. 1987). Accused had right to withdraw his guilty plea in light of additional, unanticipated subtraction from pay, if he had good-faith belief that he had fully settled his liability to reimburse Government for overpayment under allegedly false travel vouchers and if that belief had induced accused's entry of his pleas.

2. ***By the convening authority***. Under RCM 705(d)(5)(b), the convening authority may withdraw from a pretrial agreement at any time before the accused begins performance of promises contained in the agreement, upon the failure by the accused to fulfill any material promise or condition in the agreement, when inquiry by the military judge discloses a disagreement as to a material term in the agreement, or if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review. As a practical matter, once the accused begins performance, the convening authority has limited opportunity to withdraw from the PTA. *United States v. Dean*, 67 M.J. 224 (C.A.A.F. 2009); *United States v. Manley*, 25 M.J. 346 (C.M.A. 1987) (once accused completed performance of pretrial agreement, as modified by parties at trial, the convening authority was not authorized to unilaterally withdraw from the agreement).

a. ***Appellate courts have strictly interpreted convening authority's right to withdraw from an approved pretrial agreement***. *United States v. Dean*, 67 M.J. 224 (C.A.A.F. 2009). On eve of trial, convening authority withdrew from pretrial agreement because the accused refused to modify stipulation of fact to include new (post-preferral) misconduct. Relying on RCM 704(d)(4)(B), court held the convening authority could not withdraw once the accused began performance of any promise in the agreement; in this case, accused had signed stipulation of fact, filed an amended witness (to conform with provision in pretrial agreement), and elected trial by judge alone. Government argued the parties had a disagreement to a material term, as the Government believed a "good conduct" provision was implicit in the agreement; CAAF summarily dismissed that argument and held the convening authority improperly withdrew from the agreement. Of note, the accused signed the stipulation of fact and elected trial by military judge alone ***before*** the convening authority approved the pretrial agreement; the accused began performance before there was an approved agreement, and the Government could not withdraw once the convening authority signed the document.

b. *United States v. Williams*, 60 M.J. 360 (C.A.A.F. 2004). Accused's pretrial agreement required him to reimburse his victim(s) "once those individuals and the amounts owed have been ascertained." On the day of trial the government withdrew from the PTA reasoning, under RCM 705(d)(4)(B), that the accused's failure to reimburse his victim breached a material PTA term. Defense argued he was not in breach because the term failed to establish a time limit, allowing for restitution after trial. Defense requested specific performance of the PTA arguing (also under RCM 705(d)(4)(B)) that his execution of a stipulation of fact with the government constituted performance and he had not otherwise breached any material term. CAAF did not rule whether entrance into a stipulation of fact constitutes performance or whether the accused failed to fulfill a material term. CAAF, focusing on the parties' failure to establish a meeting of the minds for the restitution time limit, held, under RCM 705(d)(4)(B), that the government can withdraw from a PTA if the MJ "discloses a disagreement as to a material term in the agreement."

c. *United States v. Parker*, 62 M.J. 459 (C.A.A.F. 2006). Accused entered into a PTA to plead guilty to AWOL and missing movement by neglect in return for the CA suspending any adjudged BCD or confinement in excess of thirty days. The

military judge, however, rejected the accused's plea to missing movement by neglect because the accused said he only overheard statements by his NCOs, as opposed to a direct or official conveyance, regarding the place and time of the movement. When the military judge rejected the accused's plea, the government withdrew from the PTA and moved forward to trial before the military judge alone on the charge of missing movement by design. The military judge found the accused guilty of missing movement by design and sentenced him to a BCD and five months confinement. The N-MCCA held that the military judge erroneously rejected the accused's plea by questioning the reliability of the information the accused relied upon to make his providence inquiry statements. Under this theory, the accused was entitled to his original PTA sentence limitation of a suspended BCD and no more than thirty-days confinement. After trial, however, the accused submitted a clemency letter stating he did not desire suspension of his BCD. CAAF held that the MJ did not erroneously reject the accused's plea and defense never requested the MJ to reopen the plea. Therefore, PTA failed to exist and the accused's express and repeated request for a non suspended BCD during his unsworn statement and clemency matters controls.

d. *United States v. Pruner*, 37 M.J. 573 (A.C.M.R. 1993). Convening authority withdrew from proposed agreement by accused. Performance of pretrial agreement was not commenced per RCM 705(d)(5)(b) when accused had not yet signed proposed stipulation of fact and had not yet requested witnesses.

e. *United States v. Villareal*, 52 M.J. 27 (C.A.A.F. 1999). Convening authority could lawfully withdraw from pretrial agreement based upon pressure from victim's family members, who were opposed to permitting the accused to plead guilty to manslaughter instead of murder. The decision to withdraw was based in part on the advice of the CA's superior. Afterward, the case was forwarded to a third, impartial CA, who convened the court, and the accused pled not guilty. CAAF, by a 3-2 vote, held that the military judge did not err in refusing to order specific performance of the pretrial agreement. The accused had not relied to his detriment on the agreement in any manner that would prejudice his right to a fair trial.

F. **PERMISSIBLE TERMS OR CONDITIONS**.

1. ***Stipulation of fact***. A promise to enter into a stipulation of fact concerning offenses to which a plea of guilty is entered or as to which a confessional stipulation will be entered. *United States v. Bertelson*, 3 M.J. 314 (C.M.A. 1977).

2. ***Promise to testify***. Accused may agree to testify or provide assistance to investigators as a witness in the trial of another person. However, it is likely impermissible to require an accused testify without a grant of immunity. *See United States v. Profitt*, 1997 WL 165434 (A.F. Ct. Crim. App. 1997) (unpub); *United States v. Rivera*, 46 M.J. 52 (C.A.A.F. 1997), *affirming* 44 M.J. 527 (A.F. Ct. Crim. App. 1996) (term which required accused to "testify in any trial related in my case without a grant of immunity" did not violate public policy, *under facts of this case* as the accused had not been called to testify. Both cases discussed *supra*.

3. ***Provide restitution***. *United States v. Mitchell*, 46 M.J. 840 (N-M. Ct. Crim. App. 1997). Accused who fails to make full restitution pursuant to a defense proposed term in PTA is not unlawfully deprived of the benefit of the PTA where the failure to comply with the restitution obligation is based on indigency. Accused uttered bad checks and defrauded financial institutions of $30,733. The defense proposed a term that required accused to make full restitution in exchange for suspension of confinement in excess of 60 months. The accused was sentenced, *inter alia*, to 10 years confinement. While in jail,

the accused made partial restitution until his business failed. The accused, now indigent, cannot necessarily use indigency to negate operation of PTA term requiring full restitution. CA properly vacated suspension under PTA.

4. ***Conform accused's conduct to certain conditions of probation***.

a. *See United States v. Spriggs*, 40 M.J. 158 (C.M.A. 1994) (an indeterminate term of suspension of up to 15 years to complete sex offender program was inappropriate).

b. *United States v. Wallace*, 58 M.J. 759 (N-M. Ct. Crim. App. 2003). Accused sentenced to life without parole. In accordance with his pretrial agreement, the convening authority suspended all confinement in excess of 30 years for the period of confinement plus 12 months after accused's release. Accused argued that the period of suspension could only be 5 years from the date sentence was announced. HELD: Pretrial agreement provision suspension period for the period of confinement and one year from date of release does not violate public policy. RCM 1108 states that a period of suspension should not be unreasonably long. "It is this Court's opinion that placing Accused on probation for 31 years of an adjudged life sentence without possibility of parole is not unreasonably long and does not violate public policy."

5. ***Other misconduct provisions***.

a. *United States v. Bulla*, 58 M.J. 715 (C.G. Ct. Crim. App. 2003). Pretrial agreement included a misconduct provision "that permitted the convening authority, among other things, to disregard the sentence limiting part of the pretrial agreement if the [accused] committed a violation of the UCMJ between the time the sentence was announced at her court-martial and the time the convening authority acted on the sentence." Accused was in an unauthorized absence status for two days shortly after the end of court-martial proceedings. Relying on the misconduct provision, the convening authority approved the sentence as adjudged, rather than as would have been limited by the PTA (which would have suspended the BCD for twelve months from action). Although CGCCA had "reservations about some of the potential results of this misconduct provision, it held that provision does not violate public policy" at least as applied in this case to a sentence element that the convening authority only agreed to suspend." Further, accused's two-day AWOL was a "material breach" of the PTA that allowed the convening authority to be released from his obligations under the agreement. Finally, court finds that prior to finding accused violated the misconduct provision, convening authority should hold a proceeding similar to that provided for by Article 72, UCMJ and RCM 1109 (vacation proceedings) and apply a preponderance of the evidence burden of proof. Although convening authority applied a lesser, incorrect burden of proof, the error was harmless.

b. *United States v. Tester*, 59 M.J. 644 (A. Ct. Crim. App. 2003). Pretrial agreement contained deferral of confinement provision and misconduct provision similar to that in *Bulla*, *supra*. Court held procedures of RCM 1109 (vacation of suspension) must be complied with before an alleged violation of such terms may relieve the convening authority of the obligation to fulfill the agreement. Convening authority followed provisions to rescind deferral of confinement.

6. ***Waive unreasonable multiplication of charges***. *United States v. Mitchell*, 62 M.J. 673 (N-M. Ct. Crim. App. 2006). The accused agreed in his PTA to waive a motion alleging unreasonable multiplication of charges. The military judge reviewed this provision with the accused but did not ask him if he had an unreasonable multiplication of

charges motion to make. On appeal, defense argued that the term violated public policy, requiring the nullification of the accused's PTA under RCM 705(c)(1)(B). N-MCCA, noting the issue as one of first impression, held that an unreasonable multiplication of charges motion is not of a constitutional dimension and is not specifically prohibited under RCM 705 (c)(1)(B). Based on the facts of the accused's case, the court held the provision did not violate public policy.

7. ***Waive Article 32 investigation and other procedural protections***. Accused may waive the Article 32 as well as the right to trial by court-martial composed of members or the right to request trial by military judge alone, or the opportunity to obtain the personal appearance of witnesses at sentencing proceedings. *United States v. Gansemer*, 38 M.J. 340, (C.M.A. 1993) (upholding term requiring accused waive separation board if punitive discharge was not adjudged; term does not violate public policy or fundamental fairness, as accused can ask for discharge in lieu of court-martial and there was no overreaching).

8. ***Forfeiture of personal property (computer)***. *United States v. Henthorn*, 58 M.J. 556 (N-M. Ct. Crim. App. 2003). Accused convicted of receiving child pornography in violation of 18 U.S.C. § 2252A. Court holds that provision in pretrial agreement that required accused "to forfeit his personal property (laptop computer) pursuant to 18 U.S.C. §2253 did not constitute an unauthorized forfeiture or fine and was not an excessively harsh punishment." Because the computer was used in the commission of the crime, its forfeiture was consistent with the application of the federal forfeiture statute, and was not a "punishment." "Needless to say, if the [accused] found his agreement too onerous, he could have withdrawn from it."

9. ***Unlawful command influence***. *United States v. Weasler*, 43 M.J. 15 (C.A.A.F. 1995). While it is against public policy to require an accused to withdraw an issue of unlawful command influence in order to obtain a pretrial agreement, accused may *initiate* a waiver of unlawful command influence in order to secure a favorable pretrial agreement. *But see* Judge Wiss' concurrence, which warns "that this Court will witness the day when it regrets the message that the majority opinion implicitly sends to commanders."

10. ***Fines***. *United States v. Smith*, 44 M.J. 720 (A. Ct. Crim. App. 1996). Including fines as a term in pretrial agreements is a recognized "good reason" for imposing same, where agreement is freely and voluntarily assented to avoid some more dreaded lawful punishment. Accused was convicted of felony murder. Military judge imposed a fine as part of the sentence which required the accused to pay the $100,000 by the time he is considered for parole (sometime in the next century) or be confined for an additional 50 years or until he dies, whichever come first. The court held the fine was permissible but the contingent confinement provision was not, as it circumvented Secretary of Army's parole authority.

11. ***Waive Article 13 punishment***. *United States v. McFadyen*, 51 M.J. 289 (C.A.A.F. 1999). Accused's waiver of Article 13 issue as part of pretrial agreement does not violate public policy. For all cases in which "a military judge is faced with a pretrial agreement which contains an Article 13 waiver, the military judge should inquire into the circumstances of the pretrial confinement and the voluntariness of the waiver, and ensure that the accused understands the remedy to which he would be entitled if he made a successful motion." Here, accused agreed to plead guilty and, in exchange for a sentence limitation, to waive his right to challenge his pretrial treatment under Article 13. Accused was an airman who complained about his treatment in pretrial confinement at a Navy brig (where he was stripped of rank, prevented from contacting his attorney, and had his phone calls monitored). While announcing a prospective rule only, the court found no reason to disturb the waiver here: Accused did not contest the voluntariness of waiver, an inquiry was conducted by the military judge, the accused was allowed to raise and argue in

mitigation his claims of ill-treatment at the hands of the Navy, and the military judge was able, if he wished, to consider the nature of pretrial confinement in determining the sentence.

12. ***Waive comparative sentencing information***. *United States v. Oaks*, 2003 CCA LEXIS 301 (A.F. Ct. Crim. App. Dec. 10, 2003) (unpub.). Term waiving right to present comparative sentencing information in unsworn statement does not violate public policy. Term does not impermissibly limit right to present a full sentence case to the sentencing authority. Court finds *United States v. Grill*, 48 M.J. 131 (C.A.A.F. 1998), inapplicable, as presenting sentence comparison material was not permitted by military judge; in contrast, accused here agreed to waive his right under *Grill* in exchange for the benefits of a pretrial agreement.

13. ***Enrollment in a sexual offender treatment program***. *United States v. Cockrell*, 60 M.J. 501 (C.G. Ct. Crim. App. 2004). MJ failed to discuss with the accused a provision in the PTA requiring the accused to enroll in a sexual offender treatment program following his release from confinement and the ramifications if he failed to comply with that requirement. While the ramifications of failing to comply with the terms of the sexual offender treatment program were unclear in the PTA, and left unexplained by the MJ, the court does not state that requiring an accused to enroll in a sexual offender treatment program is a per se impermissible term.

14. ***Agreement not to discuss alleged constitutional violation***. *United States v. Edwards*, 58 M.J. 49 (C.A.A.F. 2003). As part of PTA, accused agreed not to discuss, in his unsworn statement, any circumstances surrounding potential constitutional violations occurring during AFOSI's interrogation of him (interrogation after detailing of defense counsel without first notifying defense counsel). If a provision is not contrary to public policy or RCM 705, accused may knowingly and voluntarily waive it. RCM 705 does not prohibit this pretrial term, and specifically does not deprive the accused of the right to a complete sentencing proceeding. Military judge conducted detailed inquiry of the accused to determine he knowingly and voluntarily agreed to it, and whether he understood the implications of his waiver.

15. ***Forum selection (military judge alone)***.

a. *United States v. Burnell*, 40 M.J. 175 (C.M.A. 1994). Government would not agree to two-year sentencing limitation unless accused waived members. COMA rules that with accused's voluntary and intelligent waiver, PTA was not violative of public interest. Even if government had declined *any* PTA unless accused waived members, the "government would not be depriving [accused] of anything he was entitled to."

b. *United States v. Andrews*, 38 M.J. 650 (A.C.M.R. 1993). Government indicated during pre-trial negotiations that if accused elected trial with members, "then the quantum portion would be higher than if we went with military judge alone." Court ruled, "[W]e hold that the change to RCM 705 now permits the government to propose as a term of the pretrial agreement, that the [accused] elect trial by military judge alone, and the amount of the sentence limitation may depend on that election." *See also United States v. McClure*, A.C.M.R. No. 9300748 (A.C.M.R. Nov. 23, 1993) (unpub.) (convening authority's handwritten counter-offer on pretrial agreement stated: "The foregoing is accepted only if the accused elects to be tried by military judge alone.").

c. Appellate courts might invalidate a pretrial agreement if accused asserts (s)he was "coerced" into waiving trial by members. *United States v. Young*, 35 M.J. 541 (A.C.M.R. 1992).

d. A service or command policy, such as standardized pretrial agreements, which undermines the legislative intent of Article 16 "will be closely scrutinized." However, agreements are permissible if waiver is "freely conceived defense product." *United States v. Zelenski*, 24 M.J. 1 (C.M.A. 1987).

G. **PROHIBITED TERMS OR CONDITIONS**.

RCM 705. Pretrial agreements.

. . . .

(c) *Terms and conditions*

(1) *Prohibited terms or conditions.*

(A) *Not voluntary.* A term or condition in a pretrial agreement shall not be enforced if the accused did not freely and voluntarily agree to it.

(B) *Deprivation of certain rights.* A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; the complete and effective exercise of post-trial and appellate rights.

1. ***Not voluntary***. A term or condition in a pretrial agreement shall not be enforced if the accused did not freely and voluntarily agree to it.

2. ***Deprivation of certain rights***. A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge jurisdiction of the court-martial; the right to speedy trial; the right to complete sentencing proceedings; the complete and effective exercise of post-trial and appellate rights.

a. *United States v. Libecap*, 57 M.J. 611 (C.G. Ct. Crim. App. 2002). Accused contended that the pretrial agreement, requiring him to request a bad conduct discharge at trial, was unenforceable. The appellate court concluded that RCM 705(c)(1) prohibited the provision because it deprived the accused of a complete sentencing proceeding by negating the value of putting on a defense sentencing case. Moreover, the requirement to request a bad conduct discharge improperly placed the accused in the position of either giving up a favorable pretrial agreement or forgoing a complete sentence proceeding. The provision was against public policy for similar reasons. The accused was prejudiced by the provision, even though he had not requested a bad conduct discharge at trial, because he was precluded from telling the military judge that he wanted a second chance and from arguing for a sentence that did not include a punitive discharge. Since the accused had specifically stated that the error did not affect the voluntariness of his pleas, the appellate court determined that the appropriate remedy was a rehearing on sentence.

b. *United States v. McLaughlin*, 50 M.J. 272 (C.A.A.F. 1999). Accused offered to waive a speedy trial issue in his pretrial agreement (accused had been in pretrial confinement for 95 days). CAAF held that under the MCM this provision is unenforceable, so the military judge should have declared it impermissible, upheld the remainder of the agreement, and then ask the accused if he wished to litigate the issue. If he declined to do so, the waiver would be clearer. Nevertheless, the accused must make a prima facie showing or colorable claim for relief. Despite 95-day delay, no showing of prejudice.

c. *United States v. Benitez*, 49 M.J. 539 (N.M. Ct. Crim. App. 1998). Accused offered to waive all non-constitutional and non-jurisdictional motions. The military judge determined there was a speedy trial issue, and that the term was proposed by the government. The accused had been in pretrial confinement for 117 days at the time of arraignment. The court held that there was a colorable

showing of a viable speedy trial claim and that it was not convinced this was harmless error. Finding and sentence set aside.

3. ***Term involving individual military counsel***. *United States v. Copley*, No. 20011015 (A. Ct. Crim. App. Feb. 26, 2004) (unpub.). Increase in confinement cap from 12 to 13 months due to accused's exercise of his right to an individual military counsel which caused a delay in proceedings "inferentially implicated appellant's right to individual military counsel," and violated public policy. Court reassessed sentence and affirmed only 11 months confinement.

4. ***Waiver of clemency or parole***. *United States v. Tate*, 64 M.J. 269 (C.A.A.F. 2007). The accused, in his PTA, agreed to decline any clemency or parole offered to him for a period of twenty years. The MJ sentenced the accused to life without parole but the PTA limited the accused's confinement to fifty years, which, but for his PTA term, would have made him eligible for clemency in five years and parole in ten years. CAAF held that a PTA term limiting the accused's right to clemency or parole violates RCM 705(c)'s right to a complete and effective exercise of post-trial and appellate rights. Allowing such a term would improperly impede the ability of service secretaries to exercise their clemency and parole powers, "as well as ultimate control of sentence uniformity" throughout their respective service. CAAF struck the PTA's specific term but ruled the stricken term did not impair the balance of the agreement and the plea. *See also United States v. Thomas*, 60 M.J. 521 (N-M. Ct. Crim. App. 2004) (any PTA provision precluding the accused from accepting clemency violates public policy, even if accused's sentence could have included death or required a mandatory minimum of confinement for life for a premeditated murder conviction),.

5. *United States v. Sunzeri*, 59 M.J. 758 (N-M. Ct. Crim. App. 2004). Term, originating with accused, that prohibited accused from presenting testimony of witnesses located outside of Hawaii either in person, by telephone, letter, or affidavit, violated public policy as it impermissibly deprived the accused of a complete sentencing proceeding. By contrast, it is permissible to waive *personal appearance* of sentencing witnesses, so long as other methods are available for presenting that evidence to the factfinder (like telephonic testimony or stipulations of expected testimony).

6. *United States v. Davis*, 50 M.J. 426 (C.A.A.F. 1999). Accused offered a PTA in which he agreed to plead not guilty and, in exchange for a sentence limitation, to enter into a confessional stipulation and present no evidence. The stipulation admitted basically all elements of the offenses except the wrongfulness of marijuana use and the intent to defraud concerning the bad check offenses. CAAF found the provision violated the prohibition against accepting a confessional stipulation as part of a pretrial agreement promising not to raise any defense. *See also United States v. Keyes*, 33 M.J. 567 (N.M.C.M.R. 1991) (improper to have accused waive in pretrial agreement military judge's disqualification after judge's impartiality is reasonably questioned).

7. *United States v. Cassity*, 36 M.J. 759 (N.M.C.M.R. 1992). Accused pled guilty in exchange for a pretrial agreement which would suspend a bad-conduct discharge, provided confinement for more than four months was adjudged. Confinement adjudged was for less than four months, and convening authority did not suspend the discharge. Agreement found to be contrary to public policy and fundamentally unfair.

8. *United States v. Thomas*, 60 M.J. 521 (N-M. Ct. Crim. App. 2004). Where an accused's sentence could include death and required a mandatory minimum of confinement for life for a premeditated murder conviction, any PTA provision precluding the accused from accepting clemency, if offered, violates public policy.

9. *United States v. Schmelzle*, No. 200400007, 2004 CCA LEXIS 148 (N-M. Ct. Crim. App. July 14, 2004) (unpub) (based on the accused's eligibility for retirement, a provision requiring the accused to not request transfer to the reserves, if a punitive discharge was not adjudged, violated public policy).

10. *United States v. Conklan*, 41 M.J. 800 (A. Ct. Crim. App. 1995). Pretrial agreement in which the quantum portion was increased if the accused raised claims of de facto immunity encumbered the accused's due process right to challenge the jurisdiction of the court-martial. The litigation of non-frivolous claims of lack of jurisdiction and immunity are not the proper subjects for plea bargaining.

H. **PROBLEMATIC TERMS OR CONDITIONS**.

1. ***Waive all waivable motions***. *United States v. Gladue*, 67 M.J. 311 (C.A.A.F. 2009). Accused pled guilty pursuant to a pretrial agreement agreeing to "waive any waiveable [*sic*] motions."[3] At trial, military judge asked the defense what motions were waived by this provision; defense counsel stated the only contemplated motions were for a continuance, suppression of evidence, change of venue, and entrapment (and did not mention multiplicity or unreasonable multiplication of charges). On appeal (and for the first time), the accused argued multiplicity or, alternatively, unreasonable multiplication of charges. The CAAF found the accused waived those issues in the pretrial agreement. The court noted: "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." When an issue is merely forfeited, appellate courts will review for plain error; if an accused waives a right at trial, it is "extinguished" and will not be reviewed on appeal. In this case, the accused knowingly waived all waivable motions, which included multiplicity and unreasonable multiplication of charges. The CAAF held it was not relevant that the defense did not contemplate these specific motions at trial.

a. Despite the CAAF's decision in *Gladue*, a "waive all waivable motions" provision can be problematic. Under RCM 910(f)(4), the military judge must ensure the accused understands the pretrial agreement. If the accused and counsel did not anticipate a motion at trial, yet purported to waive all motions, the waiver of the unanticipated motion was arguably unknowing. Military judges, in an abundance of caution, should ask defense counsel what specific motions are being waived under a "waive all waivable motions" provision. This practice precludes challenges on appeal that an accused was unaware of other motions or (more problematic) believed he was waiving a non-waivable motion (like speedy trial).

b. *Cf. United States v. Rivera*, 46 M.J. 52 (C.A.A.F. 1997), *affirming* 44 M.J. 527 (A.F. Ct. Crim. App. 1996) (term in PTA which required that accused waive "all pretrial motions" was too broad, and purported to deprive accused of right to make motions that could not be bargained away); *United States v. Jennings*, 22 M.J. 837, 838-39 (N.M.C.M.R. 1986) (provision in pretrial agreement to "waive any pretrial motion I may be entitled to raise" is "null and void" as "contrary to public policy").

c. *See also United States v. Silva*, 1997 CCA LEXIS 267 (N-M. Ct. Crim. App. 1997) (unpub.). Term in PTA, which required accused to "waive all waiveable motions" not contrary to public policy and RCM 705(c)(1)(B). Such a term does not include motions that are nonwaivable under RCM 705(c)(1)(B).

[3] *United States v. Gladue*, 65 M.J. 903, 904 n.2 (A.F. Ct. Crim. App. 2008) ("It is well established that this provision does not per se violate either Rule for Courts-Martial 705 or public policy."), *aff'd*, 67 M.J. 311 (C.A.A.F. 2009).

2. ***Conditional Requests for Delay***. *United States v. Giroux*, 37 M.J. 553 (A.C.M.R. 1993). Defense counsel submitted a post-trial "Conditional Request for Delay" to cover a portion of time between the preferral of charges and the date of trial. Defense counsel was willing to accept either 37 or 72 days of processing time in return for sentence mitigation by the convening authority. Ambiguity in convening authority's acceptance was resolved in favor of accused. A.C.M.R. pronounced that "for obvious reasons, we strongly recommend that convening authorities and staff judge advocates not entertain agreements of this nature in the future."

3. ***Testifying without Immunity***. *See United States v. Profitt*, 1997 CCA LEXIS 117 (A.F. Ct. Crim. App. Apr. 4, 1997) (unpub.) (term "testify without a grant of immunity" should be interpreted with common sense, which dictates that the convening authority was requiring the accused testify in future trials related to the offenses in which he was involved). The court held the PTA is valid under RCM 705 in a case involving guilty plea to false official statement and use and distribution of LSD in exchange for the accused promises to: not ask convening authority to provide funding for more than three sentencing witnesses (RCM 705 (c)(2)(E)); testify without grant of immunity against any other military members (RCM 705 (c)(2)(B)); and not raise any waivable pretrial motions. The MJ questioned accused and counsel extensively during providence and all parties agreed the term did not encompass motions of a Constitutional dimension. *See also United States v. Rivera*, 46 M.J. 52 (C.A.A.F. 1997), *affirming* 44 M.J. 527 (A.F. Ct. Crim. App. 1996) (term which required accused to "testify in any trial related in my case without a grant of immunity" did not violate public policy, *under facts of this case* as accused had not yet been called to testify).

4. ***Waive any and all defenses***. *United States v. Forrester*, 48 M.J. 1 (C.A.A.F. 1998). Term which required the accused waive his right to "any and all defenses" did not violate RCM 705 or public policy. Accused charged with attempted housebreaking, attempted larceny, violation of a lawful general regulation, and aggravated assault. Requirement to waive all defenses was not overly broad, considering that the accused failed to raise any defense during the providence inquiry or sentencing.

5. ***Vacation of suspension term***. *United States v. Perlman*, 44 M.J. 615 (N-M. Ct. Crim. App. 1996), 48 M.J. 353 (C.A.A.F. 1998) (sum. disp.) (affirming but expressing no opinion on whether term is lawful). Government argued that term in PTA permitted SPCMCA to execute vacation of suspension without forwarding case to GCMCA for action. Court held that although PTA does not indicate that accused wanted to waive those rights; Congressional intent was to grant accused an important procedural due process right for vacation actions and it is doubtful whether such rights are waivable. *See also United States v. Smith*, 46 M.J. 263 (C.A.A.F. 1997) (holding that PTA term providing for vacation proceedings and processing under Article 72 and RCM 1109 in the event of future misconduct cannot be interpreted as waiver of the GCMCA's authority to review and take action on vacation).

I. **REMEDY FOR UNENFORCEABLE TERMS**. *United States v. McLaughlin*, 50 M.J. 217 (C.A.A.F. 1999) (a term requiring accused to "waive the speedy trial issue" is impermissible under RCM 705(c)(1)(B) and the military judge should have declared it void and unenforceable, while upholding the rest of the agreement; judge should have also asked the accused if he wanted to raise the issue).

J. **INQUIRY INTO QUANTUM AND RESOLUTION OF AMBIGUOUS TERMS**.

1. ***Contract principles govern***. *United States v. Grisham*, 66 M.J. 501 (A. Ct. Crim. App. 2008). ACCA provided an excellent summary of the contract principles used to interpret pretrial agreements. In *Grisham*, the approved pretrial agreement included this provision: "The government agrees not to prefer any additional charges or specifications

against the accused for any potential misconduct of which the *government is aware at the time this offer is signed*." (emphasis supplied by the court). The government became aware of misconduct in the nine days between the date the accused signed the pretrial agreement and the date the convening authority approved it: the accused and counsel signed the pretrial agreement on 1 December 2004; the accused (who was in pretrial confinement) provided a urine sample as part of a prison-wide urinalysis; on 6 December 2004, the Army's laboratory found amphetamines in the accused's sample; on 10 December 2004, after conducting several standard confirmatory tests, the laboratory certified the positive result; also on 10 December 2004, the convening authority approved the pretrial agreement. The accused pled guilty pursuant to his pretrial agreement in *Grisham I*. The government preferred additional charges for a second court-martial, *Grisham II*, including the wrongful use of amphetamines from December 2004. The ACCA held the pretrial agreement referred to the date *the accused* signed the pretrial agreement (as opposed to the date the convening authority signed it) and upheld the conviction for wrongful use.

a. ***Law***. "A pretrial agreement is a contract created through the bargaining process between the accused and the convening authority. It is well established in federal and military courts that pretrial agreements will be interpreted using contract law principles."

b. ***Military judge's duty to resolve ambiguity***. The military judge has a duty to "resolve any ambiguities, inconsistencies, or misunderstandings between the accused and the government during the providence inquiry." The court emphasized that if there is ambiguity, "it is the military judge's responsibility to clarify the terms of the agreement on the record, and ensure that all parties, especially the accused, understand the terms and their implications"

c. ***Practice point***. Against this lengthy dissertation of the law, the case ultimately came down to the military judge's discussion of the PTA with the accused. The military judge in *Grisham I* asked the accused about the effective date of the disputed provision and all parties agreed that it was 1 December 2004, the date the accused signed the offer to plead guilty. Military judges should force parties to clarify vague provisions on the record. ACCA commended the military judge in the first trial for asking the accused if he understood the term to mean that 1 December 2004 was the effective date.

2. ***Contract principles yield to Due Process protections***. *United States v. Smead*, 68 M.J. 44 (C.A.A.F. 2009). A pretrial agreement is a constitutional contract between the accused and the convening authority. In a typical agreement, the accused foregoes constitutional rights in exchange for a benefit, normally a reduction in sentence. As a result, when interpreting pretrial agreements, contract principles will be outweighed by Due Process Clause protections for an accused.

3. ***Ambiguous quantum provisions***. *United States v. Craven*, 69 M.J. 513 (A.F. Ct. Crim. App. 2010), *review denied*, 69 M.J. 209 (C.A.A.F. 2010). The accused pled guilty pursuant to a pretrial agreement that included this quantum: "The approved sentence will not exceed confinement in excess of thirty-six months (36)." The convening authority approved an adjudged dishonorable discharge, 28 months of confinement[4], and reduction to E-1. On appeal, the accused argued the quantum portion limited the sentence that could be approved to 36 months' confinement, which implicitly required the rank reduction and

[4] The military judge had sentenced the accused to confinement for 34 months, reduction to E-1, and to be dishonorably discharged. In footnote 5, the AFCCA noted the convening authority approved 28 months' confinement "in an exercise of clemency."

punitive discharge be disapproved. The AFCCA found the quantum was ambiguous and affirmed. "In determining the parties' understanding on ambiguous pretrial agreement terms, this Court will give the greatest weight to the parties' stated understanding at trial, for it is at the pretrial and trial stages where pretrial agreement disagreements can better be resolved." In Footnote 2, the court cited *United States v. Acevedo*, 50 M.J. 169, 173 (C.A.A.F. 1999) for proposition that "trial defense counsel is under a continuing duty to reveal in open court any discrepancy between the defense understanding of the potential sentence and that adjudged by the court"

a. ***Term was ambiguous***. In dissecting the language, AFCCA noted: (1) the provision stated "the approved sentence" rather than the unambiguous "the approved sentence to confinement"; and (2) the quantum did not expressly limit the convening authority's ability to approve other lawfully-adjudged punishments. The AFCCA then concluded, "[T]he pretrial agreement provision is ambiguous and we cannot discern the parties' intent without examining extrinsic evidence that may shed some light on the parties' intent."

b. ***Parties' intent allowed for approval of adjudged sentence***. The AFCCA quickly concluded the parties intended the provision only limit the accused's sentence to confinement without limiting other punishments. The court emphasized that the parties at trial agreed with the military judge's interpretation that the convening authority could approve the sentence as adjudged; the AFCCA noted this factor alone would have been sufficient for the court to find the parties' intent. The AFCCA then found its determination was "buttressed by the fact that neither the appellant nor his trial defense counsel objected to the SJAR" as well as the accused waiting until appeal to dispute the meaning of this provision.

4. *United States v. Acevedo*, 50 M.J. 169 (C.A.A.F. 1999). Accused entered into a PTA which provided that "a punitive discharge may be approved as adjudged. If adjudged and approved, a dishonorable discharge will be suspended for a period of 12 months from the date of court-martial at which time, unless sooner vacated, the dishonorable discharge will be remitted without further action." The military judge sentenced accused to confinement for 30 months, total forfeitures, reduction to E-1, and a bad-conduct discharge. The military judge then stated regarding the BCD, "there's nothing [in the PTA] about doing anything to a bad-conduct discharge so that is not suspended. Right?" to which both counsel agreed. The CA approved the BCD. CAAF held that it appeared that all parties had the same understanding, that an unsuspended bad-conduct discharge was envisioned as a possible approved and executed punishment.

5. *United States v. Gilbert*, 50 M.J. 176 (C.A.A.F. 1999). A companion case to *Acevedo.* The PTA had a similar provision relating to suspension of a DD, and also suspended confinement in excess of 6 months for 12 months. The military judge sentenced accused to confinement for 12 months, reduction in grade to E-2, forfeiture of all pay and allowances for 12 months, and a bad-conduct discharge. The military judge recommended suspension of the BCD. The military judge noted the impact of the PTA, on the adjudged sentence. None of the parties commented with respect to the military judge's recommendation that the convening authority suspend the bad-conduct discharge, which would have been an empty gesture if the agreement already required it. CAAF held the provision was lawful and that the BCD could be approved.

6. *United States v. Sutphin*, 49 M.J. 534 (C.G. Ct. Crim. App. 1998). Accused entered into a PTA that described five parts of the sentence covered by the agreement. One portion was characterized as the "amount of forfeiture or fine," and it included forfeitures of pay and allowances as being included under the agreement but did not mention the possibility of a fine; the last portion of the PTA stated "any other lawful punishment

(which shall expressly include, among others, any enforcement provisions in the case of a fine)." The military judge never inquired whether the accused understood a fine could be approved and imposed. The military judge ensured the accused understood that the sentence was a limitation on what could be done with him. The military judge then instructed the members they could adjudge a fine, along with confinement and a punitive discharge; the panel's sentence included a $5,000 fine. The court held the portion of the sentence which included a fine must be disapproved, since the reasonable conclusion was that only forfeitures may be approved.

7. *United States v. Edwards*, 20 M.J. 439 (C.M.A. 1985). Where fine not mentioned in agreement and sentence includes total forfeitures plus a $1,000 fine, the fine could not be approved. *See also United States v. Morales-Santana*, 32 M.J. 557 (A.C.M.R. 1991); *United States v. Gibbs*, 30 M.J. 1166 (A.C.M.R. 1990).

8. *United States v. Womack*, 34 M.J. 876 (A.C.M.R. 1992). Accused submitted agreement to plead to drunk driving if government would not go forward on related assault charge. Pretrial agreement was silent as to punishment. MJ opined (after reading this sentence and comparing it to the PTA) that the literal meaning was that the CA could only impose "no punishment." Military judge and trial counsel "agree to disagree." Military judge should have resolved ambiguity. Failure to resolve ambiguity resolved in favor of accused.

K. **POST-TRIAL RE-NEGOTIATION OF PRETRIAL AGREEMENT**.

1. *United States v. Pilkington*, 51 M.J. 415 (C.A.A.F. 1999). An accused has the right to enter into an enforceable post-trial agreement with the convening authority when the parties decide that such an agreement is mutually beneficial. Accused pled guilty to conspiracy to maltreat subordinates, maltreatment, false official statements, and assault. In a pretrial agreement, the convening authority agreed to suspend the bad-conduct discharge for 12 months. Accused and the convening authority agreed, in a post-trial agreement, that the latter could approve the punitive discharge as long as he "limited confinement to 90 days." On appeal, the accused argued that the post-trial agreement should be invalidated because it prevented judicial scrutiny of the terms and conditions. The court refused to invalidate the agreement, noting that the accused proposed the agreement after full consultation with counsel, stated that he voluntarily entered the agreement, and the post-trial agreement was directly related to the convening authority's obligations under the sentencing provisions of the pretrial agreement. Additionally, the court held that while the trial court did not review the post-trial agreement, the intermediate appellate court always have the opportunity to review such agreements.

2. *United States v. Dawson*, 51 M.J. 411 (C.A.A.F. 1999). Accused and CA agreed to a PTA in which the first 30 days of any adjudged punishment would be converted into 15 days' restriction. Confinement in excess of 30 days would be suspended. The accused received 100 days confinement and a BCD. She was placed on restriction, missed a muster, and was notified of pending vacation proceedings. She went AWOL, but was later apprehended and placed in confinement. Accused entered a new agreement with the CA where she agreed to waive the right to appear at a hearing to vacate the suspension of her sentence (the SJA had opined the one held in her absence was illegal), to waive any claims she might have concerning post-apprehension confinement, and to release the CA from the prior agreement. In return, the CA would withdraw the new absence charge, and provide day-for-day credit toward her time served in "pretrial confinement" (on the new charge). The SJA advised that, based on the errors that occurred in the first trial, he should disapprove all confinement. The CA approved the BCD and disapproved the confinement. CAAF held that this was a valid post-trial agreement that did not involve

post-trial renegotiation of an approved PTA. The agreement related to proceedings collateral to the original trial, and did not require the approval of a military judge.

L. **STIPULATIONS OF FACT (PRETRIAL AGREEMENT CASES)**. RCM 811.

1. ***Government can require the accused to stipulate to aggravation evidence or refuse to accept pretrial agreement***. *United States v. Harrod*, 20 M.J. 777 (A.C.M.R. 1985); *United States v. Sharper*, 17 M.J. 803 (A.C.M.R. 1984).

a. Government can require accused to agree to both truth and admissibility of matters contained in the stipulation of fact. The stipulation should be unequivocal that counsel and the accused agree not only to the truth of the matters stipulated but that such matters are admissible in evidence against the accused.

b. *United States v. Vargas*, 29 M.J. 968 (A.C.M.R. 1990). Defense counsel objected at trial to the inclusion of the uncharged misconduct and indicated that the accused only agreed to the stipulation out of fear of losing the deal. Military judge gave the accused an opportunity to withdraw, but the accused elected to adhere to the stipulation; no overreaching by the Government. *See also United States v. Mezzanatto*, 513 U.S. 196 (1995) (agreement to waive evidentiary provisions are subject to waiver by voluntary agreement of the parties).

2. ***Use of confessional stipulation after "busted" providence inquiry are permissible with consent of the accused***. Otherwise military judge not at liberty to consider matters presented in the unsuccessful attempt to plead guilty. *United States v. Matlock*, 35 M.J. 895 (A.C.M.R. 1992). Prosecution cannot receive the benefit of the stipulation without the concomitant limitations of the pretrial agreement. *See United States v. Cunningham*, 36 M.J. 1011 (A.C.M.R. 1993).

3. ***Stipulations in mixed plea cases***. Unless otherwise agreed to by the accused, confessional stipulation in connection with guilty pleas may not be considered by military judge as to those charges to which accused has pled not guilty (contested charges). *United States v. Banks*, 36 M.J. 1003 (A.C.M.R. 1993).

a. Confessional stipulation is the equivalent of entering a guilty plea to a charged offense; accused must knowingly and voluntarily consent to any use of stipulation beyond the limited purpose of facilitating providence inquiry. *United States v. Rouviere*, No. 9200242 (A.C.M.R. Aug. 24, 1993) (unpub.).

b. *United States v. Craig*, 48 M.J. 77 (C.A.A.F. 1998). Military judge erred by advising the accused that her confessional stipulation (which contained facts substantiating both guilty and not guilty pleas to drug offenses) waived her constitutional rights against self-incrimination, to a trial of by the facts, and to confront and cross-examine witnesses against her.

c. *United States v. Dixon*, 45 M.J. 104 (C.A.A.F. 1996). Where a stipulation leaves room for the defense to reasonably contest certain elements, and the defense in fact does so, a stipulation is not confessional. Accused entered mixed pleas to stealing mail. He entered into a stipulation of fact, in conjunction with his pretrial agreement, regarding two uncontested specifications, and the Government presented evidence on the remaining two specifications. Specification 3 involved a larceny of mail matter. The stipulation established that accused removed mail matter from its lawful place and did not intend to return the parcel to the addressee. There was no requirement to do a *United States v. Bertelson*, 3 M.J. 314 (C.M.A. 1977) inquiry. The stipulation was not "confessional" because it did not effectively establish an express admission that accused's removal of mail matter was done with an intent to steal.

M. **UNITARY NATURE OF PRETRIAL AGREEMENT**. In absence of evidence to contrary, operation of sentence appendix to pretrial agreement on sentence of court not to be treated as divisible elements. *United States v. Brice*, 38 C.M.R. 134 (C.M.A. 1967); *United States v. Monett*, 36 C.M.R. 335 (C.M.A. 1966); *United States v. Neal*, 12 M.J. 522 (N.M.C.M.R. 1981).

1. *United States v. Barraza*, 44 M.J. 622 (N.M. Ct. Crim. App. 1996). Accused pled to sodomy and indecent acts in exchange for pretrial agreement which contained a term that all adjudged confinement in excess of 46 months was to be suspended for 12 months from date of convening authority's action. Accused was sentenced to 10 years, total forfeiture of all pay and allowances, reduction to E-1, and a dishonorable discharge. Defense counsel requested that the convening authority reduce confinement to aid the recovery process of accused's family. The convening authority approved the sentence and modified the punishment by suspending all confinement in excess of 14 months and 6 days for a period of 36 months. The action was lawful under the pretrial agreement because confinement was actually reduced by 32 months and was 22 months less than the accused requested in his clemency petition, even though there was a 2 year suspension increase. The reduced confinement and increased suspension periods, taken together, did not exceed confinement period authorized by the pretrial agreement.

2. *United States v. Sparks*, 15 M.J. 895 (A.C.M.R. 1983). In pretrial agreement, convening authority agreed to approve no sentence in excess of confinement for 4 months, ⅔ pay forfeitures for 4 months, reduction to E-1, and bad-conduct discharge. The adjudged sentence was confinement for 2 months, ⅔ pay forfeitures for 6 months, reduction to E-1, and bad-conduct discharge. Convening authority can approve sentence as adjudged, as overall severity not increased by extra two months forfeitures.

3. *Cf. United States v. Hayes*, No. 9002521 (A.C.M.R. Aug. 29, 1991) (unpub). In pretrial agreement, convening authority would suspend for 12 months any confinement over 20 months. The adjudged sentence was confinement for 5 years, total forfeiture of all pay and allowances, reduction to E-1, and dishonorable discharge. At action, convening authority approved confinement for 36 months (confinement over 18 months suspended for 18 months), TF, reduction to E-1, and dishonorable discharge. HELD: Reducing confinement by two months and increasing the period of suspension by six months is more favorable to the accused than the pretrial agreement, so action was proper.

4. *United States v. Barratt*, 42 M.J. 734 (A. Ct. Crim. App. 1995). No PTA. Adjudged sentence was 16 months confinement, total forfeiture of all pay and allowances, and reduction to E-1. Accused requested convening authority substitute bad-conduct discharge for reduction in confinement to 6 months; at action, convening authority approved new sentence of bad-conduct discharge and 6 months confinement. HELD: CA may *not* approve a punitive discharge when punitive discharge not adjudged at trial. Punitive discharge, as a matter of law is not a LIO punishment to confinement. *See* 10 U.S.C § 3811.

N. **POST-TRIAL**.

1. ***Effect of pretrial agreements***. *United States v. Griffaw*, 46 M.J. 791 (A.F. Ct. Crim. App. 1997). A sentence cap in a court-martial pretrial agreement is not a grant of clemency or true plea bargain identical to civilian practice. The cap is a ceiling (or "more like a flood insurance policy on a house") on what would otherwise be the maximum punishment provided by law. SJA, therefore, erroneously implied that convening authority fulfilled clemency obligation by reducing the adjudged confinement from 18 to 12 months to comply with terms of pretrial agreement.

2. ***Collateral consequences of terms***. *United States v. Lundy*, 60 M.J. 52 (C.A.A.F. 2004). Accused entered into PTA term, whereby the CA agreed to defer any and all

reductions and forfeitures until the sentence was approved and suspend all adjudged and waive any and all automatic reductions and forfeitures. For sexually assaulting his children, the accused (a SSG) was sentenced to a DD, confinement for 23 years, and reduction to E-1, which subjected him to automatic reduction and forfeitures.

a. The CA attempted to suspend the automatic reduction IAW the PTA to provide the accused's family with waived forfeitures at the E-6, as opposed to the E-1, rate. The parties, however, overlooked AR 600-8-19 which precludes a CA from suspending an automatic reduction unless the CA also suspends any related confinement or discharge which triggered the automatic reduction. ACCA stated no remedial action was required because the accused's family was adequately compensated with transitional compensation (TC), which ACCA concluded the accused's family was not entitled to because they were receiving waived forfeitures, albeit at the E-1 rate.

b. CAAF reversed, holding if a material term of a PTA is not met by the government three options exist: (1) the government's specific performance of the term; (2) withdrawal by the accused from the PTA, or (3) alternative relief, if the accused consents to such relief. Additionally, CAAF held an accused's family could receive TC while receiving either deferred or waived forfeitures if the receipt of TC was based on a discharge and if the receipt of TC was based only on the accused receiving forfeitures, the family could receive TC if not actively receiving the deferred or waived forfeitures. On remand, ACCA, ruled specific performance was "more appropriate because the [accused] has not indicated he would consent to any particular alternative relief." In January 2005, the Secretary of the Army (SECARMY) granted an exception to AR 600-8-19 allowing the suspension of the rank reduction and the provision of forfeitures at the E6 rate without requiring the CA to suspend the discharge or confinement triggering the automatic reduction. SECARMY did not approve interest on the E6 forfeiture amount and ACCA ruled it did not have the authority to provide the approximately $3,000 in interest on the original amount owed to the accused and remanded the case to the SA to approve the interest payment or to otherwise return the case to ACCA to set aside the findings and sentence.

c. In Fall 2005, SECARMY made the interest payment. In Summer 2006, CAAF issued another *Lundy* opinion, holding that the accused bore the burden to show that the timing of the payment was material to his decision to plead guilty.

d. *Lundy* is a good cautionary tale. Government counsel should ensure pretrial agreements are simple.

3. ***ETS and pay issues***. *United States v. Perron*, 58 M.J. 781 (C.A.A.F. 2003). In *Perron*, the accused agreed to plead guilty in exchange for sentence limitations that included pay and allowances going to his family. However, prior to trial the accused's term of service expired and once convicted he entered into a no-pay status. As a matter of clemency the accused's counsel asked the convening authority to release Perron from confinement "to gain immediate employment . . . to allow for the financial relief his family desperately needs." The convening authority did not grant the request, opting instead to grant alternative relief. A tortured set of appeals and remands where the adequacy of the alternative relief granted was at issue followed. The issue that finally reached CAAF was whether convening authorities and appellate courts may "fashion an alternative remedy of [their] own choosing" against the accused's wishes. CAAF said no: "It is fundamental to a knowing and intelligent plea that where an accused pleads guilty in reliance on the promises made by Government in a pretrial agreement, the voluntariness of that plea depends on the fulfillment of those promises by the Government . . . Imposing

alternative relief on an unwilling [accused] to rectify a mutual misunderstanding of a material term in a pretrial agreement violates the [accused]'s Fifth Amendment Right to due process."

4. ***Timing of terms in pretrial agreement regarding pay to dependents***. *United States v. Sheffield*, 60 M.J. 591 (A.F. Ct. Crim. App. 2004). Accused pled guilty to numerous military offenses and was sentenced to a BCD, four months confinement, and reduction to E-1. The accused's PTA contained a term that the CA would "waive automatic forfeitures in the amount of five hundred dollars, which sum was to be paid to the guardian appointed by the accused to care for his minor dependants." The SJAR failed to mention this term and the CA did not pay the five hundred dollars to the accused's dependents. On appeal, the accused requested the court to disapprove his adjudged BCD, or in the alternative, to allow him to withdraw from the plea. The government contended specific performance was appropriate. AFCCA held the government could not specifically perform because the accused could not receive the benefit of his PTA bargain (for his dependents to receive five hundred dollars per month during his incarceration). Likewise, the court failed to approve the accused's request to disapprove his BCD because the government did not agree to the alternative relief. ***The original PTA was nullified and findings and sentence set aside***.

III. CONCLUSION

IV. APPENDIX – PLEAS & PTAs SUMMARY

MAJOR POINT	*SUMMARY*
PERMISSIBLE PLEAS	• The recognized pleas are not guilty, guilty, guilty by exceptions, guilty by exceptions and substitutions, and guilty to a named lesser included offense. The plea of guilty to a named lesser included offense was created to bring pleas in line with the change to RCM 918 (gave the MJ authority to find an accused guilty of a lesser included offense). An accused can also enter a conditional plea with the consent of the GCMCA and approval of the MJ. • An accused cannot enter a plea of *nolo contendre* or plead guilty to a capital offense when there is a possibility of finally receiving a death sentence.
THE EFFECT OF A GUILTY PLEA	• A plea waives appellate review of all defects not raised at trial which are neither jurisdictional nor tantamount to a denial of due process. • Motions waived include: suppression of confessions, evidentiary motions, and speedy trial motions based on RCM 707. Motions not waived include, *inter alia*, multiplicity motions that are not facially duplicative, unlawful command influence, and ineffective assistance of counsel.
MECHANICS OF *CARE* INQUIRY	• MJs are responsible for ensuring the providence of a plea. The accused's plea must be knowing, intelligent, and voluntary, and have a basis in fact to survive appellate review. MJ ensures this through *Care* Inquiry. • The *Care* Inquiry consists of arraignment and the providence inquiry. During the providence inquiry, the MJ must inform the accused of the elements of the offense using the *Benchbook*, that a plea admits the elements of the offenses, that the accused knowingly waives constitutional rights, communicate the maximum sentence that could be imposed, and secure a factual basis in the accused's words to support the plea. • MJs must be careful to ask open ended questions of the accused during the providence inquiry rather than conducting a cross examination. A cross examination type inquiry might invalidate the plea on appeal on the basis that the MJ forced the guilty plea. The MJ must also be careful to clearly explain the elements from the *Benchbook* and also in plain language so the accused understands them. The MJ should also examine and discuss the stipulation of fact with the accused. An accused need not personally recollect a crime in order to successfully plead.
USE OF THE PROVIDENCE INQUIRY; MIXED PLEA CASE PROCEDURE (RCM 913)	• The MJ should inform the accused that the providence inquiry will be used to determine an appropriate sentence. This use of the inquiry is permissible as long as the accused is aware of its potential use. • The accused's providence inquiry cannot be used in a mixed plea case to prove a contested greater offense (e.g., pleads guilty to the lesser included offense of wrongful and Gov't seeks to prove larceny), nor can the providence inquiry for one charge be used to prove a separate charge. • When an accused enters mixed pleas, the accused will have the option, under RCM 913, to inform the court members of an earlier guilty plea. The exception to this rule is if the accused pleads to a lesser included offense and the Gov't intends to prove the greater offense.
MILITARY JUDGE AND PTAs	• MJs must inquire into the propriety of PTAs as part of the entire in-court plea process. A military judge must intervene when an accused asserts any degree of force or Gov't overreaching in negotiating or approving a PTA.
PERMISSIBLE AND IMPERMISSIBLE TERMS OF PTAs	A term that deprives an accused of a constitutional due process right cannot be part of a PTA. This includes waiver of speedy trial, jurisdiction, counsel, due process, complete sentencing proceedings, and inclusion of *sub rosa* agreements. Permissible terms include waiver of a members trial, promises of restitution, reasonable probation, and waiver of accusatory stage unlawful command influence. *US v. Weasler* has spurred the introduction of novel terms that require a high degree of scrutiny.

TAB T

VOIR DIRE AND CHALLENGES

I. INTRODUCTION 1

II. CHALLENGING THE ENTIRE PANEL 2

III. INVESTIGATION OF COURT MEMBERS.....4

IV. VOIR DIRE 7

V. CHALLENGES FOR CAUSE – GENERALLY 12

VI. CHALLENGES FOR CAUSE – ACTUAL BIAS 13

VII. CHALLENGES FOR CAUSE – IMPLIED BIAS 14

VIII. CHALLENGES FOR CAUSE – LOGISTICS 23

IX. PEREMPTORY CHALLENGES – GENERALLY 28

X. DISCRIMINATORY PEREMPTORY CHALLENGES – *BATSON* 29

XI. CONCLUSION 36

XII. APPENDIX - VOIR DIRE AND CHALLENGES SUMMARY.....37

MAJ S. CHARLES NEILL

JANUARY 2011

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VOIR DIRE AND CHALLENGES

Outline of Instruction

I. INTRODUCTION

A. **IN GENERAL**. The Sixth Amendment right to a jury trial does not apply to military servicemembers. However, a military accused enjoys the right to trial before court members, as provided by Congress in Article 25, UCMJ. *See United States v. Witham*, 47 M.J. 297, 301 (C.A.A.F. 1997) ("Again, we note that a military accused has no right to a trial by jury under the Sixth Amendment. He does, however, have a right to due process of law under the Fifth Amendment, and Congress has provided for trial by members at a court-martial.") (citations omitted). To ensure the impartiality of panel members, they are subject to voir dire by the military judge and counsel. Article 41, UCMJ, and R.C.M. 912 control the process. Both sides have an unlimited number of challenges for cause against panel members. *See* Article 41(a)(1), UCMJ. Both sides are also allowed one peremptory challenge of the members. *See* Article 41(b)(1).

1. The Sixth Amendment right to a trial by an impartial jury of the "state" does not apply to the military because panel members are selected not from the "state" but from those in the military service per Article 25, UCMJ. *Whelchel v. McDonald*, 340 U.S. 122, 127 (1950). The Sixth Amendment right to an "impartial" jury, however, applies to military practice, through the Due Process Clause.

2. "Part of the process due is the right to challenge for cause and challenge peremptorily the members detailed by the convening authority." *United States v. Witham*, 47 M.J. 297, 301 (C.A.A.F. 1997)

3. "The reliability of a verdict depends upon the impartiality of the court members. Voir dire is fundamental to a fair trial." *United States v. Jefferson*, 44 M.J. 312 (C.A.A.F. 1996).

4. "The purpose of voir dire and challenges is, in part, to ferret out facts, to make conclusions about the members' sincerity, and to adjudicate the members' ability to sit as part of a fair and impartial panel." *United States v. Bragg*, 66 M.J. 325, 327 (C.A.A.F. 2008).

5. The convening authority personally selects panel members with two significant limitations:

a) The convening authority ***cannot*** select members in any manner that systematically excludes a group of otherwise qualified candidates (for example, potential members cannot be excluded on the basis of rank, religion, race, or gender).

b) The convening authority ***cannot*** "stack" a panel to obtain a certain result (for example, cannot pick members who will dole out harsh sentences).

B. **IMPARTIAL MEMBERS**. Court members must be impartial. To ensure this impartiality, both sides have an unlimited number of challenges for cause against panel members. *See* Article 41(a), UCMJ.

C. **MILITARY JUDGE CONTROLS VOIR DIRE**. Under R.C.M. 912(d), "The military judge ***may*** permit the parties to conduct the examination of members or may personally conduct the examination." The Discussion to R.C.M. 912(d) suggests a preference for allowing counsel to question members (noting that "[o]rdinarily, the military judge ***should permit*** counsel to

personally question the members") but does not give counsel a right to personally question members. Under this rule and attendant case law, the military judge remains in virtually complete control of voir dire.

D. **ORDER OF MARCH**: Depending on the military judge the process generally follows this order:

1. Selection of members.

2. Drafting of a court-martial convening order (CMCO).

3. Selected members complete questionnaires.

4. Case is referred to a certain CMCO.

5. After case is docketed, members are excused who are unavailable for the trial date and alternate members are added.

6. Counsel review questionnaires for the members who will sit.

7. On the day of trial, members come to court and are sworn as a group; the military judge then asks the entire group questions (*Military Judges' Benchbook* recommends 28 preliminary questions for group voir dire).

8. Both counsel (normally with trial counsel going first and defense second) ask the group questions.

9. Parties may request permission from the military judge to question member(s) individually as necessary.

10. After all questioning, trial counsel asserts challenges for cause.

11. Defense then asserts challenges for cause.

12. Trial counsel can use a peremptory challenge and then defense counsel can use a peremptory challenge.

13. Finally, challenged members are excused and the trial proceeds.

II. CHALLENGING THE ENTIRE PANEL

A. **IN GENERAL**. There may be cases in which the defense has some reason to believe that the military panel, or the "venire,"[1] has been improperly selected. In such cases, defense may wish to challenge entire panel. R.C.M. 912(b) sets out the procedure for mounting such a challenge.

1. Before voir dire begins, a party may move to stay the proceedings on the ground that members were selected improperly.

2. Once defense makes an offer of proof that, if true, would constitute improper selection of members, the moving party shall be entitled to present evidence. If the military judge determines the convening authority improperly selected the members, the military judge shall stay proceedings until members are properly selected.

3. ***Waiver***. Failure to make a timely motion under this section waives the issue of improper selection except where:

a) The issue relates to the minimum required number of members under R.C.M. 501(a);

b) The member does not have the requisite qualifications (for example, does not satisfy Article 25 criteria; or where the member is not active duty, not a

[1] See BLACK'S LAW DICTIONARY 1694 (9th ed. 2009) ("venire" is a "panel of persons selected for jury duty and from among whom the jurors are to be chosen").

commissioned or warrant officer, or is an enlisted member where the accused has not requested enlisted members); or

c) The accused has requested a panel comprised of one-third (⅓) enlisted members, and they are not present or there is an inadequate explanation for their absence.

4. Defense counsel challenging panel selection frequently allege that the panel was "packed" or "stacked" to achieve a desired result; panel stacking is prohibited. *United States v. Roland*, 50 M.J. 66, 69 (C.A.A.F. 1999); *United States v. White*, 48 M.J. 251, 254 (C.A.A.F. 1998).

B. **MATTERS CONSIDERED BY CONVENING AUTHORITY**. Under R.C.M. 912(a)(2), a copy of written materials considered by the convening authority in selecting the detailed members shall be provided to any party upon request. This information includes the SJA's advice to the convening authority for panel selection, the nominations from subordinate commanders, and other documents presented to the convening authority. While the rule states that "such materials pertaining solely to persons who were not selected for detail as members" need not be provided, the military judge has the authority to direct such information be disclosed for good cause.

C. **THEORIES FOR ATTACKING PANEL SELECTION – IN GENERAL**. In selecting panel members, the convening authority cannot systematically exclude otherwise qualified personnel from serving. *United States v. Dowty*, 60 M.J. 163, 171 (C.A.A.F. 2004); *United States v. Roland*, 50 M.J. 66, 68-69 (C.A.A.F. 1999).

D. **ATTACKING SELECTION – EXCLUSION OF NOMINEES BY RANK**.

1. ***General rule***. Convening authority cannot systematically exclude personnel from panel selection based on rank. *United States v. Dowty*, 60 M.J. 163, 171 (C.A.A.F. 2004) ("[S]ystemic exclusion of otherwise qualified potential members based on an impermissible variable such as rank is improper."); *United States v. Bertie*, 50 M.J. 489, 492 (C.A.A.F. 1999) ("[W]e have also held that *deliberate and systematic exclusion* of lower grades and ranks from court-martial panels is not permissible."); *United States v. Morrison*, 66 M.J. 508, 510 (N-M. Ct. Crim. App. 2008). However, servicemembers in the grades of E-1 and E-2 are presumptively unqualified under Article 25 and may be excluded from selection. *United States v. Yager*, 7 M.J. 171 (C.M.A. 1979) (exclusion of persons in grades below E-3 permissible where there was a demonstrable relationship between exclusion and selection criteria embodied in Article 25(d)(2)).

2. ***Rationale***. *United States v. Benson*, 48 M.J. 734 (A.F. Ct. Crim. App. 1998). Convening authority violated Article 25 by sending memorandum to subordinate commands directing them to nominate "officers in all grades and NCOs in the grade of master sergeant or above" and then by failing to select members below the rank of master sergeant (E-7). Convening authority testified that he did not intend to violate Article 25, but he never selected a member below the grade of E-7; AFCCA held that systematic exclusion of junior enlisted members is inappropriate, as most junior enlisted have sufficient education and experience as to be eligible to serve (specifically, many E-4s have served at least 5 years on active duty and 88 percent have some form of post-secondary education, and the majority of E-5s have served 10 or more years on active duty and 18 percent have an associate's or higher degree).

3. ***Examples***. *United States v. Daigle*, 1 M.J. 139, 141 (C.M.A. 1975) (improper for convening authority to systematically exclude lieutenants and warrant officers); *United States v. Smith*, 37 M.J. 773 (A.C.M.R. 1993) (improper for convening authority to return initial panel selection documents and direct subordinate commanders to provide Soldiers in the grades of E-7 and E-8). *Cf. United States v. Nixon*, 33 M.J. 433 (C.M.A. 1991) (noting a panel consisting of only members in the grades of E-8s and E-9s creates an

appearance of evil and is probably contrary to Congressional intent ,but affirming because the convening authority testified he complied with Article 25 and did not use rank as a criterion).

4. ***Paperwork cannot inadvertently exclude qualified personnel***. *United States v. Kirkland*, 53 M.J. 22 (C.A.A.F. 2000). The SJA solicited nominees from subordinate commanders via a memo signed by the SPCMCA. The memo sought nominees in various grades. The chart had a column for E-9, E-8, and E-7, but no place to list a nominee in a lower grade. To nominate E-6 or below, nominating officer would have had to modify form. No one below E-7 was nominated or selected for the panel. CAAF held that where there was an "unresolved appearance" of exclusion based on rank, "reversal of the sentence is appropriate to uphold the essential fairness . . . of the military justice system."

5. ***May replace nominees with others of similar rank***. *United States v. Ruiz*, 46 M.J. 503 (A.F. Ct. Crim. App. 1997), *aff'd*, 49 M.J. 340 (C.A.A.F. 1998) (convening authority did not improperly select members based on rank when, after rejecting certain senior nominees from consideration for valid reasons, he requested replacement nominees of similar ranks to keep the overall balance of nominee ranks relatively the same).

E. **ATTACKING SELECTION – EXCLUSION OF NOMINEES BASED ON UNIT OF ASSIGNMENT.** *United States v. Brocks*, 55 M.J. 614 (A.F. Ct. Crim. App. 2001), *aff'd*, 58 M.J. 11 (C.A.A.F. 2002). Base legal office intentionally excluded all officers from the medical group from the nominee list, because all four alleged conspirators and many of the witnesses were assigned to that unit. Citing *United States v. Upshaw*, 49 M.J. 111, 113 (C.A.A.F. 1998), the court said, "[a]n element of unlawful court stacking is improper motive. Thus, where the convening authority's motive is benign, systematic inclusion or exclusion may not be improper." Held: Exclusion of medical group officers did not constitute unlawful command influence.

F. **DIFFICULT TO MOUNT CHALLENGES: HARD TO FIND EVIDENCE OF IMPROPRIETY**.

1. ***Composition of panel is not enough to show impropriety***. *United States v. Bertie*, 50 M.J. 498 (C.A.A.F. 1999) (disproportionate number of high-ranking panel members did not create presumption of impropriety in selection).

2. ***Paperwork errors may not be enough to show impropriety.*** *United States v. Roland*, 50 M.J. 66 (C.A.A.F. 1999) (SJA's memo soliciting nominees E-5 to O-6 was not error); *United States v. Upshaw*, 49 M.J. 111 (C.A.A.F. 1998) (good faith administrative error resulting in exclusion of otherwise eligible members (E-6s) was not error).

3. ***Convening authority selecting commanders***. *United States v. White*, 48 M.J. 251 (C.A.A.F. 1998). A CA who issues a memorandum directing subordinate commands to include commanders, deputies and first sergeants in the court member applicant pool, and then proceeds to select more commanders than non-commanders for court-martial duty does not engage in court-packing absent evidence of improper motive or systematic exclusion of a class or group of candidates. No systematic exclusion because the CA's memo instructed that "staff officers and NCOs" and "your best and brightest staff officers" should be nominated to serve as member. See Effron, J., and Sullivan, J., concurring in the result, but criticizing the majority's willingness to equate selection for command with selection for panel duty.

III. INVESTIGATION OF COURT MEMBERS

A. **PANEL QUESTIONNAIRES**. Under R.C.M. 912(a)(1), trial counsel may (and shall upon request of defense counsel) submit to members written questionnaires before trial. "Using questionnaires before trial may expedite voir dire and may permit more informed exercise of challenges." R.C.M. 912(a)(1) Discussion.

1. ***Required questions***: Under R.C.M. 912(a)(1), the following information *shall* be requested upon application by defense counsel and *may* be requested by trial counsel in written questionnaires: date of birth; sex; race; marital status and sex, age, and number of dependents; home of record; civilian and military education, including, when available, major areas of study, name of school or institution, years of education, and degrees received; current unit to which assigned; past duty assignments; awards and decorations received; date of rank; and whether the member has acted as accuser, counsel, investigating officer, convening authority, or legal officer or staff judge advocate for the convening authority in the case, or has forwarded the charges with a recommendation as to disposition.

2. ***Additional questions***: Under R.C.M. 912(a), "Additional information may be requested with the approval of the military judge."

3. ***Format***: Under R.C.M. 912(a), "Each member's responses to the questions shall be written and signed by the member."

B. **DISCLOSURE BY MEMBERS AT TRIAL**.

1. ***Members under oath***. Before voir dire, trial counsel administer to panel members an oath to "answer truthfully the questions concerning whether you should serve as a member of this court-martial." DA PAM 27-9, *Military Judges' Benchbook*, at 36. *See also* R.C.M. 807(b)(2) Discussion (providing suggested oath for panel members); R.C.M. 912(d) Discussion ("If the members have not already been placed under oath for the purpose of voir dire, they should be sworn before they are questioned.") (citation omitted).

2. ***Instruction about impartiality***. After panel members are sworn, the military judge instructs, "With regard to challenges, if you know of any matter that you feel might affect your impartiality to sit as a court member, you must disclose that matter when asked to do so." DA PAM 27-9, *Military Judges' Benchbook*, at 41.

3. ***Broad inquiry***. The military judge asks 28 standard questions during group voir dire, including, "Having seen the accused and having read the charge(s) and specification(s), does anyone feel that you cannot give the accused a fair trial for any reason?" *Id.* at 42.

4. ***Members have duty to disclose***. *United States v. Albaaj*, 65 M.J. 167 (C.A.A.F. 2007). Accused's brother testified as a merits witness. He was also recalled briefly as a defense sentencing witness, offering evidence in extenuation and mitigation. One of the members, LTC M, had a previous working relationship with the brother, that defense described as "extremely antagonistic." During voir dire, military judge instructed the members to disclose any matter that might affect their partiality. During trial, the defense called the brother as a witness and LTC M did not indicate at any time that he knew him, even after he recognized him. Following a *DuBay* hearing, military judge found LTC M and the brother had professional contact while the brother was at Range Control and the member developed negative impressions of the brother that were memorialized in several e-mails. However, LTC M testified that, between the last e-mail and the trial (a period of 15 months), LTC M "developed a favorable opinion" of the brother. At the *DuBay* hearing, military judge found that LTC M "did not fail to honestly answer a material question on voir dire and that [LTC M] did not fail to later disclose his knowledge of [the brother] in bad faith." CAAF reversed. Applying the test from *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), CAAF found that LTC M violated his duty of candor as a panel member. First, LTC M incorrectly indicated that he did not know the brother during voir dire and then "fail[ed] to correct the misinformation." Second, LTC M "failed to disclose information that was material to the conduct of a fair and impartial trial" because as a result of the nondisclosure, the parties were unaware of LTC M's relationship with the brother. Third, the "correct response . . . would have

provided a valid basis for challenge." Applying the implied bias standard, CAAF found that "[a] reasonable public observer of this trial would conclude that [LTC M's] actions injured the perception of fairness in the military justice system."

C. **DISCLOSURE BY TRIAL COUNSEL OR GOVERNMENT**.

1. ***Affirmative duty to disclose***. *United States v. Glenn*, 25 M.J. 278 (C.M.A. 1987). Case reversed because Deputy Staff Judge Advocate failed to disclose that member was his sister-in-law. Court reversed even though member signed affidavit swearing that she had no prior knowledge of the case and was not affected by the relationship.

2. ***Close calls and trial counsel duty to disclose***. *United States v. Modesto*, 43 M.J. 315 (C.A.A.F. 1995). Colonel was charged with conduct unbecoming (performing as female impersonator at gay club, sodomy with another male, indecent touching with another male, cross-dressing in public). Trial counsel failed to disclose that male panel member had dressed as a woman at Halloween Party. Court held that reversal was unwarranted because incident would not have been valid grounds for challenge, so effective voir dire was not prevented. Despite the outcome, the CAAF noted, "Both the SJA and the trial counsel have an affirmative duty to disclose any known ground for challenge for cause." *Id.* at 318.

3. ***Practice Point***: Government should liberally disclose information that might be a basis for a challenge for cause.

D. **DEFENSE DUTY TO DISCOVER**.

1. Under R.C.M. 912(f)(4), most grounds for challenging a member may be waived. The rule notes that waiver extends those matters "the party knew of or could have discovered by the exercise of diligence the ground for challenge and failed to raise it in a timely manner."

2. *United States v. Dunbar*, 48 M.J. 288 (C.A.A.F. 1998). When panel member questionnaire contains information that may result in disqualification, the defense must make reasonable inquiries into the member's background either before trial or during voir dire. The Government may not be required to provide the background for the disqualifying information in every situation. The accused was charged with dereliction of duty, conduct unbecoming an officer, and fraternization. A member's questionnaire revealed that she had testified as an expert witness in child-abuse cases prosecuted by the trial counsel. The defense failed to conduct voir dire on this issue. The defense waived the issue by failing to conduct voir dire after reviewing the questionnaire and then failing to exercise a causal or peremptory challenge. There was no additional affirmative requirement for the Government to disclose the information.

3. *United States v. Briggs*, No. ACM 35123, 2008 CCA LEXIS 227 (A.F. Ct. Crim. App. June 13, 2008) (unpublished). Accused was charged with selling survival vests and body armor taken from C-5s. This equipment was used to protect the flight crews operating these aircrafts. On appeal, defense argued for a new sentencing hearing because a member was a pilot. Essentially arguing implied bias, the defense claimed that the member, as a pilot, could not have been impartial because the crime involved "stealing safety and survival gear off an aircraft." First, the court noted the Supreme Court standard: "[F]or an accused to be entitled to a new trial due to an incorrect voir dire response the 'party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause.'" (quoting *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984)). In this case, the court held the member did fail to honestly answer a material question. Rather, he truthfully stated he worked with C-5 aircraft, which the accused "with his years and background in the Air Force" would have

understood to mean the member was pilot. In biting language, the court noted, "[T]here is no evidence that the member failed to honestly answer a material question by not stating the obvious."

IV. VOIR DIRE

A. **PURPOSES OF VOIR DIRE**. The questioning of panel members (known as voir dire) exists so parties can intelligently exercise both challenges for cause and peremptory challenges. *See* R.C.M. 912(d) Discussion, ("The opportunity for voir dire should be used to obtain information for the intelligent exercise of challenges."); *United States v. Bragg*, 66 M.J. 325, 327 (C.A.A.F. 2008) ("The purpose of voir dire and challenges is, in part, to ferret out facts, to make conclusions about the members' sincerity, and to adjudicate the members' ability to sit as part of a fair and impartial panel."). In addition to this primary purpose, there are three secondary purposes of voir dire:

1. Educate the panel and defuse weaknesses in the case. *But see* R.C.M. 912(d) Discussion ("[C]ounsel should not purposely use voir dire to present factual matter which will not be admissible or to argue the case").

2. Establish a theme.

3. Build rapport with members.

See also 2 FRANCIS A. GILLIGAN AND FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 15-53.00 at 15-29 (3d ed. 2006) ("Although voir dire can be used for many other purposes, such as highlighting various issues, educating the court members, or building rapport between counsel [and] members, such uses are improper unless done in the otherwise proper process of voir dire."); *id.* n.164 ("This is not to deny that voir dire may play a legitimate tactical role. Few questions can be asked in an entirely neutral fashion, and to require neutrality might well defeat the very purpose of voir dire. . . . The key, however, is that questions may not be asked for other purposes; they must have independent legitimacy as a proper part of the process of voir dire and challenges.").

B. **MILITARY JUDGE CONTROLS VOIR DIRE – IN GENERAL**.

R.C.M. 912. Challenge of selection of members; examination and challenges of members.

. . . .

(d) *Examination of members*. The military judge may permit the parties to conduct the examination of members or may personally conduct the examination. In the latter event the military judge shall permit the parties to supplement the examination by such further inquiry as the military judge deems proper or the military judge shall submit to the members such additional questions by the parties as the military judge deems proper. A member may be questioned outside the presence of the other members when the military judge so directs.

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1. ***Rule***. "Generally, the procedures for voir dire are within the discretion of the trial judge." *United States v. Jefferson*, 44 M.J. 312, 318 (C.A.A.F. 1996). *See also* R.C.M. 912(d) (printed above) and Discussion ("The nature and scope of the examination of members is within the discretion of the military judge.").

2. ***Broad latitude to military judge in controlling voir dire***. "Neither the UCMJ nor the *Manual for Courts-Martial* gives the defense the right to individually question the members." *United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001) (upholding military judge's practice of requiring written voir dire questions from counsel seven days before trial and denying defense and trial counsel requests to personally question the members). The court suggested that the military judge who reserves voir dire to the bench must conduct sufficient questioning to expose grounds for challenge: "The military judge's questions properly tested for a fair and impartial panel and allowed counsel to intelligently exercise challenges." *Id*. at 137.

3. ***Military judge may reserve voir dire to the bench***.

a) ***Before impaneled***. *United States v. Belflower*, 50 M.J. 306 (C.A.A.F. 1999) (holding military judge did not abuse his discretion in prohibiting individual voir dire by defense counsel of four members where counsel did not ask any questions on group voir dire that would demonstrate the necessity for individual voir dire).

b) ***After impaneled.*** *United States v. Lambert*, 55 M.J. 293 (C.A.A.F. 2001). Right after the members returned a verdict of guilty to one specification of indecent assault, the civilian defense counsel asked military judge to allow voir dire of the members because one member took a book titled *Guilty as Sin* into the deliberation room. The military conducted voir dire of the member who brought the book into the deliberation room, but did not allow the defense an opportunity to conduct individual or group voir dire. Noting that neither the UCMJ nor the *Manual* gives the defense the right to individually question the members, and analyzing the issue under an abuse of discretion standard, CAAF held the military judge did not err by declining to allow defense counsel to voir dire the members.

4. ***Preference for group voir dire***. *United States v. Belflower*, 50 M.J. 306 (C.A.A.F. 1999). Military judge did not abuse his discretion in prohibiting individual voir dire by defense counsel of four members where defense did not ask any questions on group voir dire that would demonstrate the necessity for individual voir dire.

5. ***Military judge may restrict method of voir dire.*** *United States v. Jefferson*, 44 M.J. 312 (C.A.A.F. 1996). Military judge did not abuse discretion by: refusing to permit "double-teaming" by defense counsel during voir dire; limiting individual voir dire regarding burden of proof, inelastic attitude toward members, and credibility of witnesses when defense counsel admitted that initial questions in these areas were confusing. However, military judge did abuse discretion in not allowing defense to reopen voir dire to explore issue of potential bias of two members who stated they had friends or close relatives who were victims of crimes.

6. ***Military judge may require questions be submitted in writing and in advance.*** *United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001) (upholding military judge's practice of requiring written voir dire questions from counsel 7 days before trial); *United States v. Torres*, 25 M.J. 555 (A.C.M.R. 1987) (military judge may require counsel to submit questions in writing for approval); R.C.M. 912(d) Discussion ("The nature and scope of the examination of members is within the discretion of the military judge."). However, the military judge may not deny otherwise proper questions solely because they were not previously submitted in writing.

7. ***Liberal voir dire and appellate review.*** In limiting voir dire, military judge should consider that liberal voir dire can save cases on appeal. *See United States v. Dowty*, 60 M.J. 163 (C.A.A.F. 2004) (affirming a "novel" panel selection process, in part, due to the military judge allowing defense counsel to conduct extensive voir dire of members concerning their selection as panel members); *United States v. Simpson*, 58 M.J. 369 (C.A.A.F. 2003) (in high profile case involving allegations of unlawful command influence and unfair pretrial publicity, court notes repeatedly that the military judge permitted counsel to conduct extensive individual voir dire prior to trial).

C. **MILITARY JUDGE CONTROLS VOIR DIRE – PROPERLY DISALLOWED QUESTIONS**.

1. ***Jury nullification.*** In *United States v. Smith*, 27 M.J. 25 (C.M.A. 1988), accused was charged with premeditated murder of his wife. Defense counsel wanted to ask members, "Are you aware that a conviction for premeditated murder carries a mandatory life sentence?" Military judge could preclude defense counsel from asking this question where "jury nullification" was motive. Court noted that voir dire should be used to obtain

information for the intelligent exercise of challenges. A per se claim of relevance and materiality simply because a peremptory challenge is involved is not sufficient. The broad scope of challenges does not authorize unrestricted voir dire.

2. ***"Commitment" questions***. In *United States v. Nieto*, 66 M.J. 146 (C.A.A.F. 2008), accused was charged with wrongful use based solely on a positive urinalysis result. During voir dire, trial counsel walked the panel through the Government's case, asking specific questions about the reliability of urinalysis results. Trial counsel then received an affirmative response from each member to this confusing question: "Does any member believe that *any* technical error in the collection process, *no matter how small*[,] means that the urinalysis is *per se invalid*?" During individual voir dire, trial counsel aggressively attempted to rehabilitate members from this answer (which suggested the members would vote not guilty if evidence showed "any" technical error in the urinalysis collection process), using fact-intensive hypothetical questions related the accused's urinalysis.[2] On appeal, defense argued the trial counsel's hypothetical questions improperly forced the members to commit to responses based on evidence not yet before them, denying a fair trial. Because there was no objection at trial, CAAF upheld the case under a plain error analysis. However, three judges wrote concurring opinions arguing that counsel cannot ask members to commit to findings or a sentence based on case-specific facts previewed in voir dire; the three judges even suggested that a military judge could commit plain error by not ending such questioning (presumably the questions would have to be particularly egregious to trigger a plain error finding). This case may have had a different result if the defense counsel had objected at trial.

3. ***Overly broad***. In *United States v. Toro*, 34 M.J. 506 (A.F.C.M.R. 1991), trial counsel improperly converted lengthy discourses on the history and mechanics of drug abuse, and on the misconduct of the accused and others, into voir dire questions by asking whether the members "could consider this information in their deliberations?"

4. ***Sanctity of life***. In *United States v. Nixon*, 30 M.J. 501 (A.F.C.M.R. 1989), accused was charged with unpremeditated murder of his Filipino wife. Air Force court found there was no abuse of discretion when military judge allowed trial counsel to ask panel whether Asian societies place a lower premium on human life and to ask if any member opposes capital punishment.

5. ***Vague or "trick" questions***. *United States v. Smart*, 21 M.J. 15, 20 (C.M.A. 1985) ("We are aware that the liberal voir dire of court members which often occurs may lure a member into replies which are not fully representative of his frame of mind.").

a) *United States v. Dorsey*, 29 M.J. 761 (A.C.M.R. 1989). In case for cocaine use, defense counsel asked, "Does anyone feel that the accused needs to explain why his urine tested positive for cocaine?" All members replied yes. MJ properly denied challenges to all panel members based on members' responses to judge's inquiries concerning prosecution's burden of proof.

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[2] CAAF provided several exchanges between trial counsel and individual members during voir dire. This fact-intensive exchange was typical:

> TC: And so it wouldn't necessarily be per se invalid if the coordinator didn't put his initials on the bottle[,] let's say. If it came back to the coordinator [and] the accused brought it back to the table, but the coordinator didn't put his initials on the bottle before it went back into the box. Would that be a violation that you couldn't over look [sic]? No matter what[,] that is an invalid test in your mind?
>
> MBR (CWO2 [C]): In that case with the initials, no.

Nieto, 66 M.J. at 148 (alterations in original).

b) *United States v. Rood*, NMCCA 200700186, 2008 CCA LEXIS 96 (N-M. Ct. Crim. App. Mar. 20, 2008) (unpublished). Accused was charged with several offenses, including wrongful use of marijuana. During voir dire, civilian defense counsel asked the panel, "Does any member believe that a positive urinalysis alone proves a knowing use of a controlled substance?" The senior member of the panel, a Navy Captain, responded in the affirmative. The military judge then properly instructed the members that use of a controlled substance may be inferred to be wrongful, but that such an inference was not required. All members agreed that they could follow the military judge's instructions. During individual voir dire, the senior member said, "My opinion is that you are personally responsible for everything that goes into your body." He further elaborated:

> CC: This belief that you are responsible for everything that goes into your body is a firmly held belief?
>
> Member: I believe, yes.

The defense challenged the member for cause for implied bias. The military judge rejected the challenge and the appellate court affirmed. "The beliefs he articulated in response to the defense counsel's questions were objectively reasonable for an average citizen not versed in the nuances of criminal law." The member also "clearly evinced his willingness to follow the court's instructions on the law regarding . . . a drug urinalysis case." The court seemed bothered by the civilian defense counsel's questioning, specifically framing a general voir dire question with a mild misstatement of law (whether a positive urinalysis proves wrongful use), arguably to trigger challenges for cause.

D. **MILITARY JUDGE CONTROLS VOIR DIRE – LIMITS**.

1. ***Insufficient questioning of members***. In *United States v. Richardson*, 61 M.J. 113 (C.A.A.F. 2005), four members stated they had professional dealings with detailed trial counsel. Military judge briefly questioned all four members about the nature of these dealings, and all four responded that they would not give the government's case more or less credence based on their experience with the trial counsel. Defense counsel then questioned the first three members but did not ask about their relationship with the trial counsel. For the fourth member, defense counsel asked several questions about the member's dealings with trial counsel. Following that questioning, the defense counsel asked to "briefly recall" the other three members who had prior dealings with trial counsel. The military judge denied the request, noting that all members said they would not give the trial counsel "any special deference" and concluding, "I think there's been enough that's been brought out." *Id.* at 116. CAAF held the military judge abused his discretion by refusing to reopen voir dire to question the members about their relationships with the trial counsel. CAAF reasoned that further inquiry was necessary to determine whether the relationships with trial counsel were beyond a cursory professional connection. *Id.* at 119.

2. ***Member with friends or relatives who are crime victims***. In *United States v. Jefferson*, 44 M.J. 312 (C.A.A.F. 1996), military judge abused discretion by not allowing defense to reopen voir dire to explore potential bias of two members who said they had friends or close relatives who were victims of crimes. (Note, CAAF found no abuse of discretion in military judge refusing to permit "double-teaming" by defense counsel during voir dire or limiting individual voir dire regarding burden of proof, inelastic attitude toward members, and credibility of witnesses as defense counsel admitted those questions were confusing).

3. ***Urinalysis questions***. *United States v. Adams*, 36 M.J. 1201 (N.M.C.M.R. 1993) (abuse of discretion not to allow defense counsel to voir dire prospective members about their previous experiences with or expertise in drug urinalysis program, and their beliefs about the reliability of the program).

E. **WAIVER OF VOIR DIRE ISSUES**.

1. Defense counsel should ensure the record clearly shows any voir dire issues that may be raised on appeal. Merely asking the military judge for individual voir dire without stating a legally-cognizable basis is likely waiver:

> A number of options were available to the defense counsel: (1) Defense counsel could have asked more detailed questions during group *voir dire* regarding the issues now raised on appeal; (2) defense counsel could have asked the military judge to re-open group *voir dire*; or (3) if he was concerned about the limited value of group *voir dire* alone, defense counsel could have requested an Article 39(a) session to call the military judge's attention to specific matters, thus making a record for appeal. In the absence of such actions, ***the sparse record we are presented in this case provides no basis for reversal***.

United States v. Belflower, 50 M.J. 306, 310-11 (C.A.A.F. 1999) (emphasis supplied).

2. *United States v. Williams*, 44 M.J. 482 (C.A.A.F. 1996). MJ did not unreasonably and arbitrarily restrict voir dire by denying a defense request for individual voir dire of member (SGM) who expressed difficulty with the proposition that no adverse inference could be drawn if accused failed to testify, and another member (MAJ) who disclosed that he had a few beers with one of the CID agents who would be a witness. Defense counsel did not conduct additional voir dire. The MJ granted the defense challenge for cause against the SGM. The defense peremptorily challenged the MAJ based on a theory that the denial of individual voir dire deprived the defense of an opportunity to sufficiently explore the basis for a challenge for cause. Court holds "[s]ince defense counsel decided to forego questioning, he cannot now complain that his ability to ask questions was unduly restricted."

F. **DENIAL OF QUESTIONS TESTED FOR ABUSE OF DISCRETION**.

1. ***Rule***. *United States v. Belflower*, 50 M.J. 306 (C.A.A.F. 1999) (military judge did not abuse his discretion in prohibiting individual voir dire by defense counsel of four members where defense did not ask any questions on group voir dire that would demonstrate the necessity for individual voir dire).

2. ***Generally, military judge will only abuse discretion if <u>no</u> questions are permitted into valid area for potential challenge.*** *United States v. McDonald*, 57 M.J. 747 (N-M Ct. Crim. App. 2002), *rev'd on other grounds*, 59 M.J. 426 (C.A.A.F. 2004). Military judge required written questions beforehand, and asked several government questions (some of which the MJ revised) over defense objection. Questions involved whether members ever discussed with their children what they should do if someone propositions them in an inappropriate way, and how the members thought a child would do if an adult solicited them for sex. Citing the *Belflower* standard (that "the appellate courts will not find an abuse of discretion when counsel is given an opportunity to explore possible bias or partiality"), the court found no abuse of discretion: "Whether it is the Government or the accused, we believe that the aforementioned rules governing the content of voir dire apply equally. In other words, the TC had as much right to obtain information for the intelligent exercise of challenges as the DC."

V. CHALLENGES FOR CAUSE – GENERALLY

R.C.M. 912. Challenge of selection of members; examination and challenges of members.
. . . .
(f) *Challenges and removal for cause.*
(1) *Grounds.* A member shall be excused for cause whenever it appears that the member:
(A) Is not competent to serve as a member under Article 25(a), (b), or (c);
(B) Has not been properly detailed as a member of the court-martial;
(C) Is an accuser as to any offense charged;
(D) Will be a witness in the court-martial;
(E) Has acted as counsel for any party as to any offense charged;
(F) Has been an investigating officer as to any offense charged;
(G) Has acted in the same case as convening authority or as the legal officer or staff judge advocate to the convening authority;
(H) Will act in the same case as reviewing authority or as the legal officer or staff judge advocate to the reviewing authority;
(I) Has forwarded charges in the case with a personal recommendation as to disposition;
(J) Upon a rehearing or new or other trial of the case, was a member of the court-martial which heard the case before;
(K) Is junior to the accused in grade or rank, unless it is established that this could not be avoided;
(L) Is in arrest or confinement;
(M) Has informed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged;
(N) Should not sit as a member in the interest of having the court-martial free from ***substantial doubt*** as to ***legality, fairness, and impartiality***.

A. Each side has an unlimited number of challenges for cause. *See* Article 41(a)(1), UCMJ; R.C.M. 912(f).

1. ***Nondiscretionary bases***. R.C.M. 912(f)(1)(A)-(M) list rarely-used scenarios that require a panel member be excused, to include a member who is "in arrest or confinement," "an accuser to any offense charged," or "a witness in the court-martial."

2. ***Discretionary bases***. R.C.M. 912(f)(1)(N) allows a member to be challenged for actual bias and implied bias.

B. **ACTUAL BIAS & IMPLIED BIAS**. Actual and implied bias are based on R.C.M. 912(f)(1)(N), which provides that a member should be excused if serving would create a "substantial doubt as to [the] legality, fairness, and impartiality" of the proceedings. Actual and implied bias each have a separate test (set forth below), though a challenge for cause often invokes both principles. *United States v. Armstrong*, 54 M.J. 51 (C.A.A.F. 2000).

C. **RATIONALE FOR ACTUAL AND IMPLIED BIAS DOCTRINES**. "[T]he text of R.C.M. 912 is not framed in the absolutes of actual bias, but rather addresses the ***appearance of fairness*** as well, dictating the avoidance of situations where there will be substantial doubt as to fairness or impartiality. ***Thus, implied bias picks up where actual bias drops off because the facts are unknown, unreachable, or principles of fairness nonetheless warrant excusal***." *United States v. Bragg*, 66 M.J. 325, 327 (C.A.A.F. 2008).

D. **LIBERAL GRANT MANDATE**. Military judges are charged to liberally grant challenges for cause from the defense. *United States v. James*, 61 M.J. 132 (C.A.A.F. 2005). The liberal grant mandate does not apply to Government challenges.

1. ***Rationale***. The convening authority selects the panel members and can be said to have an unlimited number of peremptory challenges. Per *James*, "Given the convening authority's broad power to appoint [panel members], we find no basis for application of the 'liberal grant' policy when a military judge is ruling on the Government's challenges for cause." *United States v. James*, 61 M.J. 132, 139 (C.A.A.F. 2005). Additionally, the court noted the SJA may excuse one third of the panel members under R.C.M. 505(c)(1)(B). By contrast, the accused "has only one peremptory challenge at his or her disposal." *Id.*

2. ***Long history***. *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987) ("We again take the opportunity to encourage liberality in ruling on challenges for cause. Failure to heed this exhortation only results in the creation of needless appellate issues."); *United States v. Moyar*, 24 M.J. 635, 638, 639 (A.C.M.R. 1987) ("The issue of denial of challenges for cause remains one of the most sensitive in current military practice. . . . Military law mandates military judges to liberally pass on challenges. Notwithstanding this mandate . . . some trial judges have at best only grudgingly granted challenges for cause and others frustrate the rule with *pro forma* questions to rehabilitate challenged members.").

E. **REHABILITATING MEMBERS**. Once a member gives a response that shows a potential grounds for challenge, counsel or the military judge may ask questions of that member to rehabilitate him or her. *See United States v. Napolitano*, 53 M.J. 162 (C.A.A.F. 2000) (member indicated on questionnaire disapproval of civilian defense counsel's behavior in another case; judge did not abuse discretion in denying challenge for cause because member retracted opinion and said he was not biased against the counsel). Counsel should consider these questions when attempting to rehabilitate a member:

1. Can you follow the judge's instructions regarding the law?

2. Will you base your decision only on the evidence presented at trial, rather than your own personal experience?

3. Have you made your mind up right now concerning the type of punishment the accused should receive if convicted?

4. Can you give this accused a full, fair, and impartial hearing?

Note, these standard questions may not be sufficient, especially if counsel only gets "naked disclaimers" from the members. Counsel should tailor questions to the facts of the case and get clear, unequivocal answers. *But see United States v. Townsend*, 65 M.J. 460, 465 (C.A.A.F. 2008) ("[T]here is a point at which numerous efforts to rehabilitate a member will themselves create a perception of unfairness in the mind of a reasonable observer.").

VI. CHALLENGES FOR CAUSE – ACTUAL BIAS

A. **STANDARD**. Whether the bias is such that the member will not yield to the evidence presented and the judge's instructions. *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007); *United States v. New*, 55 M.J. 95, 99 (C.A.A.F. 2001; *United States v. Warden*, 51 M.J. 78, 81 (C.M.A. 1999). Appellate courts give great deference to the military judge's rulings on actual bias because it is a question of fact, and the military judge was able to observe the demeanor of the challenged member. *United States v. Bragg*, 66 M.J. 325 (C.A.A.F. 2008); *United States v. Napolitano*, 53 M.J. 162, 166 (C.A.A.F. 2000). The credibility of the member is key, so actual bias is a *subjective determination* made by the military judge.

B. **RARELY USED TO EXCUSE A MEMBER**. For example, in *United States v. Clay*, 64 M.J. 274 (C.A.A.F. 2007), accused was charged with rape and indecent assault. During voir dire, the senior panel member was asked whether his judgment would be affected because he had two teenage daughters. He responded, "[I]f I believed beyond a reasonable doubt that an individual were guilty of raping a young female, I would be *merciless within the limit of the law*." Trial counsel attempted to rehabilitate the member, who said, "I believe I could" when asked if he could consider the full range of permissible punishments. Despite the member's initial statement (which suggested he had an actual bias), the court ruled the case was not one of actual bias because the member said he could be fair and the military judge made "observations of those statements." *Id*. at 276. The case was ultimately reversed on implied bias grounds (that ruling is discussed below).

VII. CHALLENGES FOR CAUSE – IMPLIED BIAS

A. **STANDARD**. *United States v. Elfayoumi*, 66 M.J. 354 (C.A.A.F. 2008). Challenge for cause based on implied bias is reviewed on an *objective standard*, through the eyes of the public. "Implied bias exists when most people in the same position would be prejudiced." *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996). In applying implied bias, the focus is on "the perception or appearance of fairness of the military justice system." *United States v. New*, 55 M.J. 95, 100 (C.A.A.F. 2001). Accordingly, "issues of implied bias are reviewed under a standard less deferential than abuse of discretion but more deferential than de novo." *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004). In *Elfayoumi*, the court provided this summary:

> Implied bias exists when most people in the same position as the court member would be prejudiced. To test whether there is substantial doubt about the fairness of the trial, we evaluate implied bias objectively, through the eyes of the public, reviewing the perception or appearance of fairness of the military justice system. This review is based on the "totality of the circumstances." Although we review issues of implied bias for an abuse of discretion, because we apply an objective test, we apply a less deferential standard than we would when reviewing a claim of actual bias.

B. **IN GENERAL**.

1. ***Common issues***. Implied bias can be expansively applied, as the test considers the public's perception of the military justice system. Several cases have raised implied bias based on (1) member's knowledge of the case, issues, or witnesses; (2) member's rating chain relationship with other members; (3) member being a victim of a similar crime or knowing a victim of a similar crime; (4) member's predisposition to punishment; and (5) potential unlawful command influence. Each of these bases is discussed below.

2. ***Example.*** *United States v. Clay*, 64 M.J. 274 (C.A.A.F. 2007). Accused was charged with rape and indecent assault. During voir dire, the senior panel member was asked whether his judgment would be affected because he had two teenage daughters. He responded, "[I]f I believed beyond a reasonable doubt that an individual were guilty of raping a young female, I would be *merciless within the limit of the law*." Trial counsel attempted to rehabilitate the member, who said, "I believe I could" when asked if he could consider the full range of permissible punishments. While the court found no actual bias, the military judge erred and should have granted the challenge for cause based on implied bias and the liberal grant mandate. CAAF reasoned that the answers he gave, in response to the voir dire questions and rehabilitation questions, "create[d] the perception that if [he], the senior member of the panel, were convinced of the Appellant's guilt he would favor the harshest sentence available, without regard to the other evidence."

C. **GROUNDS FOR CHALLENGE– KNOWLEDGE OF CASE, ISSUES, WITNESSES**.

1. ***Generally***. *United States v. Briggs*, 64 M.J. 285 (C.A.A.F. 2007). Air Force technical sergeant was tried for larceny of survival vests from the aircraft he was responsible for maintaining and re-selling them. Military judge denied challenge for cause against CPT H, the wife of the appellant's commander; she had learned from her husband that "vests went missing." In finding that the member lacked actual bias, the military did not address the liberal grant mandate or implied bias. On appeal, using the implied bias theory, CAAF found military judge erred in denying the challenge for cause. The court cited a number of reasons why this challenge should have been granted, including: the safety of the member's husband's unit was placed at risk by the accused, the husband's performance evaluation could have been affected by the accused's criminal misconduct, and the member's husband was responsible for the initial inquiry into the misconduct and recommendation as to disposition. *See also United States v. Minyard*, 46 M.J. 229 (C.A.A.F. 1997) (military judge should have granted challenge for cause against member

whose husband investigated case against accused, despite member's claim that she knew little about the case, that she and he husband did not discuss cases).

2. ***Knowledge of the case***. *United States v. Rockwood*, 52 M.J. 98 (C.A.A.F. 1999). In a high profile case, some knowledge of the facts of the offense or an unfavorable inclination toward an offense is not per se disqualifying. The critical issue is whether a member is able to put aside outside knowledge, association, or inclination, and decide the case fairly and impartially on its merits. Accused was convicted of various offenses arising out of issues related to Operation Uphold Democracy in Haiti. The defense challenged the entire panel based on the following: an acquittal would damage the reputation of the members individually, the general court-martial convening authority, and the 10th Mountain Division; several members knew key witnesses against the accused and would give their testimony undue weight; that members were exposed to and would be affected by pretrial publicity; and members evinced an inelastic attitude about a possible sentence in the case. The court held that there was no actual bias; members are not automatically disqualified based on professional relationships with other members or with witnesses; and some knowledge of the facts or an unfavorable inclination toward and offense is not per se disqualifying.

a) *United States v. Hollings*, 65 M.J. 116 (C.A.A.F. 2007). Military judge did not abuse his discretion in denying this challenge for cause for a member that the defense alleged met the definition of legal officer under R.C.M. 912(f)(1)(G). Under the facts elicited at trial, the member did not meet the definition of "legal officer." The accused also argued on appeal that the challenge should have been granted under an implied bias theory because he was a "career legal officer, he was familiar with [the accused's] case as a result of his duties, and at least some of those duties were legal in nature." The member's responses during voir dire did not reveal any actual or implied bias.

b) *United States v. Baum*, 30 M.J. 626 (N.M.C.M.R. 1990). Military judge improperly denied two causal challenges: first member was the sergeant major of alleged co-conspirator who had testified at separate Article 32, was interviewed by chief prosecutor, and had voluntarily attended accused's Article 32 investigation; second member was colonel who headed depot inspector's office, had official interest in investigation, and had discussed cases with chief investigator and government witness.

3. ***Member's "possible" knowledge of case may require excusal***. *United States v. Bragg*, 66 M.J. 325 (C.A.A.F. 2008). Accused was a Marine recruiter charged with rape and other offenses involving two female high students. Member stated during voir dire that he learned information about the case before trial. While he could not recall how he obtained this information, he knew the "general identity" of the victim, the general nature of the offense, and the investigatory measures taken by law enforcement. The member had been the deputy chief of staff for recruiting and, in that capacity, he normally read relief for cause (RFC) packets of recruiters. The member could not recall if he had reviewed the accused's RFC packet, though he said that if he had, he "probably would have" recommended relief. The member said he could be impartial despite his prior knowledge of the case. CAAF reversed: "In making judgments regarding implied bias, this Court looks at the totality of the factual circumstances." In this case, the member may have recommended adverse action against the accused, so he should have been excused.

4. ***Member knows about pretrial agreement***. *United States v. Jobson*, 31 M.J. 117 (C.M.A. 1990). Knowledge of pretrial agreement does not per se disqualify the court member. Whether the member is qualified to sit is a decision within the discretion of the military judge.

5. ***Member knows about accused's sanity report***. *United States v. Dinatale*, 44 M.J. 325 (C.A.A.F. 1996). In an indecent acts on minors case, military judge did not clearly abuse his discretion by denying a challenge for cause against a member (Chief of Hospital Services at the local military hospital) where voir dire supported the conclusion that the member's review of sanity report was limited to reading the psychologist's capsule findings, member did not recall seeing accused's report, member stated that she could decide the case based on the evidence and MJ instructions, and mental state of accused was not an issue at trial.

6. ***Member knows trial counsel***. *United States v. Hamilton*, 41 M.J. 32 (C.M.A. 1994). Military judge denied challenges for cause against three officer members who had been past legal assistance clients of assistant trial counsel. Professional relationship not a per se basis for challenge. Members provided assurances of impartiality.

7. ***Member is a potential witness***. *United States v. Perez*, 36 M.J. 1198 (N.M.C.M.R. 1993). Three officer members stated during voir dire that they observed "stacking incident" (assault on a warrant officer). In reversing, court held potential witnesses in case should have been excused for cause.

8. ***Member's outside investigation***. *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). Accused, who worked in the comptroller's disbursing office, was convicted of rape at a contested court-martial by members. LTC F, the eventual panel president, was the deputy comptroller and had pretrial knowledge of the accused and co-accused's cases through his own investigative efforts and newspaper articles. MJ granted seven of eight defense challenges for cause but denied the challenge against LTC F without making findings. CAAF held that LTC F's "inquiry went beyond a routine passing of information to a superior—. . . his inquires were so through that he subjectively believed he knew all there was to know—that he had the 'complete picture.'" Under the implied bias standard, an objective observer could reasonably question LTC F's impartiality and that the MJ erred in denying defense's challenge for cause. Findings reversed. *Cf. United States v. Nigro*, 28 M.J. 415 (C.M.A. 1989) (in a bad check case, military judge properly denied challenge for cause against member who called credit union to ask about banking procedures; member's responses to inquiries were clear and unequivocal that he could remain impartial and follow judge's instructions).

9. ***Experience with key trial issues***. *United States v. Daulton*, 45 M.J. 212 (C.A.A.F. 1996). In a child sexual abuse case, military judge erred in failing to grant a defense challenge for cause against a member who stated that her sister had been abused by her grandfather, and was shocked when she first heard of her sister's allegations, "but had gotten over it." The member's responses to the MJ's rehabilitative questions regarding her ability to separate her sister's abuse from the evidence in the trial were not "resounding."

10. ***Member with position and experience***. *United States v. Lattimore*, 1996 WL 595211 (A.F. Ct. Crim. App. 1996) (unpub.). In case involving stealing and use of Demerol, no abuse of discretion to deny challenge for cause against O-6-member who was a group commander and former squadron commander; had preferred charges in three or four courts-martial; recently forwarded charges of drug use; sat through portion of expert forensic toxicologist in unrelated drug case; and who indicated that, although not predisposed to give punitive discharge, some form of punishment was appropriate if accused was found guilty, but would consider sentence of no punishment. No per se exclusion for commanders and prior commanders who have preferred drug charges.

11. ***Knowledge of witnesses***.

a) *United States v. Ai*, 49 M.J. 1 (C.A.A.F. 1998). Military judge did not abuse his discretion in denying a challenge for cause against a member who was a friend and former supervisor of a key government witness. In a graft case, during voir dire, an officer member revealed that a key government witness had previously worked for him as a food manager for one year three years ago. The member indicated, during group and individual voir dire, that the relationship would not affect him as a member and he would follow all MJ instructions. CAAF recognized that while R.C.M. 912(f)(1)(N) is broad enough to permit a challenge for cause against a member on the basis of favoring witnesses for the prosecution, there was no "historical basis" in the record to support the challenge. The work relationship was limited in duration, negating any inference of predisposition.

b) *United States v. Napoleon*, 46 M.J. 279 (C.A.A.F. 1997) (holding that under both actual and implied bias standard, military judge properly denied challenge for cause against member who had *official* contacts with special agent-witness who was "very credible because of the job he has" and had knowledge of case through a staff meeting).

c) *United States v. Arnold*, 26 M.J. 965 (A.C.M.R. 1988). Member who had seen witness in another trial and formed opinion as to credibility should have been excused. However, the mere fact that a witness had appeared before the member in another case is not grounds by itself to grant a challenge; if so, this would virtually prohibit the repeated use in different trials of witnesses such as police officers and commanders.

d) ***Practice point***. Trial and defense counsel should read a list of anticipated witnesses to the members during voir dire.

D. **GROUNDS FOR CHALLENGE – RATING CHAIN RELATIONSHIP**. If one member is in the rating chain of one or more other members, that *may* be a basis for challenge. It is not a per se basis for challenge. *United States v. Murphy*, 26 M.J. 454 (C.M.A. 1988) (rating chain relationship is not an automatic disqualification; inquiry of both parties is necessary).

1. ***Rating chain as a voting block.***

a) *United States v. Wiesen*, 56 M.J. 172 (C.A.A.F. 2001), *recon. denied*, 57 M.J. 48 (C.A.A.F. 2002). During voir dire, COL Williams, a brigade commander and the senior member, identified six of the other nine members as his subordinates. The defense argued implied bias and attempted to challenge COL Williams. The military judge denied this causal challenge. The defense then used their peremptory challenge to remove COL Williams, but preserved the issue for appeal by stating, "but for the military judge's denial of [our] challenge for cause against COL Williams, [we] would have peremptorily challenged [another member]."[3] The court concluded, "Where a panel member has a supervisory position over six of the other members, and the resulting seven members make up the two-thirds majority sufficient to convict, we are placing an intolerable strain on public perception of the military justice system." CAAF held "the military judge abused his discretion when he denied the challenge for cause against COL Williams." Finding prejudice, findings and sentence were set aside.

b) *But see United States v. Bagstad*, 67 M.J. 599 (N-M. Ct. Crim. App. 2008), *aff'd on other grounds*, 68 M.J. 177 (C.A.A.F. 2010) (affirming based on defense

[3] Note, under the current RCM 912(f)(4), this "but for" peremptory challenge would *not* preserve the issue for appeal. Under the current rule, the causal challenge is waived if the challenged member is excused with a peremptory challenge.

counsel waiver without addressing issue before the N-MCCA). In a case similar to *Wiesen*, court upheld military judge's denial of challenge against senior member who rated another panel member, even though the rater and ratee constituted the two-thirds necessary to convict on a three-member panel. In questionable reasoning, N-MCCA held the case had different "contextual facts" from *Wiesen*, as the senior member was a Capt (O-3) and the junior member was a GySgt (E-7); the court added that the NCO was three years old than the officer and had served seven years longer. Further, the third panel member was a 1stSgt (E-8). The court noted that the "camaraderie between, and respect and deference for, senior NCO's, is significant." In this context, N-MCCA concluded the presence of two senior NCOs serving on a panel with a company grade officer weakens "any reasonable perception" that the rating chain relationship could have improperly influenced deliberation; hence, an informed public would not question the fairness of this proceeding.

2. ***Counsel must develop record***. *United States v. Blocker*, 33 M.J. 349 (C.M.A. 1991) (noting obligation is on the party making the challenge to inquire into any rating chain relationships; military judge has no *sua sponte* duty to conduct such inquiry); *United States v. Murphy*, 26 M.J. 454 (C.M.A. 1988) (rating chain relationship is not an automatic disqualification; careful inquiry of both parties is necessary).

3. ***Military judge may abuse discretion if questions about rating chain are not allowed***. *United States v. Garcia*, 26 M.J. 844 (A.C.M.R. 1988) (rating relationship merits inquiry and appropriate action based on members' responses). *Cf. United States v. DeNoyer*, 44 M.J. 619 (A. Ct. Crim. App. 1996). Identification of supervisory or rating chain relationship not enough to support individual member questioning. After defense asked panel in excess of 25 questions, some repetitious, in various areas, and then identified possible rating or supervisory relationships among five of the nine members, MJ denied defense request for individual voir dire. No abuse of discretion by denying defense request for individual voir dire. However, ACCA cautioned that granting defense requests would have eliminated appellate issues and enhanced perception of fairness.

E. **GROUNDS FOR CHALLENGE – VICTIM (OR INDIRECT VICTIM) OF SIMILAR CRIME**.

1. ***Considerations in victim analysis***:

a) Who was victim? Panel member or a family member?

b) How similar was the accused's crime to the one the victim was involved in?

c) Was victim's crime unsolved?

d) Traumatic? How many times a victim?

e) Does the member give clear, reassuring, unequivocal answers about his impartiality?

2. ***Close relationship with victim of similar crime***. *United States v. Terry*, 64 M.J. 295 (C.A.A.F. 2007). Military judge erred in not granting challenge for cause under the implied bias theory and liberal grant mandate. In rape trial, member's girlfriend (whom he intended to marry) was raped, became pregnant, terminated their relationship, and named the child after him. Although six years had passed, "most members in [the member's position] would have difficulty sitting on a rape trial . . . . Further, an objective observer might well have doubts about the fairness of Appellant's court-martial panel."

3. ***Relative who died because of pre-natal drug use***. *United States v. Miles*, 58 M.J. 192 (C.A.A.F. 2003). Military judge abused his discretion by failing to grant challenge for

cause based on implied bias where, during voir dire in guilty plea case involving wrongful use of cocaine, member revealed his ten-year-old nephew died as a result of mother's pre-natal use of cocaine. Member described tragedy in article in base newspaper scheduled for publication shortly after court-martial. Trial counsel commented that event "evidently" was "a very traumatic experience" for the member. "We conclude that asking [the member] to set aside his memories of his nephew's death and to impartially sentence Appellant for illegal drug use was 'asking too much' of him and the system." Sentence set aside.

a) ***Practice Point*:** "Where a particularly traumatic similar crime was involved . . . we have found that denial of a challenge for cause violated the liberal-grant mandate." This is ultimately a fact-specific inquiry.

b) *Cf. United States v. Denier*, 43 M.J. 693 (A.F. Ct. Crim. App. 1995) (in drug case, member stated he would be fair even though his daughter was a recovering cocaine addict, though he would be affected "some" but not intellectually; no abuse of discretion to deny challenge for cause).

4. ***Wife victim of domestic violence***. *United States v. White*, No. 2001132 (A. Ct. Crim. App. Dec. 8, 2003) (unpub.). Appellant charged with attempted murder of wife; convicted of assault with intent to inflict grievous bodily harm and other offenses. Military judge abused discretion by denying challenge for cause of member whose wife was victim of domestic abuse by her first husband. Individual voir dire revealed wife suffered a broken neck from abuse; member stated that "I've told him, simply, that, 'If I ever see you and you look like you're going to raise a hand for her, I'm gonna kill you and then we'll sort it out later.' That's kind of the way I feel about it." While court found no abuse of discretion as to actual bias, the court found error as to implied bias. Notably, court gave MJ less discretion on implied bias because he did not address that issue on the record. "On these facts, an objective observer would likely question the fairness of the military justice system." Findings set aside.

5. ***Members in robbery case were victims of robbery/burglary.*** Member in a robbery case had been a robbery victim seven times. Another member, a two-time victim of burglary, indicated "it's hard to say" if those prior incidents would influence his deliberations; it "might trigger something from the past, it may not." *United States v. Smart*, 21 M.J. 15 (C.M.A. 1985). Perfunctory claims of impartiality are not enough; challenge should have been granted to keep outcome "free from doubt." *But see United States v. Fulton*, 44 M.J. 100 (C.A.A.F. 1996) (member on robbery and larceny case not disqualified even though prior victim of burglary).

6. ***Panel was robbed during court-martial for larceny.*** *United States v. Lavender*, 46 M.J. 485 (C.A.A.F. 1997). The implied bias doctrine will not operate to entitle an accused on trial for larceny to have the entire panel removed for cause after two members had money stolen from their unattended purses in deliberation room. The implied bias doctrine is only applied in rare cases. *See Hunley v. Godinez*, 784 F. Supp. 522 (N.D. Ill.), *aff'd*, 975 F.2d 316 (7th Cir. 1992) (holding due process does not require a new trial every time a juror has been placed in a potentially compromising situation; doctrine of implied bias appropriately applied to defendant convicted of murder during a burglary where judge denied challenges for cause against members who changed vote from "not guilty" to "guilty" after becoming victims of burglary during overnight recess in sequestered hotel).

7. ***Minor victim of gun violence***. *United States v. Hudson*, 37 M.J. 968 (A.C.M.R. 1993). E-8 member in aggravated assault case involving shooting at NCO Club had been caught in crossfire during similar incident 15 years earlier in off-post bar fight. Member indicated that he could remain fair and impartial.

8. ***Victim of dissimilar crime <u>not</u> disqualified***. *United States v. Smith*, 25 M.J. 785 (A.C.M.R. 1988). Member in a rape case had been a larceny victim. Challenge denied; any recent crime victim is not automatically disqualified.

9. ***Member duty to disclose***. *United States v. Mack*, 36 M.J. 851 (A.C.M.R. 1993). Officer member in an assault case failed to disclose that he had been held at gunpoint, tied up, and threatened with death during armed robbery thirty years earlier. Member indicated that he had "forgotten about it." Returned for *DuBay* hearing to determine (1) was there a failure to honestly answer a material question?; (2) would the correct (honest) response provide a valid basis for challenge for cause? Case affirmed after *DuBay* hearing.

10. ***The outer limits***. Victims of similar crimes have been allowed to sit as members, provided they unequivocally evince an ability to be open-minded and consider the full range of permissible punishments.

a) *United States v. Basnight*, 29 M.J. 838 (A.C.M.R. 1989). Member was victim of three larcenies and his parents were victims of two larcenies. Denial of challenge for cause proper in light of member's candor and willingness to consider complete range of punishments.

b) *United States v. Reichardt*, 28 M.J. 113 (C.M.A. 1989). Larceny of ATM card and money; member's wife had been victim of a similar crime. Not error to deny challenge based on judge's inquiry, unequivocal responses, and judge's findings.

c) *But see United States v. Campbell*, 26 M.J. 970 (A.C.M.R. 1988). Challenge should have been granted based on equivocal responses. Member "waffled" in response to questions about his impartiality. Member "[w]ould *try* to be open-minded, *somewhat* objective, but 'not sympathetic to thieves.'"

F. **GROUNDS FOR CHALLENGE – INELASTIC PREDISPOSITION TO SENTENCE**. A member is not automatically disqualified merely for admitting an unfavorable inclination or predisposition toward a particular offense.

1. ***Draconian view of punishment***. *United States v. Schlamer*, 52 M.J. 80 (C.A.A.F. 1999). Member disclosed her severe notions of punishment ("rape = castration;" "you take a life, you owe a life"). Nevertheless, she was adamant that she had not made up her mind in accused's case, that she believed in the presumption of innocence, and that she would follow the judge's instructions. CAAF held the military judge did not abuse his discretion in denying the challenge. Similarly, the judge's grant of a Government challenge against a member who had received an Article 15 and stated he would be "uncomfortable" judging the accused was within the judge's discretion and comported with the "liberal grant" mandate.

2. ***Would you <u>consider</u> no punishment as a sentencing option?*** *United States v. Martinez*, 67 M.J. 59 (C.A.A.F. 2008) (per curiam). Accused pled guilty to a single specification of wrongful use of methamphetamines and elected sentencing before members. During general voir dire, member was asked if he could consider "no punishment" during sentencing; he said "no," adding, "He obviously knew it was wrong and came forward with his guilt, and there has to be punishment for it." During follow-up questioning, member said he could consider the full range of sentencing options, to include no punishment, however: "[W]e'll weigh it from no punishment to the max. I can do that, but something has to be done." CAAF unanimously reversed, reasoning that the member should have been excused for implied bias, as a reasonable person would question the fairness of the proceedings because the member stated "something has to be done" when asked about sentencing. Case seems inconsistent with *Rolle*, discussed *infra*.

a) *But cf. United States v. Rolle*, 53 M.J. 187 (C.A.A.F. 2000). Accused, a Staff Sergeant, pled guilty to use of cocaine. Much of voir dire focused on whether the members could seriously consider the option of no punishment or whether they felt a particular punishment (like a punitive discharge) was appropriate. One member, CSM L, stated "I wouldn't" let the accused stay in the military, and "I am inclined to believe that probably there is some punishment in order there . . . I very seriously doubt that he will go without punishment." CSM L conversely noted there was a difference between a discharge and an administrative elimination from the Army. Another member, SFC W, stated, "I can't [give a sentence of no punishment] . . . because basically it seems like facts have been presented to me because he evidentially [*sic*] said that he was guilty." Military judge denied the challenges for cause against CSM L and SFC W; CAAF noted that "[p]redisposition to impose some punishment is not automatically disqualifying." (citing *United States v. Jefferson*, 44 MJ 312, 319 (C.A.A.F. 1996); *United States v. Tippit*, 9 MJ 106, 107 (C.M.A. 1980)). "[T]he test is whether the member's attitude is of such a nature that he will not yield to the evidence presented and the judge's instructions."

b) *United States v. Martinez*, 67 M.J. 59 (C.A.A.F. 2008) (per curiam). During voir dire in drug case, member stated, there is "no room in my Air Force for people that abuse drugs – you know – violate the articles and law that we have set forth." After several rehabilitation questions, the member hesitated about whether he would consider the full range of punishment, to include no punishment: "So, there has to be a punishment to fit the crime—whatever that case may be. . . . [W]e'll weigh it from no punishment to the max. I can do that, but something has to be done." CAAF reversed, finding the member "did not disavow an inelastic attitude toward punishment."

c) *United States v. McLaren*, 38 M.J. 112 (C.M.A. 1993). Despite member's initial responses that he could not consider "no punishment" as an option where accused charged with rape, sodomy, and indecent acts, member's later responses showed he would listen to the evidence and follow the judge's instructions. Member's responses to defense counsel's "artful, sometimes ambiguous questioning" does not necessarily require that a challenge for cause be granted. The majority opinion included this conclusion: "I would have substantial misgivings about holding that a military judge abused his discretion by refusing to excuse a court member who could not in good conscience consider a sentence to no punishment in a case where all parties agree that a sentence to no punishment would have been well outside the range of reasonable and even remotely probable sentences." *Id.* at 119 n.*.

d) *United States v. Czekala*, 38 M.J. 566 (A.C.M.R. 1993), *aff'd*, 42 M.J. 168 (C.A.A.F. 1995). Member indicated an officer convicted of conduct unbecoming should not be permitted to remain on active duty. Member stated she would follow guidance of military judge. Denial of challenge for cause not abuse of discretion.

e) *United States v. Greaves*, 48 M.J. 885 (A.F. Ct. Crim. App. 1998). Accused pled guilty to wrongful use of cocaine. Military judge did not abuse his discretion by failing to grant a challenge for cause against member who stated during voir dire that, while he would keep an open mind, he thought that a sentence of no punishment would be an unlikely outcome, adding that in "99.9 percent of the cases, some punishment would be in order." *Id.* at 887. Court held the member did not express an inflexible attitude toward sentencing; he merely stated "what

should be patently obvious to all; while a sentence to no punishment is an option which should be considered, it is not often appropriate." *Id.*

3. ***Member's strong predisposition to punitive discharge may require excusal***. *United States v. Giles*, 48 M.J. 60 (C.A.A.F. 1998). Military judge "clearly" abused his discretion by failing to grant a challenge for cause against a member who demonstrated actual bias by his inelastic attitude toward sentencing in a case involving attempted possession of LSD with intent to distribute and attempted distribution of LSD. While member indicated that he could consider all evidence and circumstances, he responded to defense questions that anyone distributing drugs should be punitively discharged and that he had not heard of or experienced any circumstance where a punitive discharge would not be appropriate. These responses disqualified member under R.C.M. 912(f)(1)(N). *But see Rolle, supra*, a later case with similar facts but an opposite outcome.

4. ***Suggested rehabilitation questions for sentencing predisposition***:

a) Are you aware that punishment can range from no punishment, to the slight punishment of a letter of reprimand, all the way to a discharge and confinement?

b) Do you understand that you should not decide on a punishment until you hear all of the evidence?

c) Can you follow the judge's instructions regarding the law?

d) Will you listen to all of the evidence admitted at trial, before deciding a sentence?

e) Can you give this accused a full, fair, and impartial hearing?

G. **GROUNDS FOR CHALLENGE – UNLAWFUL COMMAND INFLUENCE**.

1. ***Courts maintain that it is in the "rare case" where implied bias will be found.*** *United States v. Youngblood*, 47 M.J. 338 (C.A.A.F. 1997). Application of the implied bias standard is appropriate to determine whether a military judge abused his discretion in denying challenges for cause against court members based on counsel argument that members were affected by unlawful command influence. Prior to court-martial, each member attended staff meeting where convening authority and SJA gave a presentation on standards, command responsibility, and discipline; during presentation, SJA and convening authority expressed dissatisfaction with a previous commander's disposition of an offense.

2. *United States v. Stoneman*, 57 M.J. 35 (C.A.A.F. 2002). Six of nine members either received email from brigade commander threatening to "declare war on all leaders not leading by example," to "CRUSH all leaders in this Brigade who don't lead by example" or attended a "leaders conference" where the same issues were discussed. MJ denied defense challenges for cause based on implied bias, but did not conduct a hearing concerning claim of UCI. Reversed and remanded for *DuBay* hearing. Case illustrates nexus between UCI and implied bias. Quantum of evidence to raise UCI is "some evidence;" quantum of evidence to sustain challenge for cause is greater. Just because burden not met on challenge does not mean burden not met to raise UCI. "[I]n some cases, voir dire might not be enough, and . . . witnesses may be required to testify on the issue of UCI."

H. **GROUNDS FOR CHALLENGE – MEMBER HAS BIAS AGAINST COUNSEL**.

1. ***Negative bias against specific counsel***. *United States v. Napolitano*, 53 M.J. 162 (C.A.A.F. 2000) (member indicated on questionnaire disapproval of civilian defense counsel's behavior in another case; judge did not abuse discretion in denying challenge for cause because member retracted opinion and said he was not biased against the counsel;

different result likely if member has had adversarial dealings with counsel). *See also United States v. Rome*, 47 M.J. 467 (C.A.A.F. 1998) (military judge abused discretion by failing to grant a challenge for cause, based on implied bias, against member who judge determined had engaged in unlawful command influence in previous unrelated court-martial and who defense counsel had personally and professionally embarrassed through cross examination in previous high-profile case).

2. ***Bias against defense attorneys (in general).*** *United States v. Townsend*, 65 M.J. 460 (C.A.A.F. 2008). When asked his "opinions of defense counsels," member said he had a "mixed view." While he respected military defense counsel as military officers with high ethical and moral standards, he had a "lesser respect for some of the ones you see on TV, out in the civilian world," an apparent reference to the member's regular viewing of the television show *Law and Order*. Court upheld military judge's denial of the challenge for cause, noting no actual or implied bias was present.

I. **GROUNDS FOR CHALLENGE – ACCUSED SHOULD TESTIFY**. *United States v. Ovando-Moran*, 48 M.J. 300 (C.A.A.F. 1998). No abuse of discretion to deny challenge for cause against member who considered it unnatural if accused failed to testify. Court reasoned that MJ's explanation of accused's right to remain silent and member's statement that he would put preconceptions aside supported view that that member's "misperception" was not a personal bias against accused.

J. **GROUNDS FOR CHALLENGE – ACCUSED SHOULD PLEAD GUILTY**. *United States v. White*, No. 20061313 (A. Ct. Crim. App. Aug. 11, 2010) (unpublished). During individual voir dire, panel member said he observed a trial of one of his Soldiers who had been charged with sexually abusing a child. He said he resented the Soldier – who was clearly guilty – for pleading not guilty and forcing the child victim to testify.[4] The trial counsel asked the member a few rehabilitation questions and the member agreed the other case would not affect his deliberations in the present case. The ACCA held the military judge did not abuse her discretion in denying the defense challenge for cause. Relying on *United States v. Elfayoumi*, 66 M.J. 354, 357 (C.A.A.F. 2008), the court noted that panel members are also members of society who may have strongly-held personal views which is part of the "human condition." In this case, a reasonable observer understanding the human condition would not question the neutrality, impartiality, and fairness of the proceeding.

VIII. CHALLENGES FOR CAUSE – LOGISTICS

A. **TIMING OF CHALLENGES.** UCMJ art. 41.

1. UCMJ art. 41(a). If exercise of challenge for cause reduces court below minimum required per Article 16 (5 members for GCM, 3 members for SPCM), the parties shall exercise or waive all other causal challenges *then apparent*. Peremptories will not be exercised at this time.

2. UCMJ art. 41(b). Each party gets one peremptory. If the exercise of a peremptory reduces court below the minimum required by Article 16, the parties must use or waive any remaining peremptory challenge against the remaining members of the court *before* additional members are detailed to the court.

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[4] The member said, "I kind of have malice toward [the soldier] because he was guilty and I think he knew in his heart he was guilty but he made his 10-year-old daughter get on the stand and [recount] what he did to her and I didn't appreciate that very much." He added: "[I]t was very evident that the [s]oldier was guilty and he was proven to be guilty. And yes[,] you're innocent until proven guilty, but pretty much everybody knew that the guy was guilty—I mean, for lack of a better term he was a scum bag. And for him to put that little girl through the trauma was unacceptable. I just don't have any respect for a man who would put a little girl through that." (alterations in original).

3. UCMJ art. 41(c). When additional members are detailed to the court, the parties get to exercise causal challenges against those new members. After causal challenges are decided, each party gets one peremptory challenge against members not previously subject to a peremptory challenge.

4. *See United States v. Dobson*, 63 M.J. 1 (C.A.A.F. 2006). The accused selected an enlisted panel to hear her contested premeditated murder case. After the military judge's grant of challenges for cause (CfCs) and peremptory challenges (PCs) the GCMCA needed to twice detail additional members for the court-martial to obtain ⅓ enlisted members, as required by Article 25, UCMJ. The CAAF provided the following chart as to the progression of the panel's composition:

Panel Composition	***Total***	***Officer***	***Enlisted***
Initial	10	6	4
<u>After 1st causal challenges</u>	<u>7</u>	<u>5</u>	<u>2 (No 25 quorum)</u>
After 1st peremptory challenge	**5**	**4**	**1**
After 1st additions	10	6 *(added 2)*	4 *(added 3)*
<u>After 2d causal challenges</u>	<u>8</u>	<u>6</u>	<u>2 (No 25 quorum)</u>
After 2d peremptory	**7**	**5**	**2**
After 2d additions	10	5 *(added 0)*	5 *(added 3)*
After 3d causal challenges	9	5	4
Final (after 3d peremptory)	8	5	3

The issue on appeal was whether the MJ erred by granting the parties' PCs (**bolded above**) after the ⅓ enlisted quorum, as required by Article 25, UCMJ, was busted after the 1st and 2nd CfCs (<u>underlined above</u>) were granted. While ⅓ enlisted quorum was broken after the 1st and 2nd CfCs, the panel membership never dropped below five members as required for a general court-martial under Article 16, UCMJ. The defense argued that the MJ should not have granted the parties' PCs once the ⅓ enlisted quorum was broken under Article 25, UCMJ even though the total membership requirements of Article 16, UCMJ were met. Article 41, UCMJ states that if the exercise of CfCs drops panel membership below Article 16 requirements that additional members will be detailed and PCs will not be granted at that time. Article 41, UCMJ, however, does not address panel membership falling below Article 25, UCMJ ⅓ enlisted requirements. The CAAF held that the MJ did not error by granting PCs when Article 25 quorum was lacking but Article 16 quorum was met. The CAAF reasoned that "[t]he enlisted representation requirement in Article 25 employs a percentage, not an absolute number[, unlike Article 16,]. . . [a]s a result, there are circumstances in which an enlisted representation deficit under Article 25 can be corrected through exercise of a peremptory challenge against an officer." Defense also objected to the GCMCA detailing two additional officers to the panel after the 1st CfCs were granted as an attempt to dilute enlisted representation. The CAAF stated that the accused is entitled only to ⅓ enlisted membership and the rules do not "require the [GCMCA] to add only the minimum number and type [of members] necessary to address a deficit under Article 16 or 25."

B. **PRESERVING DENIED CAUSAL CHALLENGES**. R.C.M. 912(f)(4).

1. ***Background***. Executive Order Amended R.C.M. 912(f)(4) and the "But For" Rule. *See* Executive Order 13387 – 2005, dated 18 October 2005. R.C.M. 912(f)(4) was amended by deleting the fifth sentence and adding other language to state: "When a challenge for cause has been denied the successful use of a peremptory challenge by either

party, excusing the challenged member from further participation in the court-martial, shall preclude further consideration of the challenge of that excused member upon later review."

2. ***Old rule***. *United States v. Jobson*, 31 M.J. 117 (C.M.A. 1990). The CMA translated the old version of R.C.M. 912 (f)(4) as follows:

a) If counsel does not exercise her peremptory challenge, she waives her objection to the denied causal challenge. She preserves the denied causal if she uses her peremptory against any member of the panel. But…

b) If she uses her peremptory against the member she unsuccessfully challenged for cause and fails to state the "but for" rule, she waives your objection to the denied causal. So…

c) Counsel preserves her denied causal if she uses her peremptory against the member she unsuccessfully challenged for cause and she states the "*but for"* rule (i.e., "I'm using my peremptory to excuse Member X; but for your denial of my challenge for cause of Member X, I would have used my peremptory on Member A.").

3. ***Current rule.*** R.C.M. 912(f)(4). If "objectionable" member does not sit on the panel (for example, if defense counsel uses preemptory challenge to excuse the member), the appellate court will not review the military judge's denial of a challenge for cause for that member. The challenge will also be waived on appeal if the party exercising the challenge does not exercise its peremptory challenge against another member.

a) *Ross v. Oklahoma*, 487 U.S. 81 (1988). Defense had to use peremptory challenge to remove juror who should have been excused for cause; no violation of Sixth Amendment or due process right to an impartial jury. "Error is grounds for reversal only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him."

b) *United States v. Medina*, 68 M.J. 587, 592 (N-M. Ct. Crim. App. 2009). Defense counsel challenged member on implied bias grounds at trial and the military judge denied the challenge. Following the denial, defense did not exercise a peremptory against any member. The court held, "Failure to exercise a peremptory challenge against any member constitute[s] waiver of further review of an earlier challenge for cause, therefore, this issue is without merit." (citing R.C.M. 912(f)(4)).

c) *Cf. United States v. Eby*, 44 M.J. 425 (C.A.A.F. 1996). The defense failed to preserve for appeal the issue of prejudice under R.C.M. 912(f)(4) by using its peremptory challenge against a member who survived a challenge for cause without stating that the defense would have peremptorily challenged *another member* if military judge had granted the challenge for cause.

C. **DURING-TRIAL CHALLENGES**. Although challenges to court members are normally made prior to presentation of evidence, R.C.M. 912(f)(2)(B) permits a challenge for cause to be made "at any other time during trial when it becomes apparent that a ground for challenge may exist." Peremptory challenges may not, however, be made after presentation of evidence has begun.

1. *United States v. Camacho*, 58 M.J. 624 (N-M. Ct. Crim. App. 2003). During lunch break after completion of Government case on merits and rebuttal, the President of panel was overheard stating to government witness, "It's execution time," and making certain gestures, "including a vulgar one with his finger." Challenge for cause granted, which left only two members in this BCD-Special CM. Four new members were detailed, two of

2. *United States v. Bridges*, 58 M.J. 540 (C.G. Ct. Crim. App. 2003). After findings, DC moved to impeach findings due to unlawful command influence (SJA email reporting child sex abuse case). DC claimed that, had she known of email, she would have questioned members about it and "might have elicited some information as to bias." BUT, DC did not challenge any member for cause at that time or specifically ask the military judge to permit additional voir dire on the issue. HELD: The email on its own was not "an apparent ground for challenge for cause." As such, the military judge did not abuse his discretion by failing to *sua sponte* reopen voir dire.

3. *United States v. Millender*, 27 M.J. 568 (A.C.M.R. 1988). During break in court-martial, member asked legal clerk if it would be possible to learn the "other sentence." Challenge denied; no exposure to extra-judicial information which could influence deliberations. Court noted the legal clerk did not answer the member's questions and immediately reported the question to the military judge (who properly investigated and found no outside information had been given to the member).

4. *United States v. Arnold*, 26 M.J. 965 (A.C.M.R. 1988). If member recognizes a witness, conduct individual voir dire to test for bias.

D. **CHALLENGES AFTER TRIAL**.

1. *United States v. Sonego*, 61 M.J. 1 (C.A.A.F. 2005). Members sentenced the accused after his guilty plea to ecstasy use. During voir dire CPT Bell, a member, stated in response to the MJ's group voir dire questions that he did not have an inelastic predisposition as to punishment. Approximately a month after the accused's court-martial his attorney was representing another airman for drug use. During that court-martial CPT Bell stated that any service member convicted of a drug offense should receive a BCD. A verbatim transcript was not made for this second court-martial because it resulted in acquittal but the defense attorney submitted an affidavit recounting CPT Bell's different responses. On an issue of first impression the CAAF granted review to determine the "measure of proof required to trigger an evidentiary hearing" based on an allegation of juror dishonesty. Noting that the federal circuits differ on this issue, the CAAF adopted a "colorable claim" test requiring "something less than proof of juror dishonesty before a hearing is convened." The court, ordering a *DuBay* hearing, ruled that the defense attorney's affidavit constituted a "colorable claim" of juror dishonesty to warrant a further evidentiary hearing.

2. *United States v. Humphreys*, 57 M.J. 83 (C.A.A.F. 2002). Defense submitted a post-trial motion for a new trial based on discovery that two members were in the same rating chain, although both answered the military judge's question on that issue in the negative. The military judge held a post-trial 39(a) session and questioned the involved members, during which both responded that they did not remember the military judge asking the question, and their answers were not an effort to conceal the rating chain relationship. The military judge concluded the members' responses during trial were "technically . . . incomplete," but their responses in the Article 39(a) session caused him to conclude he would not have granted a challenge for cause based on the relationship. He denied the defense motion for new trial. HELD: affirmed. In order to receive a new trial based on a panel member's failure to disclose info during voir dire, defense must make two showings: (1) that a panel member failed to answer honestly a material question on voir dire; and (2) that a correct response would have provided a valid basis for a challenge for cause. "[A]n evidentiary hearing is the appropriate forum in which to develop the full

circumstances surrounding each of these inquiries." Appellate court's role in process is to "ensure the military judge has not abused his or her discretion in reaching the findings and conclusions." Here the military judge did not abuse his discretion where he determined that "full and accurate responses by these members would not have provided a valid basis for a challenge for cause against either or both."

3. *United States v. Dugan*, 58 M.J. 253 (C.A.A.F. 2003). The military judge refused to grant a post-trial 39(a) session to voir dire members concerning UCI in deliberations. The CAAF remanded for a *DuBay* hearing. Under these circumstances, MRE 606(b) "permits voir dire of the members regarding what was said during deliberations about [the alleged UCI comments of a commander], but the members may not be questioned regarding the impact of any member's statements or the commander's comments on any member's mind, emotions, or mental processes."

E. **MILITARY JUDGE'S DUTY AND *SUA SPONTE* CHALLENGES**. Under R.C.M. 912(f)(4), a military judge may excuse a member *sua sponte* for actual or implied bias: "Notwithstanding the absence of a challenge or waiver of a challenge by the parties, the military judge *may*, in the interest of justice, excuse a member against whom a challenge for cause would lie." However, failure to excuse a member *sua sponte* will normally not require reversal.

1. *United States v. Velez*, 48 M.J. 220 (C.A.A.F. 1998). In a case involving two specifications of rape and two specifications of assault, the MJ did not err by failing, *sua sponte*, to remove three panel members based on implied bias. The implied bias doctrine was not invoked because the record established the following: the member who admitted knowing one of the rape victims had a tenuous relationship with victim, disavowed that this relationship would influence him, and the defense failed to challenge the member on such grounds; second member disavowed that command relationship with government rebuttal witness would influence him, and the defense counsel failed to challenge the member on that ground; the third member frankly disclosed that he had two friends who were victims of rape, and that he has a 15-year-old daughter he wanted to protect from rape, but disavowed improper influence and stated that he would follow the MJ's instructions.

2. *United States v. Strand*, 59 M.J. 455 (C.A.A.F. 2004). Court member was son of officer who acted as convening authority in the case. The member's father acted to excuse and detail new members in the absence of the regular GCMCA. The defense did not challenge the son for cause. On appeal, the defense contended that the military judge had a *sua sponte* duty to remove the son for implied bias. The court held that the military judge did not abuse his discretion in declining to *sua sponte* excuse the member, and declined to adopt a *per se* "familial relationship" basis for excusal. Here, the government revealed the familial relationship, and the military judge allowed both parties a full opportunity to voir dire the member. Although the military judge may excuse an unchallenged member in the interest of justice, there must be justification in the record for such a drastic action. The record in this case did not reveal an adequate justification for such action.

3. *See also United States v. Collier*, NMCCA 20061218, 2008 CCA LEXIS 53 (N-M. Ct. Crim. App. Feb. 21, 2008) (unpublished). In a bizarre case, trial counsel challenged a member for cause, based on implied bias. Defense counsel objected to the challenge, which the government then withdrew. On appeal, defense argued the military judge should have excused the member *sua sponte* for implied bias. During voir dire, the member stated he was an Administration Officer, knew three of the witnesses in the case (he interacted with them on a daily basis and was in the rating chain for two of them), and recognized the accused's name from reviewing personnel rosters. The member had been on a cruise for seven months and had no knowledge of the facts of the case. In response to

the government challenge for cause of this member, the defense counsel said: "[W]e feel that there's no problem with him. He's been on [a] cruise and has no knowledge of any of that." The military judge asked defense counsel why he objected to the government challenge and, before counsel could answer, the trial counsel withdrew the challenge for cause, but added, "We were more concerned with appearance. But, we'll withdraw our challenge for cause, if defense objects to that." In affirming the case, the court noted the member's minimal knowledge of the accused was "matter-of-fact and devoid of emotion." The member also stated that his professional relationship with three government witnesses would not affect his assessment of their testimony. Finally, in deciding there was no bias, the court noted "perhaps most tellingly" that the defense counsel at trial objected to the challenge.

IX. PEREMPTORY CHALLENGES – GENERALLY

A. **IN GENERAL.** One per side, unless new members are detailed. *See* Article 41(b)(1), UCMJ.

1. ***Additional Peremptory***. *United States v. Carter*, 25 M.J. 471 (C.M.A. 1988). Judge improperly denied defense request for additional peremptory after panel was "busted" and new members were appointed; however, error was harmless. *See also Rivera v. Illinois*, 556 U.S. ____ (2009) (noting "there is no freestanding constitutional right to peremptory challenges" and a peremptory challenge is "a creature of statute.").

a) No Sixth Amendment right to a peremptory challenge. *Ross* v. *Oklahoma*, 487 U.S. 81(1988).

b) No Fifth Amendment due process right to peremptory challenge. *United States v. Martinez-Salazar*, 528 U.S. 504 (2000).

c) *But cf. United States v. Pritchett*, 48 M.J. 609 (A.F. Ct. Crim App. 1998). Military judge erred to the prejudice of the accused by denying the accused his statutory right to exercise a peremptory challenge against one of the new court members added after the original panel as supplemented fell below quorum. In a forcible sodomy and indecent liberties with a child case, the panel twice fell below quorum. After the third voir dire, the military judge denied both sides the right to exercise peremptory challenges. The defense implied that it desired to exercise the challenge and the MJ replied, "*I don't want to hear anymore about it. I ruled.*" The exercise of a peremptory challenge is a statutory right. Deprivation of that right carries a presumption of prejudice, absent other evidence in the record, requiring automatic reversal.

2. ***No conditional peremptory challenges***. *United States v. Newson*, 29 M.J. 17 (C.M.A. 1989). It was improper for judge to allow trial counsel to "withdraw" peremptory challenge after defense counsel reduced enlisted membership below one-third quorum. *But See United States v. Owens*, No. 200100297, 2005 CCA LEXIS 182 (N-M. Ct. Crim. App. June 17, 2005) (unpub.). Government exercised its peremptory challenge (PC), defense exercised its PC, and the MJ then asked defense if they had any objection to the government's PC. Defense objected but prior to the MJ's ruling the government withdrew its PC and then the MJ allowed the government to PC a different member to which procedure the defense objected. While "ordinarily" the government must exercise its PC prior to the defense and the MJ cannot alter this procedure "without a sound basis," the N-MCCA reasoned that a sound basis existed because of the defense's untimely objection which if timely made would have allowed the government to exercise its PC prior to the defense. In the alternative, even if the MJ erred no prejudice accrued to the accused particularly where the member, who the government tried to PC with defense objection, ultimately sat on the case.

3. ***If additional members are detailed (busted quorum).*** If the exercise of a peremptory reduces court below the minimum required, the parties must use or waive any remaining peremptory challenge against the remaining members of the court *before* additional members are detailed to the court. *United States v. Owens*, No. 200100297, 2005 CCA LEXIS 182 (N-M. Ct. Crim. App. June 17, 2005) (unpub.). Government exercised its peremptory challenge (PC), defense exercised its PC, and the MJ then asked defense if they had any objection to the government's PC. Defense objected but prior to the MJ's ruling the government withdrew its PC and then the MJ allowed the government to PC a different member to which procedure the defense objected. While "ordinarily" the government must exercise its PC prior to the defense and the MJ cannot alter this procedure "without a sound basis," N-MCCA reasoned that a sound basis existed because of the defense's untimely objection which if timely made would have allowed the government to exercise its PC prior to the defense. In the alternative, even if the MJ erred no prejudice accrued to the accused particularly where the member, who the government tried to PC with defense objection, ultimately sat on the case.

X. DISCRIMINATORY PEREMPTORY CHALLENGES – *BATSON*

A. **IN GENERAL**. *Batson v. Kentucky* prohibits the use of unlawful discrimination in the exercise of a peremptory challenge. The *Batson* case expressly prohibited race-based challenges. Subsequent Supreme Court cases have extended *Batson* to forbid peremptory challenges based on race or gender.

1. ***The origin***. *Batson v. Kentucky,* 476 U.S. 79 (1986). The Supreme Court held that a party alleging that an opponent was exercising peremptory challenges for the purpose of obtaining a racially-biased jury had to make a *prima facie* showing of such intent before the party exercising the challenges was required to explain the reasons for the strikes (prosecutor had used peremptory challenges to strike all four of the African-Americans from the venire, with the result that Batson, an African-American, was tried by an all-white jury). The three-part *Batson* test requires: (1) a prima facie case of discrimination, (2) then the provision of a race neutral reason, and (3) proof of purposeful discrimination.

2. ***Military application***. The Supreme Court has never specifically applied *Batson* to the military. However, military caselaw has applied *Batson* to peremptory challenges through the Fifth Amendment. Military courts have, in some instances, made *Batson* even more protective of a member's right to serve. Under *Batson*, counsel cannot exercise a peremptory challenge based on race or gender.

a) *United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988) (equal protection right to be tried by a jury from which no racial group has been excluded is part of due process and applies to courts-martial). Court in *Santiago* recognized that "in our American society, the Armed Services have been a leader in eradicating racial discrimination," and held that government's use of only peremptory challenge against minority court member raised *prima facie* showing of discrimination.

b) In the military, a trial counsel addressing a *Batson* challenge cannot proffer a reason that is "unreasonable, implausible, or that otherwise makes no sense." *See United States v. Tulloch*, 47 M.J. 283, 287 (C.A.A.F. 1997). By contrast, civilian courts only need a reason that is not "inherently discriminatory," even if explanation is not "plausible." *See Rice v. Collins*, 546 U.S. 333 (2006).

c) *United States v. Moore,* 28 M.J. 366 (C.M.A. 1989) adopted a per se rule that "every peremptory challenge by the Government of a member of an accused's race, upon objection, must be explained by trial counsel." This is further expanded by *Powers* below.

3. ***Making a* Batson *challenge***. If either side exercises a challenge against a panel member who is a member of a minority group, then the opposing side may object and require a race-neutral reason for the challenge.

4. **Batson *applies to defense***. *United States v. Witham*, 47 M.J. 297 (C.A.A.F. 1997) (holding *Batson* applicable to defense in courts-martial); *Georgia v. McCollum*, 505 U.S. 42(1992) (holding that the Constitution prohibits a civilian criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges). If the government can show a prima facie case, the burden shifts to the defense to provide a race neutral reason for their peremptory challenge.

B. **PARAMETERS OF RACE-BASED CHALLENGES**.

1. ***Accused and member need not be of the same racial group***. *Powers v. Ohio*, 499 U.S. 400 (1991). "The Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely on their race. . . ."

a) Court's holding removes the requirement from *Batson* that the accused and challenged juror be of the same race.

b) Court's ruling in *Powers* is very broad. Focuses on both the rights of the accused as well as the challenged member.

c) Prosecutors must now be prepared to articulate a race-neutral reason for all peremptory challenges, regardless of the races of the accused or member.

2. ***Race defined***. *Hernandez v. New York*, 500 U.S. 352 (1991) (extending *Batson* to potential jurors who were bilingual Latinos, with the Court viewing Latinos as a cognizable race for *Batson* purposes and referring to Latinos as both a race and as an ethnicity). *See also United States v. Martinez-Salazar*, 528 U.S. 304 (2000) ("a defendant may not exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's gender, ethnic origin, or race"). To date the Supreme Court has applied *Batson* only to classifications which have received heightened scrutiny; race, gender, and ethnic origin (thus far limited to Latinos). *But see Rico v. Leftridge-Byrd*, 340 F.3d 178 (3d Cir. 2003) (*Batson* prohibits the exercise of peremptory challenges based on ethnic origin of Italian-Americans).

C. **PARAMETERS OF GENDER-BASED CHALLENGES**. As discussed above, *Batson* applies to gender-based challenges. *J.E.B. v. Alabama*, 511 U.S. 127 (1994). *JEB* held that the Equal Protection Clause prohibits litigants from striking potential jurors solely on the basis of gender. Ruling extends the concept that private litigants and criminal defense attorneys are "state actors" during voir dire for purposes of Equal Protection analysis. *See also United States v. Omoruyi*, 7 F.3d 880 (9th Cir. 1993) (prosecutor claimed that he used peremptory challenges against two single females because he thought they "would be attracted to the defendant" because of his good looks; court finds this was gender-based discrimination).

1. ***Applies to military***. *United States v. Witham*, 47 M.J. 297 (C.A.A.F. 1997) (gender, like race, is an impermissible basis for the exercise of a peremptory challenge by either the prosecution or the military accused).

2. ***Trial counsel must provide gender-neutral reason for striking member***. *United States v. Ruiz*, 49 M.J. 340 (C.A.A.F. 1998) (the per se rule developed in *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989), is applicable to Government peremptory challenges based on gender whether a MJ requests a gender neutral reason or not).

3. ***Generally, additional voir dire is unnecessary***. *United States v. Bradley*, 47 M.J. 715 (A.F. Ct. Crim. App. 1997). Accused charged with rape and assault. Trial counsel's

exercise of peremptory challenge against one of two remaining members based on fact that member challenged was investigating officer on a case involving the legal office was gender-neutral and valid under *Batson*, and did not require military judge to grant defense request for additional voir dire to explore the basis of the trial counsel's supporting reason. Neither *Witham* nor *Tulloch* elevate a peremptory challenge to the level of a causal challenge (party making peremptory challenge need only provide a race neutral explanation in response to a *Batson* challenge).

4. ***Occupation-based peremptory challenges (subterfuge for gender?)***. *United States v. Chaney*, 53 M.J. 383 (C.A.A.F. 2000). The government used its peremptory challenge against the sole female member. After a defense objection, TC explained that member was a nurse. Military judge interjected that in his experience TCs "rightly or wrongly" felt members of medical profession were sympathetic to accuseds, but that it was not a gender issue. Defense did not object to this contention or request further explanation from TC. CAAF upheld the military judge's ruling permitting the peremptory challenge, noting that the military judge's determination is given great deference. CAAF noted it would have been preferable for the MJ to require a more detailed clarification by TC, but here DC failed to show that the TC's occupation-based peremptory challenge was unreasonable, implausible or made no sense.

D. **PARAMETERS OF RACE- AND GENDER-NEUTRAL REASONS**. The Supreme Court has held that the "genuineness of the motive" rather than "the reasonableness of the asserted nonracial motive" is what is important. *Purkett v. Elem*, 514 U.S. 765 (1995) (Missouri prosecutor struck two African-American men from panel stating "I don't like the way they looked," and they "look suspicious to me;" this is a legitimate hunch, and the *Batson* process does not demand an explanation that is "persuasive or even plausible;" only facial validity, as determined by trial judge, is required). *See Rice v. Collins*, 546 U.S. 333 (2006). The prosecutor struck a minority female because (1) she had rolled her eyes in response to a question from the court; (2) she was young and might be too tolerant of a drug crime, and (3) she was single and lacked ties to the community. The trial judge did not observe the eye roll but allowed the challenge based on the second and third grounds. The trial judge noted that the government also used a PC against a white male juror because of his youth. The Supreme Court, citing *Purkett v. Elem*, 514 U.S. 765 (1995), stated that a race neutral explanation "does not demand an explanation that is persuasive, or even plausible, so long as the reason is not inherently discriminatory, it suffices." *See also Hernandez v. New York*, 500 U.S. 352 (1991) ("[A]n explanation based on something other than the race of the juror. . . Unless a discriminatory intent is inherent in the prosecutor's explanation the reason offered will suffice.").

1. ***Different standard for trial counsel***. Peremptory challenges are used to ensure qualified members are selected, but, in the military, the convening authority has already chosen the "best qualified" after applying Article 25, UCMJ. Therefore, under *Batson, Moore*, and *Witham*, trial counsel may not strike a person on a claim that is unreasonable, implausible, or otherwise nonsensical. *United States v. Tulloch*, 47 M.J. 283 (C.A.A.F. 1997). *Tulloch* is a departure from Supreme Court precedent, which requires only that counsel's reason be "genuine." *Purkett v. Elem*, 514 U.S. 765 (1995).

a) *Tulloch:* Accused was African-American. Trial counsel moved to strike African-American panel member based on "demeanor," claiming member appeared to be "blinking a lot" and "uncomfortable." CAAF held this was insufficient to "articulate any connection" between the purported demeanor and what it indicated about the member's "ability to faithfully execute his duties on a court-martial." Trial counsel's peremptories are assessed under a "different standard."

b) Trial counsel must be able to defend the peremptory challenge as non-pretext.

c) Counsel cannot simply affirm his good faith or deny bad faith in the use of the peremptory.

d) Counsel must articulate a connection between the observed behavior, etc., and a colorable basis for challenge (e.g., "member's answers to my questions suggested to me she was not comfortable judging a case based on circumstantial evidence alone," etc.).

e) Military judge should make findings of fact when the underlying factual predicate for a peremptory challenge is disputed, particularly where the dispute involves in-court observations of the member. The military judge should make "findings of fact that would establish a reasonable, plausible race-neutral explanation for a peremptory challenge by the Government of a member chosen as 'best qualified' by a senior military commander." *Tulloch*, 47 M.J. 289.

2. ***Fact-specific inquiry and inconsistent results***.

a) *United States v. Robinson*, 53 M.J. 749 (A. Ct. Crim. App. 2000). Trial counsel's proffered reason for striking minority member (that he was new to the unit and that his commander was also a panel member) was unreasonable. Counsel did not articulate any connection between the stated basis for challenge and the member's ability to faithfully execute the duties of a court-martial member. Sentence set aside.

b) *United States v. Shelby*, 26 M.J. 921 (N.M.C.M.R. 1988). Trial counsel peremptorily challenged junior African-American officer in sodomy trial of African-American accused. Inexperience of junior member was accepted racially-neutral explanation, even though other junior enlisted members remained.

c) *United States v. Curtis*, 28 M.J. 1074 (N.M.C.M.R. 1989), *rev'd on other grounds*, 33 M.J. 101 (C.M.A. 1991). Trial counsel challenged African-American member who stated that serving on court-martial in a capital case would be a good "learning experience." Upheld as a racially-neutral explanation.

d) *United States v. Woods*, 39 M.J. 1074 (A.C.M.R. 1994). TC says, "We just did not get the feeling that SSG Perez was paying attention and would be a good member for this panel. It had nothing to do with the fact that his last name was Perez. I mean there is no drug stereotype here." Court holds TC's articulated basis (inattentiveness) was not pretext for intentional discrimination.

3. ***The numbers game and protecting quorum***. *United States v. Hurn*, 55 M.J. 446 (C.A.A.F. 2001). The DC objected after the TC exercised the government's peremptory challenge against panel's only non-Caucasian officer. TC's basis "was to protect the panel for quorum." CAAF held the reason proffered did not satisfy the underlying purpose of *Batson*, *Moore*, and *Tulloch*, which is to protect the participants in judicial proceedings from racial discrimination.

a) Case remanded for *DuBay* hearing based on TC's affidavit, filed two and a half years after trial, which set forth other reasons for challenging the member in question.

b) Post-*DuBay: United States v. Hurn*, 58 M.J. 199 (C.A.A.F. 2003). In *DuBay* hearing, TC testified he also removed the member because the member had expressed concern about his "pressing workload." MJ determined challenge was race-neutral. CAAF affirmed, finding no clear error: "The military judge's determination that the trial counsel's peremptory challenge was race-neutral is entitled to great deference and will not be overturned absent clear error" (internal

quotations and citations omitted). *But see Greene*, below (holding where part of the reason for a challenge is not race-neutral, the entire reason must fail).

4. ***Valid logistical reasons for using peremptory***. *United States v. Clemente*, 46 M.J. 715 (A.F. Ct. Crim. App. 1997). Trial counsel's use of peremptory challenge to remove only Filipino member of panel because member was scheduled to go on leave during the trial was race neutral. Defense counsel acquiesced in objection by stating that "it would accept it and was ready to go ahead and continue."

E. **MIXED MOTIVE CHALLENGES ARE IMPROPER**. *United States v. Greene*, 36 M.J. 274 (C.M.A. 1993). Two reasons for exercise of peremptory challenge: one reason was facially valid and race-neutral; the second amounted to a "gross racial stereotype" and was clearly not race neutral. Where part of the reason for a challenge is not race neutral, the entire reason must fail. Findings and sentence set aside. *See also Georgia v. McCollum*, 505 U.S. 42, 54 (1992) (civilian defendant's use of peremptory challenges based on racial consideration was prohibited).

F. **BEYOND RACE/ETHNIC GROUP AND GENDER, *BATSON* IS GENERALLY INAPPLICABLE.**

1. ***Marital status***. Peremptory challenges based on marital status do not violate *Batson*. *United States v. Nichols*, 937 F.2d 1257 (7th Cir. 1991).

2. ***Age***. Peremptory challenges based on age do not violate *Batson*. *Bridges v. State*, 695 A.2d 609 (Md. Ct. Spec. App. 1997).

3. ***Religion***. The Supreme Court has not ruled on whether *Batson* extends to religious-based peremptory challenges.

a) *United States v. Williams*, 44 M.J. 482 (C.A.A.F. 1996). Trial counsel peremptorily challenged a member who was the senior African-American officer after he indicated that he was a member of the Masons. The accused was also a Mason. No abuse of discretion for the MJ to grant the peremptory challenge where the TC indicated the race neutral reason was that the member and accused were members of the same fraternal organization. While recognizing that the Supreme Court has not extended *Batson* to religion, the court noted that the record in this case was "devoid of any indication of [the member's] religion." CAAF cites *Casarez v. Texas*, 913 S.W.2d 468, 496 (Tex. Crim. App. 1994) (on rehearing), and *State v. Davis*, 504 N.W.2d 767 (Minn. 1993), *cert. denied*, 511 U.S. 1115 (1994), as authority that *Batson* does not apply to religion.

b) Two federal circuits have decided the status of religion-based *Batson* strikes on the merits.

(1) *United States v. DeJesus*, 347 F.3d 500 (3d Cir. 2003). Court drew a distinction between a strike motivated by religious beliefs and one motivated by religious affiliation. The court found strikes motivated by religious beliefs (i.e. heightened religious activity) were permitted; no occasion to rule on issue of religious affiliation. The Seventh Circuit makes the same distinction in dicta, but did not resolve the issue because the court found no plain error. *United States v. Stafford*, 136 F.3d 1109 (7th Cir. 1998).

(2) *United States v. Brown*, 352 F.3d 654 (2d Cir. 2003). *Batson* applies to challenges based on religious affiliation. "Thus, if a prosecutor, when challenged, said that he had stricken a juror because she was Muslim, or Catholic, or evangelical, upholding such a strike would be error. Moreover, such an error would be plain." Strikes at issue involved heightened religious activity, so did not violate *Batson*.

c) ***One circuit has not addressed the issue***. *United States v. Girouard*, 521 F.3d 110, 113 (1st Cir. 2008) ("We have never held that *Batson* applies to cases of religious discrimination in jury selection. Even assuming, arguendo, that *Batson* does apply to claims of religious discrimination, we find no clear error in the district court's action. It is therefore unnecessary to resolve the open question of whether *Batson* does indeed apply to religious discrimination.").

d) ***States are split on whether* Batson *extends to religion***. *Compare Thorson v. State*, 721 So. 2d 590, 594 (Miss. 1998) (extending *Batson* to peremptory strikes based on religion); *State v. Purcell*, 18 P.3d 113, 120 (Ariz. Ct. App. 2001) (concluding that *Batson* extends to peremptory challenges based on religious affiliation); *with State v. Davis*, 504 N.W.2d 767, 771 (Minn. 1993) (rejecting argument that Batson includes peremptory strikes based on religious affiliation); *State v. Gowdy*, 727 N.E.2d 579, 586 (Ohio 2000) (permitting peremptory challenge based on juror wearing a cross); *Casarez v. State*, 913 S.W.2d 468, 496 (Tex. Crim. App. 1994) (en banc) (holding that state interests in peremptory challenges warrant excluding jurors based on religious affiliation); *James v. Commonwealth*, 442 S.E.2d 396, 398 (Va. 1994) (same).

4. ***Membership in organization***. *United States v. Williams*, 44 M.J. 482 (C.A.A.F. 1996). Accused and senior officer member of panel were members of the Masons. Peremptory challenge based on "fraternal affiliation" is race-neutral.

G. **RECENT APPLICATION OF *BATSON***. *Snyder v. Louisiana*, 552 U.S. 472 (2008). A civilian defendant was convicted of first-degree murder and sentenced to death. On appeal, defense argued the trial court erred by allowing the prosecution to use a peremptory challenge against an African-American juror despite a *Batson* challenge. In a 7-2 decision, the Court ruled the trial judge committed "plain error" by denying the *Batson* challenge.

1. Before jury selection, 85 prospective jurors were questioned during normal voir dire. Of those 85, only 36 survived challenges for cause; five of those remaining jurors were black. Under Louisiana practice, each side had 12 peremptory challenges. "[A]ll 5 of the prospective black jurors were eliminated by the prosecution through the use of peremptory strikes." At issue on appeal, the defense lodged a *Batson* challenge against the prosecution's peremptory challenge of one of the five black prospective jurors. Pursuant to *Batson* and its progeny, the prosecution gave two race-neutral reasons for using a peremptory. First, the prospective juror "looked very nervous" during questioning. Second, the prospective juror was a student teacher and said during voir dire that he was concerned jury duty might keep him from completing his requirements for the semester. Based on this second challenge, the prosecution speculated, "[H]e might, to go home quickly, come back with guilty of a lesser verdict so there wouldn't be a penalty phase."[5]

2. The Court looked at the other 50 members of the venire who said that jury duty would be an "extreme hardship." Of those 50, there were 2 white members who had serious scheduling conflicts. First, Mr. Laws was a general contractor; he said that he had "two houses that are nearing completion" so if he served on the jury, those people would not be able to move in to their homes. Mr. Laws further said that he wife recently had a hysterectomy so he was taking care of his children. He added, "[S]o between the two things, it's kind of bad timing for me." Second, Mr. Donnes approached the court with an "important work commitment" later that week; though not developed on the record, it was

[5] Under Louisiana law in effect at the time, a capital jury would deliberate on findings and then only deliberate on sentence if the defendant was found guilty of an offense for which the death penalty was authorized. In this case, if the jury had found the defendant guilty of unpremeditated murder, the jurors would have been excused and the judge would decide the sentence.

important enough that Mr. Donnes re-raised the conflict on the second day of jury selection.

3. The Court focused on the third *Batson* step, concluding that the prosecution's "pretextual explanation naturally gives rise to an inference of discriminatory intent." During jury selection, the judge's law clerk called the dean at the prospective juror's university, who said he could complete his student teaching observation even if he served on the jury. The Court concluded that the student teaching obligations were not a valid reason for exercising a peremptory, particularly in light of the other conflicts offered by two white jurors who ultimately sat as members.

H. **PROCEDURAL ISSUES**.

1. ***Timing***. Defense should object to government's peremptory challenge immediately after it has been stated by the government. *See United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999). The accused attacked military practice because it unnecessarily permits the Government a peremptory challenge even when it has not been denied a challenge for cause, contrary to *Ford v. Georgia*, 498 U.S. 411 (1991), which states: "The apparent reason for the one peremptory challenge procedure is to remove any lingering doubt about a panel member's fairness . . . ." In the military, accused asserted that "the [unrestricted] peremptory challenge becomes a device subject to abuse." The CAAF noted that Article 41(b) provides accused and the trial counsel one peremptory challenge. Neither *Ford*, nor any other case invalidates this judgment of Congress and the President.

2. ***Privacy***. Military judge should use appropriate trial procedures to best protect privacy interest of challenged member.

3. ***Type of proceedings to substantiate reasons***.

a) Argument by defense is typically enough to complete the record. But see *United States v. Downing*, 56 M.J. 419 (C.A.A.F. 2002). Appellant failed to meet burden of establishing that a court-martial panel member should have been dismissed for cause (bias), so it did not matter that the trial judge may have applied the wrong standard for challenge.

b) Affidavit, adversary hearing, and argument allowed, but evidentiary hearing denied. *United States v. Garrison*, 849 F.2d 103 (4th Cir.), *cert. denied*, 109 S. Ct. 566 (1988). *See also Ruiz* (above).

4. ***Findings on record***.

a) Judge should enter formal findings concerning sufficiency of proffered reasons. MJ should make findings of fact when underlying factual predicate for a peremptory challenge is in dispute. *See Tulloch*, above and *United States v. Perez*, 35 F.3d 632, 636 (1st Cir. 1994).

b) Military judge not required to raise the issue sua sponte, question member, or recall member for individual voir dire. *See Clemente* and *Bradley*, above.

5. ***Waiver***. To preserve the *Batson* issue, defense counsel should make timely *Batson* challenge as well as object the race- and gender-neutral reasons offered by trial counsel. Failure to object at both stages may constitute waiver.

a) *United States v. Galarza*, No. 9800075 (A. Ct. Crim. App. May 31, 2000) (unpub.) (where defense made *Batson* objection to TC's peremptory challenge of a female panel member, and TC stated member showed "indecisiveness" during voir dire, DC's failure to object or to dispute TC's proffered gender-neutral explanation for the peremptory challenge waived issue on appeal).

b) *United States v. Irvin*, 2005 CCA LEXIS 99 (A.F. Ct. Crim. App. Mar. 24, 2005) (unpub.). Trial counsel peremptorily challenged only African-American panel member in a contested rape court-martial. MJ asked the TC for a race-neutral *Batson* reason, *sua sponte*, for the challenge. TC responded that the panel member might have preconceived ideas or positions from a rape court-martial she had previously sat on the week prior and she had previously heard testimony from one of the investigators. MJ accepted this reason and defense did not object to the TC's reason or the MJ's ruling. AFCCA held the defense counsel's failure to object waived the issue and further that the MJ did not abuse his discretion in finding no purposeful discrimination by the TC.

6. ***Making the record of a* Batson *challenge – the outer limits***. *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999). Military judge erred in not requiring counsel to articulate a "race-neutral" explanation for the Government's use of its peremptory challenge against one of only two African-American panel members. Trial counsel did, however, provide a statement at the next court session, stating a race-neutral explanation for the challenge (claiming the member's responses concerning the death penalty were equivocal). Trial counsel's statement provided a sufficiently race-neutral explanation for the challenge, and the court found that public confidence in the military justice system had not been undermined. The military judge is required to make a determination as to whether trial counsel's explanation was credible or pretextual and, optimally, an express ruling on this question is preferred. However, here the military judge clearly stated his satisfaction with trial counsel's disavowal of any racist intent in making the challenge.

a) ***Avoid the issue***. Government should use peremptory challenge sparingly and only when a challenge for cause has not been granted. The requirements of *Batson* will likely be satisfied if a facially-valid challenge for cause was denied before trial counsel exercised peremptory challenge:

b) *United States v. Allen*, 59 M.J. 515 (N-M Ct. Crim. App. 2003). Government challenged officer panel member for cause "based on the fact he had previously been a criminal accused in a military justice case and, therefore, would likely hold the Government to a higher standard of proof than required by law." Military judge denied challenge for cause; government exercised its peremptory against the same member and defense made *Batson* challenge. Government gave same reason for peremptory as for challenge for cause. Court held the TC articulated a reasonable, race neutral and plausible basis for challenge.

XI. CONCLUSION

XII. APPENDIX - VOIR DIRE AND CHALLENGES SUMMARY

MAJOR POINT	*SUMMARY*
MILITARY JUDGE'S CONTROL OF VOIR DIRE	• RCM 912 grants a MJ broad authority to control the conduct of voir dire. A MJ may deny a request for individual voir dire, may limit the amount of counsel who participate in voir dire, and restrict the type of questions asked. A MJ, however, should be cautious in placing extreme limits on counsel. While the MJ may foreclose or limit counsel during voir dire, the appellate courts will review whether the MJ abused his/her discretion.
CAUSAL CHALLENGES: STANDARDS FOR EVALUATION	• MJs are to liberally grant challenges for cause (*Moyar* mandate) for the defense only (*James*). • A causal challenge based on actual bias is one of credibility and is reviewed for an abuse of discretion. MJs have significant latitude in making this subjective determination because of the opportunity to observe the demeanor of the court member. Great deference is given to MJ determination. • The bases for causal challenges include inelastic attitude on sentencing, an unfavorable inclination toward a particular offense, being a victim of a offense similar to the one being prosecuted, rating chain challenges, knowledge of the case, and/or expertise in the issues to be litigated. A member is disqualified only after a showing that the basis for a challenge will prohibit the performance of duties as a member.
THE IMPLIED BIAS DOCTRINE	• RCM 912(f)(1)(N) also embodies the implied bias doctrine. A MJ must determine whether a member should be disqualified for implied bias based on an objective standard. The question to ask is "would a reasonable member of the public have substantial doubt as to the legality, fairness, and impartiality of the proceedings?" Implied bias occurs when the member's position, experience, or situation indicates that he/she should not sit, even though the member disavows any adverse impact on their ability to perform member duties. • Impact of *Wiesen* – grant challenge if greater that 2/3 "work" for senior member.
PROCEDURAL ISSUES ASSOCIATED WITH CHALLENGES	• Article 41 provides the procedure for challenges. The underlying intent of Article 41 is to ensure that each party gets one and only one peremptory challenge, and that causal challenges are liberally granted but for defense only. • When a causal challenge reduces a court below Article 16, as opposed to Article 25, quorum, the parties must exercise all causal challenges then apparent. Peremptory challenges will not be exercised until the CA details additional members to the court and then after causal challenges. • When a peremptory challenge reduces a court below Article 16 quorum, the parties must use or waive any remaining peremptory challenges against remaining members before additional members are detailed to the court. When additional members are detailed, causal challenges are done and the parties get peremptory challenges against the new members.
***BATSON* AND PEREMPTORY CHALLENGES**	• *Batson v. Kentucky* prohibits the use of unlawful discrimination in the exercise of a peremptory challenge. Military case law applies *Batson* to courts-martial. A MJ, upon receiving a *Batson* objection, must ask the party making the peremptory challenge to provide a supporting race and/or gender neutral reason, and then determine whether that reason is in fact race and/or gender neutral. A *trial counsel* may not base a peremptory challenge on a reason that is implausible, unreasonable, or otherwise makes no sense. *Tulloch*. • *Batson* is applicable to the defense. See *Witham*. • The MJ does not have a *sua sponte* duty to raise a *Batson* challenge. In addition, an MJ is not required to conduct individual voir dire in a peremptory challenge situation. • The Supreme Court has not ruled on whether *Batson* prohibits peremptory challenges based on religion. Two federal circuits have held that it does. Civilian cases support that *Batson* does not prohibit peremptory challenges based on age. There is no military case on age.

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TAB U

INSTRUCTIONS

Table of Contents

I. INTRODUCTION 1

II. SOURCES OF INSTRUCTIONS 1

III. PRELIMINARY INSTRUCTIONS 1

IV. FINDINGS INSTRUCTIONS 2

V. SENTENCING INSTRUCTIONS 7

VI. CONCLUSION 9

LTC ERIC CARPENTER
JANUARY 2011

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INSTRUCTIONS

I. INTRODUCTION

A. According to Black's Law Dictionary, jury instructions are "direction[s] given by the judge to the jury concerning the law of the case; a statement made by the judge to the jury informing them of the law applicable to the case in general or some aspect of it; an exposition or the rules or principles of law applicable to the case or some branch or phase of it, which the jury *are bound to accept and apply*." BLACK'S LAW DICTIONARY 856 (6th ed.1991).

B. There are three essential presumptions underlying the use of instructions at trial.

1. The panel or jury **listens to** the instructions.

2. The panel or jury **understands** the instructions. *See United States v. Quintanilla*, 56 M.J. 37, 83 (2001).

3. The panel or jury **follows** the instructions. *See United States v. Quintanilla*, 56 M.J. 37, 83 (2001).

C. Colonel R. Peter Masterton, "Instructions: A Primer for Counsel" Army Lawyer October 2007 85.

1. Carolyn G. Robbins, "Jury Instructions: Plainer is Better," Trial April 1996 32.

II. SOURCES OF INSTRUCTIONS

A. Rule for Courts-Martial (R.C.M.) 920 (findings instructions) and R.C.M. 1005 (sentencing instructions).

B. Military Rules of Evidence (Mil. R. Evid.). Mil. R. Evid. 105.

C. Case Law. *See, e.g.*, court-approved model interracial identification instruction. *United States v. Thompson*, 31 M.J. 125 (C.M.A. 1990).

D. Counsel. Military judge is required to give requested instruction if: (1) issue is reasonably raised, (2) not adequately covered elsewhere in anticipated instructions, and (3) proposed instruction accurately states the law concerning facts in the case. *United States v. Briggs*, 42 M.J. 367 (1995). *See, e.g., United States v. Terry*, 64 M.J. 295, 299 (2007) (The military judge will generally instruct on matters that are "in issue." "A matter is 'in issue' when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they chose." R.C.M. 920(e)).

E. DA Pam 27-9, Military Judges' Benchbook (15 September 2002).

III. PRELIMINARY INSTRUCTIONS

A. Military judge should give preliminary instructions as it sets the stage for what is about to happen.

B. Mixed plea cases. The military judge should ordinarily defer informing the members of the offenses to which the accused pled guilty until after the findings on the remaining contested offenses have been entered. R.C.M. 913(a).

1. <u>Exception</u>: when the accused requests otherwise. *See* discussion portion of R.C.M. 913(a).

2. Exception: when the accused's plea was to lesser-included-offense and the prosecution intends to prove the greater offense. *See* discussion portion of R.C.M. 913(a).

IV. FINDINGS INSTRUCTIONS

A. Required Instructions. R.C.M. 920(e).

1. Elements of the offense(s). Benchbook, ch. 3. If the military judge entirely omits an element, the error is *per se* prejudicial. *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988). However, if the judge adequately identifies the element but gives an erroneous instruction on it, that error may be tested for prejudice. *United States v. Cowan*, 42 M.J. 475 (1995); s*ee also United States v. Glover*, 50 M.J 476 (1999). In *Glover*, the accused was convicted of wrongful use of an inhalant under Article 134. The military judge instructed the members that one of the elements was that the use of the inhalant had to be wrongful; however, he failed to clarify further or define what the term "wrongful" meant. Although the CAAF found error the court held that no element was left out; the defense did not object at trial and there is nothing in the Benchbook that provides for a more detailed instruction on the term "wrongful" in this context. It was not prejudicial error because there was no evidence that the accused may have accidentally or unintentionally inhaled the can of "dust off."

2. Mere failure to object to the instructions given by the military judge does not waive appellate review of the instructions given. Affirmative waiver on the record is required. *United States v. Wolford*, 62 M.J. 418 (2006). In *Wolford*, the CAAF concluded that the military judge instructed the members correctly on the legal definition of "child pornography" and also held that the images alone may constitute legally sufficient evidence as to whether an actual child was used to produce child pornography.

3. The military judge must be careful when instructing the members on the permissive inference instruction for wrongful use of a controlled substance. A confusing instruction could create a mandatory presumption vice a permissive inference of wrongfulness rendering such an instruction unconstitutional. *United States v. Brewer*, 61 M.J. 425 (2005).

4. The panel returns a general verdict and does not specify how the law applies to the facts, nor does the panel explain its reasons for its decision to convict or acquit. A factfinder may enter a general verdict of guilt even when the charge could have been committed by two or more means, as long as the evidence supports at least one of those means beyond a reasonable doubt. *United States v. Brown*, 65 M.J. 356 (C.A.A.F. 2007) and *United States v. Hardy*, 46 M.J. 67, 73 (C.A.A.F. 1997).

5. Elements of any lesser-included-offenses. The military judge has a *sua sponte* duty to instruct on all lesser-included-offenses **reasonably raised** by the evidence. *United States v. Davis*, 53 M.J. 202 (2000); *United States v Griffin*, 50 M.J. 480 (1999); and, *United States v. Wells*, 52 M.J. 126 (1999).

   a) A lesser-included-offense is reasonably raised when the greater offense requires members to find a disputed factual element not required for conviction of the lesser included offense. *United States v. Miergrimando*, 66 M.J.34 (C.A.A.F. 2008), (premediation is the disputed element between premeditated murder and attempted voluntary manslaughter.) *United States v. Arviso*, 32 M.J. 616 (A.C.M.R. 1991).

b) Any doubt must be resolved in favor of the accused. *United States v. Rodwell*, 20 M.J. 264 (C.M.A. 1985).

(1) The defense may affirmatively waive instruction on lesser included offenses. *United States v. Strachan*, 35 M.J. 362 (C.M.A. 1992). *But cf.United States v. Toy*, 60 M.J. 598 (N-M. Ct. Crim. App. 2004) (holding that a military judge can instruct on LIOs over defense objection if the LIO is reasonably supported by the evidence).

(2) The military judge may instruct on lesser- included-offenses in order of severity of punishment or severity of the elements of the offenses. *United States v. Emmons*, 31 M.J. 108 (C.M.A. 1990).

c) A service court may, after disapproving a conviction for an offense due to an error, approve a conviction for the lesser included offense whose instruction was not considered, and instructed upon at the trial and in fact had been waived by both parties. The court's authority comes from Article 66(c), UCMJ which allows the court to consider the entire record. *United States v. Upham*, 66 M.J. 83 (C.A.A.F. 2008).

6. Time-barred lesser-included offenses. In *United States v. Thompson*, 59 M.J. 432 (2004), the CAAF held that where some LIOs may be time-barred by the statute of limitations, the military judge has an affirmative duty to personally discuss the issue with the accused, and if not waived by the accused, to modify the instructions to include only the period of time for those LIOs that are not time-barred by the statute of limitations.

7. Special defenses. Benchbook, ch. 5.

a) Special defenses are those defenses that, while not denying that the accused committed the acts charged, seek to deny criminal responsibility for those acts.

b) The military judge has a *sua sponte* duty to instruct on special defenses reasonably raised by the evidence. *United States v. Gillenwater*, 43 M.J. 10 (CAAF 1995) (evidence was sufficient to support mistake of fact defense in wrongful appropriation case where appellant's supervisor testified he may have given appellant permission to take Government items home for personal use); *United States v. Jones*, 7 M.J. 441 (C.M.A. 1979) (instruction that defense of alibi "may or may not" have been raised was improper; military judge must determine if defense has been raised and instruct accordingly).

c) Defense counsel may affirmative waive an affirmative defense instruction. *United States v. Gutierrez*, 64 M.J. 374 (CAAF 2007)

d) Special defenses include:

(1) Self-defense and defense of others. Benchbook, paras. 5-2 and 5-3. *See United States v. Dearing*, 63 M.J. 478 (2006). Mutual combatant can regain the right to self-defense if the other side escalates the level of conflict or if the aggressor is unable to withdraw in good faith. *United States v. Lewis*, 65 M.J. 85 (2007)

(2) Accident. Benchbook, para. 5-4. *See United States v. Brown*, 63 M.J. 735 (Army Ct. Crim. App. 2006)

(3) Duress. Benchbook, para. 5-5. *See United States v. Vasquez*, 48 M.J. 426 (1998)

(4) Entrapment. Benchbook, para. 5-6.

(5) Defense of property. Benchbook, para. 5-7.

(6) Obedience to orders. Benchbook, para. 5-8.

(7) Physical or financial inability. Benchbook, paras. 5-9 and 5-10.

(8) Mistake of fact or law, Benchbook, para. 5-11, and mistake of fact as to age in carnal knowledge cases. Benchbook, p. 444. *See United States v. Gutierrez*, 63 M.J. 568 (Army Ct. Crim. App. 2006), rev'd 64 M.J. 374 (2007). Military Judge is required to provide a mistake of fact defense regarding the victim's age for indecent act with a child offense if there is some evidence to raise the defense. *United States v. Acosta-Zapata*, 65 M.J. 811 (Army Ct. Crim. App. 2007)

(9) Voluntary intoxication. Benchbook, para. 5-12. Voluntary intoxication is a mandatory instruction when some evidence of intoxication raises a reasonable doubt about actual knowledge, specific intent, willfulness, or premediitaiton when they are elements of a charged offense. *United States v. Hensler*, 44 M.J. 184, 187 (C.A.A.F. 1996). To receive the instruction, some evidence must show that the intoxication was severe enough to have the effect of rendering the accused incapable of forming the necessary intent, not just evidence of mere intoxication. *United States v. Hearn*, 66 M.J. 770 (Army Ct. Crim. App. 2008). In *Hearn*, ACCA developed a three-prong test to determine whether some evidence of voluntary intoxication was raised at trial:

(a) The crime included a mental state;

(b) There is evidence of impairment due to the ingestion of alcohol or drugs;

(c) There is evidence that the impairment affected the accused's ability to form the requisite intent or mental state.

(10) Voluntary abandonment. Benchbook, para. 5-15.

(11) Parental discipline. Benchbook, para. 5-16.

(12) Evidence negating mens rea. Benchbook, para. 5-17.

(13) Self-help under a claim of right. Benchbook, para. 5-18.

(14) Lack of causation. Benchbook, para 5-19.

(15) Lack of mental responsibility. Benchbook, chapter 6.

e) Other defenses. The military judge ordinarily has no *sua sponte* duty to instruct on defenses which deny the accused's commission of the acts charged. *United States v. Stafford*, 22 M.J. 825 (N.M.C.M.R. 1986). These defenses include:

(1) Character. Benchbook, para. 5-14.

(2) Alibi. Benchbook, para. 5-13.

f) In determining whether to give a requested instruction on a defense, the judge may not weigh the credibility of the defense evidence. *United States v. Brooks*, 25 M.J. 175 (C.M.A. 1987).

8. Only matters properly before the court-martial may be considered.

9. Presumption of innocence, reasonable doubt, the burden of proof, and procedures to be used for voting. Benchbook, pages 8-154.

B. Evidentiary Instructions. Benchbook, ch. 7. The military judge ordinarily has no *sua sponte* duty to give these instructions. However, when the evidence relates to a central issue at trial, in some cases it may be plain error for the military judge *not* to give a sua sponte evidentiary instruction. *See United States v. Kasper*, 58 M.J. 314 (2003) (when the government introduced "human lie detector" testimony through an OSI agent, it was plain error for the judge not to give a *sua sponte* curative instruction, even though defense counsel did not request one, because the testimony involved a central issue at trial -- the appellant's credibility).

1. Principals. Benchbook, para. 7-1. If the evidence indicates that someone other than the accused committed the substantive criminal acts, the military judge should instruct on the theory of principals.

2. Joint offenders. Benchbook, para. 7-2. During a joint trial, the military judge should give this instruction to explain the relationship between offenders.

3. Circumstantial evidence. Benchbook, para 7-3. The military judge should give this instruction if the issue is raised; it is almost always appropriate.

4. Stipulations. Benchbook, para. 7-4. When a stipulation of fact or expected testimony is received, the military judge should give an instruction. Stipulations of fact may be read to the members and brought into deliberations. Stipulations of expected testimony are only read to the members and can not be taken back into deliberations.

5. Judicial notice. Benchbook, para. 7-6. The military judge shall give an instruction whenever he or she takes judicial notice of any matter. *See* Mil. R. Evid. 201 and 201A.

6. Credibility of witnesses. Benchbook, para. 7-7. This instruction should be given upon request or when appropriate and must be given when the credibility of a principal witness or witness for the prosecution has been assailed by the defense.

7. Cross-racial identification. Benchbook, para. 7-7-2.

a) This instruction should be given if cross-racial identification is in issue.

b) The mere fact that an eyewitness and the accused are of different races does not require instruction; cross-racial identification must be a "primary issue" in the case. *United States v. Thompson*, 31 M.J. 125 (C.M.A. 1990).

8. Character evidence. Benchbook, para 7-8. This instruction should be given when a pertinent character trait is in evidence.

9. Expert testimony. Benchbook, para. 7-9-1. This instruction should be given if any expert testimony has been received.

10. Accomplice testimony. Benchbook, para. 7-10. This instruction should be given whenever the evidence tends to indicate a witness was culpably involved in a crime with which the accused is charged.

11. Prior statement by a witness. Benchbook, para 7-11. This instruction should be given whenever a witness's prior statements have been introduced to impeach or bolster his or her credibility.

12. Failure to testify. Benchbook, para. 7-12.

    a) General rule. When the accused does not testify at trial, defense counsel may request that the members of the court be instructed to disregard that fact and not to draw any adverse inference from it. Defense counsel may request that the members not be so instructed. Defense counsel's election shall be binding upon the military judge except that the military judge may give the instruction when the instruction is necessary in the interests of justice. Mil. R. Evid. 301(g).

    b) Even if not requested, or waived, if the members raise an issue about the accused's silence, the military judge should give the instruction. *United States v. Jackson*, 6 M.J. 116 (C.M.A. 1979).

    c) In *United States v. Forbes*, 59 M.J. 934 (N-M. Ct. Crim. App. 2004) (*en banc*), the NMCCA held that the accused's election not to give the instruction is <u>binding</u> unless the MJ determines the instruction is necessary in the interests of justice. The NMCCA adopted a sliding-scale standard of review depending on how thoroughly the MJ identifies and balances the case-specific interests of justice in deciding to give the instruction over defense objection. The CAAF adopted the NMCCA's sliding-scale standard of review for this "defense friendly" rule. Because the MJ gave the instruction over defense objection the case was set aside. 61 M.J. 354 (2005). The military judge must either abide by the defense's election or make case-specific findings for why it is necessary to give instruction over defense objection.

    d) In *United States v. Andreozzi*, 60 M.J. 727 (Army Ct. Crim. App. 2004) the defense sought to introduce evidence through another witness that he [SSG Andreozzi] "wanted to preserve his marriage." Trial counsel objected on hearsay grounds and the military judge instructed the members that they could not consider this evidence because "trial counsel had not had an opportunity to cross-examine" the declarant. This instruction was clearly erroneous because it commented on the accused's right to remain silent; however, error was harmless beyond a reasonable doubt.

13. Uncharged misconduct. Benchbook, para. 7-13.

    a) The military judge is required to instruct on the limited use of uncharged misconduct "upon request." Mil. R. Evid. 105.

    b) Instruction may be required even absent defense request. *United States v. Barrow*, 42 M.J. 655 (A.F. Ct. Crim. App. 1995) (despite defense request not to give limiting instruction regarding uncharged misconduct, one was required because "[n]o evidence can so fester in the minds of court members").

    c) Timing of instruction. *United States v. Levitt*, 35 M.J. 114 (C.M.A. 1992). Instruction should be given immediately following introduction of evidence and repeated before deliberations.

14. Spill-over effect of charged misconduct. Benchbook, para. 7-17. This instruction should be given whenever unrelated but similar offenses are tried at the same time.

a) A military judge's refusal to give a "spill-over" instruction was prejudicial error. *United States v. Myers*, 51 M.J. 570 (N-M. Ct. Crim. App. 1999)

b) Defense counsel's failure to request a spill-over instruction or to object to the findings instruction and their failure to show any material prejudice did not establish plain error even given the close scrutiny applied to a capital case. *United States v. Walker*, 66 M.J. 721 (N-M. Ct. Crim. App. 2008).

15. Past sexual behavior of victim. Benchbook, para. 7-14. This instruction should be given upon request, or when appropriate, if the past sexual behavior of a victim of a sex offense has been introduced under Mil. R. Evid. 412.

16. Variance. Benchbook, paras. 7-15 and 7-16. This instruction should be given if the evidence indicates that the offense occurred, but the time, place, amount, etc. is different than that charged. *United States v. Walters*, 58 M.J. 391 (2003). The appellant was tried for wrongful use of ecstasy on "divers occasions." The government presented evidence of six uses, and after being instructed on variance, the panel found him guilty of use on "one occasion." The CAAF reversed, holding that where a specification alleges wrongful acts on "divers occasions," any findings by exceptions and substitutions that remove the "divers occasions" language must specify the particular instances of conduct upon which the findings are based. *See also United States v. Seider*, 60 M.J. 36 (2004) (citing *Walters* and holding that the AFCCA could not conduct an Art. 66 review when the members excepted the words "divers occasions" from their findings and did not indicate which of the two instances the accused was guilty). In *United States v. Augspurger* 61 M.J. 189 (2005), the Government charged Airman Basic Augspurger with wrongful use of marijuana on divers occasions based on three discrete occasions of use. The members convicted for wrongful use of marijuana excepting the words "on divers occasions." The military judge should either have properly instructed the members that if they excepted the language "on divers occasions" they needed to make clear which factual allegation supported a conviction, or she could have sought clarification from the members after announcement of findings.

17. Impeachment questions. Benchbook, para 7-18. This instruction should be given when "have you heard" or "did you know" questions are used to test an opinion or otherwise rebut character evidence and may not be considered for any other purpose.

C. When Given. Instructions can be given before or after arguments by counsel and before members close to deliberate. R.C.M. 920(b). The timing is within the sole discretion of the military judge. See discussion to R.C.M. 920(b).

D. How Given. Instructions must be given orally on the record in the presence of all parties and members. Written copies of the instructions or, unless a party objects, portions of them may also be given to the members for their use during deliberation. R.C.M. 920(d).

V. SENTENCING INSTRUCTIONS

A. Required Instructions. R.C.M. 1005(e).

1. Maximum punishment. Benchbook, pages 61, 89-90.

a) Maximum punishment. Military judge must instruct on the maximum punishment, but not how the amount was reached (unitary sentencing). *United States v. Purdy*, 42 M.J. 666 (Army Ct. Crim. App. 1996). *See also,*

United States v. Reyes, 63 M.J. 265 (2006) regarding prejudice toward the accused for erroneous instruction on the maximum punitive discharge.

b) Punishments other than the maximum. The military judge has no *sua sponte* duty to instruct on other punishments. Instruction on the maximum punishment plus a proper sentence worksheet is sufficient. However, if counsel requests instruction on other possible punishments, the military judge will usually err if he denies such a request. *United States v. Brandolini*, 13 M.J. 163 (C.M.A. 1982).

2. Procedures for deliberations and voting. Benchbook, pages 72-4, 103-05.

a) Judge has a *sua sponte* duty to instruct on proper voting procedures. R.C.M. 1005 and 1006.

b) Failure to give instruction that members are to begin voting with the lightest proposed sentence is not plain error. *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986); but see *United States v. Thomas*, 46 M.J. 311 (1997) (distinguishing Fisher and holding that sentence of death had to be set aside when military judge instructed that the members had to vote on the most serious sentence first); *United States v. Simoy*, 50 M.J. 1 (1999) (same).

c) Collecting and counting votes.

(1) *United States v. Truitt*, 32 M.J. 1010 (A.C.M.R. 1991). Failure to instruct that junior member collects and counts the votes and the president shall check the count was harmless error.

(2) *United States v. Harris*, 30 M.J. 1150 (A.C.M.R. 1990). Failure to give instructions that voting was to be by secret written ballot <u>and</u> that the junior member was to collect and count the ballots constituted plain error.

3. Members cannot rely upon mitigating action by the convening authority. R.C.M. 1005 (e)(4).

4. Members must consider all matters in extenuation, mitigation and aggravation. R.C.M. 1005(e)(5).

a) *United States v. Simmons*, 48 M.J. 193 (1998). Accused convicted of kidnapping. In sentencing, defense introduced some evidence that accused was abused as a child. Defense wanted the military judge to give an instruction in mitigation that the accused was abused as a child. <u>Held</u>: no error for not giving the instruction. Court said there was not enough evidence to require the instruction.

b) *United States v. Perry*, 48 M.J. 197 (1998). Accused convicted of forcible sodomy and other offenses. Defense wanted an instruction in sentencing about the fact that the accused dismissal may cause the accused to pay back his education. The judge refused to give the instruction, claiming that it was collateral and there were too many factors to know for certain whether the money would be taken back, CAAF agreed. *But see United States v. Boyd*, 55 M.J. 217, 221 (2001) (holding that military judges are required to instruct on the impact of a punitive discharge on retirement benefits, "if there is an evidentiary predicate for the instruction and it is requested").

c) *United States v. Barrier*, 61 M.J. 482 (2005). Following his conviction, SrA Barrier made an unsworn statement in which he mentioned that another airman in an unrelated case received a certain punishment. Over defense objection, the military judge gave the *Friedmann* instruction (based on *United States v. Friedmann*, 53 M.J. 800 (A. F. Ct. Crim. App. 2000) in which the military judge instructed the members that the dispositions of other courts-martial were irrelevant for sentencing purposes.

B. When and How Given. R.C.M. 1005(b) and (d). Sentencing instructions should be given after arguments by counsel on sentencing and before the members close to deliberate. Instructions must be given orally, but may, in addition, be in writing.

VI. CONCLUSION

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TAB V

ARGUMENTS

Table of Contents

I. INTRODUCTION.....1

A. General. 1

II. PROCEDURE. 1

A. Motions argument.....1

B. Findings argument. 1

C. Sentencing Argument. 1

D. Waiver of Argument.....2

E. Control of argument by the military judge. 2

F. Effect of failure to object to improper argument.....2

G. Remedies for improper argument.....3

III. MATTERS THAT MAY FORM THE BASIS OF ARGUMENTS 4

A. Cross-reference: the Findings and Sentencing Outline and Evidence Outline.....4

B. Findings argument. 4

C. Sentencing argument. 5

IV. PERMISSIBLE ARGUMENT. 7

A. Findings argument. 7

B. Sentencing argument. 7

V. PROBLEM AREAS.....8

A. General. 8

B. Fundamental rights. 8

C. Inflaming passions rather than hard but fair blows. 13

VI. IMPERMISSIBLE ARGUMENT. 14

A. Counsel may not make racist comments. 14

B. Counsel may not argue a personal opinion or belief. 15

C. Counsel may not disparage or malign the other counsel. 15

D. Trial counsel may not to refer to the convening authority or argue command policies. 15

E. Counsel may not make inaccurate reference to law or cite legal authority to the members. 16

F. Counsel should not argue the nonexistence of evidence after a successful suppression motion. 16

G. Counsel may not argue evidence beyond its limited purpose..... 17

H. Counsel may not make misleading arguments. 17

I. Impact on relations between military and civilian community. 17

J. In sentencing, defense counsel may not argue for reconsideration of the findings. 17

K. Trial counsel may not argue for a punitive discharge based on the needs of service. 17

L. Trial counsel may not comment on "the average sentence." 17

M. Trial counsel may not comment on the accused's duty position. 17

N. Counsel may not argue for inferences where direct evidence of the same point would be impermissible. 17

VII. CONCLUSION..... 18

LTC ERIC CARPENTER

January 2011

ARGUMENTS

Outline of Instruction

I. INTRODUCTION.

A. General.

1. According to Black's Law Dictionary, arguments are "the remarks of a counsel in analyzing and pointing out or repudiating a desired inference, for the assistance of a decision-maker." Black's Law Dictionary 102 (7th ed. 1999).

2. This definition is important for understanding the difference between opening statements and arguments. In opening statements, counsel comment on what the evidence *is*. In argument, counsel comment on what the evidence *means*.

3. The rules reflect that distinction.

a) Argument is not allowed in the opening statement. In opening statement, counsel should confine their remarks to evidence they expect to be offered and a brief statement of the issues in the case. R.C.M. 913(b) discussion.

b) Argument is allowed on motions (R.C.M. 905(h)), findings (R.C.M. 919), and sentencing (R.C.M. 1001(g)).

II. PROCEDURE.

A. Motions argument.

1. Upon request, either party is entitled to an Article 39(a) session to present oral argument. R.C.M. 905(h).

B. Findings argument.

1. Trial counsel argues first, then defense counsel shall be permitted to reply, and then the trial counsel shall then be permitted to present rebuttal. R.C.M. 919(a).

2. The trial counsel's rebuttal argument is generally limited to matters argued by the defense. If trial counsel introduces new matter in rebuttal, then the defense counsel should be allowed to reply in rebuttal. However, the trial counsel will be allowed to make the final argument. R.C.M. 919(b) discussion.

C. Sentencing Argument.

1. Trial counsel argues first, then defense counsel. R.C.M. 1001(a)(1), (g).

2. The military judge has the discretion to permit rebuttal sentencing arguments. R.C.M. 1001(a)(1)(F), (d).

a) As a general rule, there is no right of government counsel to present rebuttal argument because the government does not have a burden of proof during presentencing proceedings in non-capital cases. *United States v. McGee*, 30 M.J. 1086 (N.M.C.M.R. 1989). The propriety of permitting such argument is dependent upon the need to address matters newly raised by the defense in its sentencing argument. *Id*.

3. Absent "good cause" the military judge should not permit departure from the order of argument set forth in R.C.M. 1001(a)(1).

a) *United States v. Budicin*, 32 M.J. 795 (N.M.C.M.R. 1990). Military judge erred by allowing trial counsel to argue last but defense counsel waived error by not objecting.

b) *United States v. Martin*, 36 M.J. 739 (A.F.C.M.R. 1993). Trial counsel should not be routinely permitted to choose whether to argue first or last on sentencing.

4. Defense counsel may not argue for a punitive discharge unless the accused consents.

a) The accused's consent must be indicated on record. *United States v. Holcomb*, 43 C.M.R. 149 (C.M.A. 1971); *United States v. Williams*, 21 M.J. 524 (A.C.M.R. 1985) (argument urging discharge presumed prejudicial unless accused consents); *United States v. Robinson*, 25 M.J. 43 (C.M.A. 1987) (erroneous argument urging military judge to adjudge a suspended discharge, despite accused's desire to remain in the service, held not to be prejudicial).

b) The standard for reversal when a defense counsel concedes a punitive discharge without consent is whether it is reasonably likely that the concession affected the sentence. *United States v. Quick*, 59 M.J. 383, 387 (C.A.A.F. 2004).

c) The military judge should question the accused to determine whether he concurs with defense counsel's argument for a discharge. *United States v. McNally*, 16 M.J. 32, 35 (C.M.A. 1983) (Cooke, J. concurring). The Military Judges' Benchbook contains a colloquy at para. 2-7-27.

d) The military judge need not question the accused if a discharge is highly likely. *United States v. Volmar*, 15 M.J. 339 (C.M.A. 1983).

e) *See also United States v. Bolkan*, 55 M.J. 425 (C.A.A.F. 2001); *United States v. Pineda*, 54 M.J. 298 (C.A.A.F. 2001); *United States v. Adame*, 57 M.J. 812 (N-M. Ct. Crim. App. 2003).

D. Waiver of Argument.

1. *United States v. McMahan*, 21 C.M.R. 31 (C.M.A. 1956). Defense counsel has a right and duty to argue and should only waive argument in unusual circumstances.

2. Defense counsel are not required to argue but need to have sound reasons for not doing so. *United States v. Sadler*, 16 M.J. 982 (A.C.M.R. 1983) (defense counsel was ineffective when he did not present any favorable matters or argue during the presentencing proceeding).

3. Trial counsel may waive argument. R.C.M. 919(a) analysis, at A21-68.

E. Control of argument by the military judge.

1. The military judge may exercise reasonable control over argument, R.C.M. 801(a)(3).

2. A military judge may restrict argument to reasonable limits in the exercise of sound discretion. However, the military judge may not arbitrarily limit the defense counsel's argument. *United States v. Dock*, 20 M.J. 556 (A.C.M.R. 1985).

F. Effect of failure to object to improper argument.

1. The Waiver Rule. Failure to object to improper argument constitutes waiver. *United States v. McPhaul*, 22 M.J. 808 (A.C.M.R. 1986).

2. If the defense counsel does not object, appellate courts will infer that the argument is not that offensive; if it was, the defense counsel would have objected. *See United States v. Jenkins*, 54 M.J. 12 (C.A.A.F. 2000).

3. Findings.

a) Failure to object to improper argument before the military judge begins to instruct the members on findings shall constitute waiver of the objection. R.C.M. 919(c).

b) *United States v. Kirks*, 34 M.J. 646 (A.C.M.R. 1992). Where three possible objections to argument existed and defense counsel only made one, other two were waived.

c) An objection by opposing counsel is the most appropriate response to an erroneous argument. *See United States v. Espronceda*, 36 M.J. 535 (A.F.C.M.R. 1992).

4. Sentencing.

a) Failure to object to improper argument before the military judge begins to instruct the members on sentencing shall constitute waiver of the objection. R.C.M. 1001(g)

b) *United States v. Desiderio*, 30 M.J. 894 (A.F.C.M.R. 1990). Defense counsel's failure to object during trial counsel's argument constituted waiver, even though defense counsel stated in his argument, "Now I didn't say anything during [trial counsel's] argument as he stood up and talked about the impact of drug use on the mission and that kind of thing. It probably was objectionable."

5. The Plain Error Exception.

a) Failure to object does not waive plain error. *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986); *United States v. Williams*, 23 M.J. 776 (A.C.M.R. 1987). *See also United States v. Young*, 470 U.S. 1 (1985).

b) In order to constitute plain error, the error must:

(1) Be obvious and substantial; and

(2) Have had an unfair prejudicial impact.

c) Note that the bar is set rather high for claims of plain error. *See United States v. Barazzamartinez*, 58 M.J. 173 (C.A.A.F. 2003) (holding that it was not plain error for trial counsel to argue that the appellant was “almost a traitor” because the appellant wrongfully imported marijuana into the United States from Mexico during a time when the United States was engaged in a war on drugs).

d) In some circumstances, prejudice is not necessary. *United States v. Thompson*, 37 M.J. 1023, (A.C.M.R. 1993). Trial counsel's racist sentencing argument was found to be plain error, despite the fact that it did not prejudice the accused's sentence.

G. Remedies for improper argument.

1. Military judge can sua sponte stop the argument. *United States v. Nelson*, 1 M.J. 235 (C.M.A. 1975); *United States v. Grady*, 15 M.J. 275 (C.M.A. 1983).

2. Military judge can give a curative instruction. *United States v. Carpenter*, 29 C.M.R. 234 (C.M.A. 1960); *United States v. Horn*, 9 M.J. 429 (C.M.A 1980).

3. Military judge can require a retraction from counsel. *United States v. Lackey*, 25 C.M.R. 222 (C.M.A. 1958).

4. Military judge can declare a mistrial. *United States v. O'Neal*, 36 C.M.R. 189 (C.M.A. 1966); *United States v. McPhaul*, 22 M.J. 808 (A.C.M.R. 1986).

5. Counsel must cease argument once military judge rules on issue in question. *United States v. Warnock*, 34 M.J. 567 (A.C.M.R. 1991).

III. MATTERS THAT MAY FORM THE BASIS OF ARGUMENTS

A. Cross-reference: the Findings and Sentencing Outline and Evidence Outline.

1. See those outlines for a complete discussion of matters that may be introduced by the parties and considered by the factfinder during the merits and presentencing proceedings.

B. Findings argument.

1. Counsel may comment on the evidence in the case. R.C.M. 919(b).

2. Counsel may comment generally on contemporary history or other matters of common knowledge. *United States v. Jones*, 11 M.J. 829 (A.F.C.M.R. 1981); *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005) (references to public figures must be generic and not specific details of sensationalized topics).

3. Counsel may not argue facts not in evidence.

a) It is error for counsel to include inadmissible hearsay in findings argument. *United States v. Nelson*, 1 M.J. 235 (C.M.A. 1975).

4. Counsel may not argue irrelevant matters.

a) M.R.E. 401, 402, 403.

b) *But see United States v. Jefferson*, 22 M.J. 315 (C.M.A. 1986). Defense counsel should have been permitted to inform members of mandatory minimum life sentence to impress seriousness of offense upon them. However, error was not prejudicial.

5. Use of providence inquiry statements in mixed plea cases.

a) Admissions in a plea of guilty to one offense cannot be used as evidence to support a finding of guilty of an essential element of a separate and different offense; however, the guilty plea inquiry and stipulation of fact may be used to satisfy the common elements of a greater offense if the pled to charge is LIO of the contested charge. *United States v. Abdullah*, 37 M.J. 692 (A.C.M.R. 1993); *United States v. Rivera*, 23 M.J. 89, 95 (C.M.A. 1986); *United States v. Flores*, __ M.J. __ (A.F. Ct. Crim. App. 2010) (ACM S31621), *review granted*, 69 M.J. 166 (C.A.A.F. 2010).

b) Plea of guilty may be used to establish common facts and elements of a greater offense within the same specification, but may not be used as proof of a separate offense. The elements of a LIO established by guilty plea (but not the accused's admissions made in support of that plea) can be used to establish common elements of the greater offense. *United States v. Ramelb*, 44 M.J. 625 (Army Ct. Crim. App. 1996).

c) *United States v. Grijalva*, 55 M.J. 223 (C.A.A.F. 2001). Admissions concerning the elements of the LIO made during providence inquiry can be considered insofar as the admissions relate to common elements of the greater offense, but it was error for the military judge to consider the accused's admissions that pertained to different elements of the greater offense.

C. Sentencing argument.

1. Counsel may comment on matters introduced pursuant to R.C.M. 1001(b)

2. Counsel may comment that a plea of guilty is a mitigating factor. R.C.M. 1001(f).

3. Counsel may comment on any evidence properly introduced *on the merits*, to include evidence of other offenses or acts of misconduct, even if introduced for a limited purpose, and evidence relating to any mental impairment or deficiency of the accused. R.C.M. 1001(f).

4. Counsel may comment on matters that arise *during the providence inquiry*, to include uncharged misconduct, if the evidence otherwise satisfies R.C.M. 1001(b)(4) and M.R.E. 403. *United States v. Arceneaux*, 21 M.J. 571 (A.C.M.R. 1985); *United States v. Holt*, 22 M.J. 553 (A.C.M.R. 1986).

   a) See the "Findings and Sentencing Outline" for a discussion of the procedures required for using the providence inquiry.

5. Counsel may not comment on impeachment evidence adduced during the presentencing proceeding during the sentencing argument. *United States v. White*, 36 M.J. 306 (C.M.A. 1993). In trial for drug use based on positive urinalysis, the trial counsel cross-examined a defense character witness regarding uncharged second positive urinalysis. Trial counsel erred by arguing that "we are not just talking about one use of Cocaine."

6. Counsel may comment generally on contemporary history or other matters of common knowledge.

   a) *United States v. Barrazamartinez*, 58 M.J. 173 (C.A.A.F. 2003). The war on drugs is common knowledge and so permissible for comment.

   b) *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005) (references to public figures must be generic and not specific details of sensationalized topics).

7. Counsel may comment on the accused's status as officer or NCO but not duty position.

   a) Counsel may mention accused's status as officer or NCO. *United States v. Everett*, 33 M.J. 534 (A.F.C.M.R. 1991). NCO status of accused was appropriate aggravating factor in drug use case.

   b) However, counsel may not argue that an accused' should receive greater punishment because of their *duty position*, unless their position was integral to the commission of the offense. *United States v. Rhodes*, 64 M.J. 630, 632 (A.F. Ct. Crim. App. 2007), *United States v. Skidmore*, 64 M.J. 655, 661 (C.G. Ct. Crim. App. 2007).

8. Counsel may not argue facts not in evidence.

   a) *United States v. Shoup*, 31 M.J. 819 (A.F.C.M.R. 1990). Trial counsel improperly mentioned facts not in evidence by arguing to the military judge "This is the third drug case you have heard this week; there were many before and there will be many more in the future...Over twenty people died in Panama a few weeks ago trying to stop drugs from coming into this country."

   b) Counsel may not argue impact on unit or service absent evidence that the accused's crimes affected the unit.

(1) *United States v. Simmons*, 31 M.J. 884 (A.F.C.M.R. 1990). Trial counsel's argument in drug case that "[w]e're going to find out who uses drugs when a plane crashes" was improper where the accused's duty was to clean airplanes and there was no evidence that appellant's use of amphetamines affected his duty.

(2) *United States v. Spears*, 32 M.J. 934 (A.F.C.M.R. 1991). Trial counsel's argument that an inspection which revealed a missing meal card had an impact on the entire unit was not a reasonable inference. If trial counsel want to make an argument that the crime affected the unit, the trial counsel need to introduce proper sentence evidence under R.C.M. 1001(b)(4).

9. Collateral consequences.

a) Generally, the collateral consequences of a sentence are not relevant to the sentencing decision and are not allowed to be argued in sentencing. *United States v. Griffin*, 25 M.J. 423 (C.M.A. 1988).

b) Effect of sentence on retirement benefits is relevant.

(1) Defense counsel may introduce evidence of the effect of a punitive discharge on retirement benefits. *See* Military Judges' Benchbook para. 2-5-22. The instruction must be given if requested and:

(a) The accused has sufficient time in service to retire;

(b) For an enlisted accused, the accused has sufficient time left on his current term of enlistment to retire without having to reenlist;

(c) For an accused that is a commissioned or warrant officer, it is reasonable that the accused would be permitted to retire but for a punitive discharge.

(2) *See also United States v. Washington*, 55 M.J. 441 (C.A.A.F. 2001); *United States v. Boyd*, 55 M.J. 217 (C.A.A.F. 2001); *United States v. Luster*, 55 M.J. 67 (C.A.A.F. 2001); *United States v. Becker*, 46 M.J. 141 (C.A.A.F. 1997); *United States v. Greaves*, 46 M.J. 133 (C.A.A.F. 1997); *United States v. Sumrall*, 45 M.J. 207 (C.A.A.F. 1996); *United States v. Polk*, 47 M.J. 116 (C.A.A.F. 1997).

(3) *United States v. Stargell*, 49 M.J. 92 (C.A.A.F. 1998). Trial counsel argued the accused, with nineteen and a half years, will get an honorable retirement unless the panel gave him a BCD. Military judge provided curative instruction to panel.

c) Loss of VA benefits is relevant.

(1) Loss of VA benefits is a relevant consideration on sentencing. *United States v. Stargell*, 49 M.J. 92 (C.A.A.F. 1998).

d) The availability of a subsequent administrative decision is not relevant. *United States v. Briggs*, __ M.J. __ (A.F. Ct. Crim. App. 2010).

10. Irrelevant matters.

a) If the accused, in the unsworn statement, mentions irrelevant matters, the military judge may issue a "Friedmann" instruction. This typically arises when the accused mentions the punishments that other co-accused in the case have received. This instruction comes from *United States v. Friedmann*, 53 M.J. 800 (A.F. Ct. Crim. App. 2000). The instruction tells the panel that those comments are irrelevant.

b) *See also United States v. Barrier*, 61 M.J. 482 (C.A.A.F. 2005) (the right to allocution is broad, and largely unfettered, but it is not without limits); *United States v. Sowell*, 62 M.J. 150 (C.A.A.F. 2005).

c) For more discussion on what matters may be covered in an unsworn statement, see the "Findings and Sentencing" Outline.

IV. PERMISSIBLE ARGUMENT.

A. Findings argument.

1. Counsel may comment on the evidence in the case, including inferences to be drawn from the evidence. R.C.M. 919(b).

2. Counsel may comment on the testimony, conduct, motives, and evidence of malice of witnesses to the extent supported by the evidence. R.C.M. 919(b) discussion.

3. Counsel may argue as though the testimony of their witnesses conclusively established the facts related by them. R.C.M. 919(b) discussion.

B. Sentencing argument.

1. Counsel may recommend a specific lawful sentence. R.C.M. 1001(g).

a) Trial counsel may inform members of maximum penalty which court-martial may impose. *United States v. Capps*, 1 M.J. 1184 (A.F.C.M.R. 1976).

b) Defense counsel may argue for a specific sentence. *See generally United States v. Goodman*, 33 M.J. 84 (C.M.A. 1991).

c) Counsel may generally argue for any legal sentence regardless of limitations contained in a pretrial agreement. *United States v. Rivera*, 49 C.M.R. 838 (A.C.M.R. 1975); *United States v. Rich*, 12 M.J. 661 (A.C.M.R. 1981).

d) However, counsel may not make misleading arguments. *United States v. Cassity*, 36 M.J. 759 (N.M.C.M.R. 1992) (finding error in government's disingenuous argument for leniency as to confinement which was designed to enhance punishment by operation of the pretrial agreement). Trial counsel may not argue for a quantum of punishment greater than that court-martial may adjudge. R.C.M. 1001(g).

e) Defense counsel may argue only for a bad-conduct discharge in lieu of confinement but not a dishonorable discharge or "a punitive discharge." *United States v. Dotson*, 9 M.J. 542 (C.G.C.M.R. 1980); *United States v. McMillan*, 42 C.M.R. 601 (A.C.M.R. 1970).

2. Counsel may refer to generally accepted sentencing philosophies. R.C.M. 1001(g).

a) These include rehabilitation of the accused, general deterrence, specific deterrence of misconduct by the accused, and social retribution. R.C.M. 1001(g).

b) General deterrence is a proper subject of argument. *United States v. Lania*, 9 M.J. 100 (C.M.A. 1980).

V. PROBLEM AREAS.

A. General.

1. There are many areas where the line between what is permissible argument and what is not appears bright, but in practice, the line is fine and often confusing. Before commenting on the following issues, counsel need to fully understand these finer distinctions. In many of the cases listed below, the defense counsel did not object to the problematic arguments and so the cases were decided under plain error analysis.

B. Fundamental rights.

1. As a general rule, trial counsel may not comment on the accused's exercise of a fundamental right. *Griffin v. California*, 380 U.S. 609 (1965); R.C.M. 919(b) discussion.

2. Right to remain silent.

a) The basic rule is that if the accused does not speak (sworn or unsworn) at trial and his counsel does not otherwise open the door, then the trial counsel cannot make any comments to the panel that suggest that they should draw a negative inference from that failure to speak. Note that even if an argument does not comment on the right to remain silent, the same comment may improperly imply that the accused has the burden of proof (see two paragraphs down).

b) Trial counsel cannot comment on the accused's election to remain to remain silent at trial.

(1) The fact that a witness has asserted the right against self-incrimination cannot be considered as raising any inference unfavorable to either the accused or the government. M.R.E. 301(f)(1).

(2) Trial counsel may not argue that the prosecution's evidence is unrebutted if the only rebuttal could come from the accused or if the members would naturally and necessarily interpret the summation as comment on the failure of the accused to testify. *United States v. Paige*, 67 M.J. 442 (C.A.A.F. 2009); R.C.M. 919(b) discussion.

(3) *United States v. Mobley*, 31 M.J. 273 (C.M.A. 1990). Trial counsel's use of rhetorical questions in argument which focused on "unanswered questions" was improper indirect comment on accused's failure to testify and failure to produce witnesses. These comments essentially amounted to a rhetorical cross-examination of a mute accused.

(4) *United States v. Harris*, 14 M.J. 728 (A.F.C.M.R. 1982). Trial counsel's comment that case before court was "one-on-one" and

that government case was uncontroverted was impermissible comment on accused's election not to testify.

(5) *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009). Military judge ruled that trial counsel's comments in opening improperly referenced the accused's election of rights. The military judge issued curative instructions and polled the members. These corrective actions kept error harmless beyond a reasonable doubt.

c) Accused elects to testify on the merits.

(1) If the accused elects to testify on the merits regarding an offense charged, and during that testimony, the accused does not deny or explain specific incrimination facts introduced by the government, the trial counsel may comment on that failure to explain those facts during closing argument on the findings. R.C.M. 919(b) discussion.

(2) The "mendacious accused."

(a) If the accused elects to testify, the trial counsel may comment on the fact that the accused's merits testimony differed from the ultimate findings. Here, the accused has testified on his own behalf on the merits and then the factfinder has found him guilty contrary to that testimony. Can the trial counsel state that the accused's testimony was a lie and that he should get a greater sentence for lying?

(b) Courts have held that the answer is yes, but only as an indication of the accused's rehabilitative potential and with a limiting instruction. Any over-emphasis by the trial counsel may be inflammatory argument. *United States v. Warren*, 13 M.J. 278 (C.M.A. 1982).

(c) The "mendacious accused" instruction is found in the Military Judge's Benchbook in paras. 2-5-23 and 2-6-1, and for capital cases at para. 8-3-38.

(d) Military judges should act with caution when giving this instruction *sua sponte* over defense objection, but to do so is not error. *United States v. Ryan*, 21 M.J. 627 (A.C.M.R. 1985)

(e) Trial counsel may should avoid language like "hasn't accepted responsibility for his actions" and "hasn't' faced up to what he did" because that comes dangerously close to improper comment on accused's exercise of fundamental rights. *United States v. Standifer*, 31 M.J. 742 (A.F.C.M.R. 1990). *See also United States v. Jenkins*, 54 M.J. 12 (C.A.A.F. 2000).

d) Accused makes inconsistent statements to investigators.

(1) If the accused makes inconsistent statements to investigators, the trial counsel may be able to argue that those statements show that the accused has not accepted responsibility for his actions. *United States v. Garren*, 53 M.J. 142 (2000).

e) Accused makes an unsworn statement.

(1) If the accused elects to make an unsworn statement during the presentencing proceeding, trial counsel may comment on the *nature* of an accused's unsworn statement. Trial counsel can point out that the unsworn statement has less evidentiary value than a sworn statement but cannot ask the court to draw an adverse inference against the accused for making an unsworn rather than a sworn statement. *United States v. Breese*, 11 M.J. 17 (C.M.A. 1981).

f) Demeanor and lack of remorse.

(1) If the accused elects to speak at trial, trial counsel may comment on the accused's demeanor and lack of remorse.

(a) Trial counsel may comment on the accused's lack of remorse provided the trial counsel can do so without commenting on the accused's exercise of a fundamental right. The argument must come from evidence that is before the court-martial and not arise because the accused did not do something while exercising a fundamental right. *United States v. Edwards*, 35 M.J. 351 (C.M.A. 1992). *See also United States v. Garren*, 53 M.J. 142 (C.A.A.F. 2000).

(b) The proper foundation for commenting on an accused's lack of remorse is: the accused has either testified or made an unsworn statement, and has either expressed no remorse or his expressions of remorse can be arguably construed to be shallow, artificial, or contrived. *United States v. Edwards*, 35 M.J. 351 (C.M.A. 1992).

(c) *United States v. Toro*, 37 M.J. 313 (C.M.A. 1993). Trial counsel's comment that the accused did not "acknowledge [the] finding of guilty" in his unsworn statement was not plain error. Such argument may be a proper comment on the accused's lack of remorse.

(d) *United States v. Carroll*, 34 M.J. 843 (A.C.M.R. 1992). Demeanor of an accused who does testify is evidence.

(2) However, the demeanor of non-testifying accused is not evidence.

(a) *United States v. Kirks*, 34 M.J. 646 (A.C.M.R. 1992). Trial counsel improperly referred to accused as the "iceman." Commenting on the demeanor of a non-testifying accused can violate the rules against arguing facts not in evidence, the rules against using character evidence, and the rules against commenting on a fundamental right. Defense counsel should object on all grounds.

(b) *See also United States v. Paxton*, 64 M.J. 484 (C.A.A.F. 2007) (when the accused does not testify or give an unsworn statement, a lack of remorse argument must be based on other evidence in the record); *see generally United States v. Cook*, 48 M.J. 64 (C.A.A.F. 1998).

3. Right to counsel and right to remain silent (during the investigation).

a) The fact that the accused during official questioning and in the exercise of rights under the Fifth Amendment or Article 31 remained silent, refused to answer certain questions, or requested counsel is inadmissible against the accused. M.R.E. 301(f)(3).

b) A person's failure to deny an accusation of wrongdoing concerning an offense for which at the time of the alleged failure the person was under official investigation or was in confinement, arrest, or custody does not support an inference of an admission of the truth of the accusation. M.R.E. 304(h)(3).

c) Trial counsel may not comment on the failure of the defense to call witnesses or testify at the Article 32. R.C.M. 919(b) discussion.

d) *United States v. Zaccheus*, 31 M.J. 766 (A.C.M.R. 1990). Trial counsel improperly commented on accused's invocation of right to counsel.

e) *United States v. Frentz*, 21 M.J. 813 (N.M.C.M.R. 1985). Government may not bring to attention of trier of fact that an accused invoked right to remain silent and consulted with attorney.

f) *United States v. Moran*, 65 M.J. 178 (C.A.A.F. 2007). Without deciding error, the court found that comments on the accused's invocation of rights was harmless beyond a reasonable doubt.

g) *United States v. Alameda*, 57 M.J. 190 (C.A.A.F. 2002). After an investigator informed the accused that he was going to be apprehended, the accused did not say anything and stared straight ahead. The investigator testified about that at trial and the trial counsel argued that this lack of response reflected his consciousness of guilt. The admission of the testimony and the argument was error. *But see United States v. Pope*, __ M.J. __ (C.A.A.F. 2011).

h) *United States v. Palumbo*, 27 M.J. 565 (A.C.M.R. 1988). It was error for an investigator to tell the members that the accused invoked his right to remain silent when questioned about the larcenies.

i) *But see United States v. Wright*, 47 M.J. 555 (N-M. Ct. Crim. App. 1997) (not error to comment on accused's demeanor when confronted with the charges against him).

4. Right to silence before investigation.

a) A defendant's silence before an arrest and rights warning does not violation the Constitution when used to impeach the defendant's testimony. *Jenkins v. Anderson*, 447 U.S. 231 (1980).

5. Comments that shift the burden of proof.

a) Use of the words "uncontradicted," "uncontroverted," and "unrebutted."

(1) These words can improperly imply that the accused has an obligation to produce evidence and witnesses to contradict the government's case. These types of comments improperly imply that the burden has shifted to the defense. *United States v. Carter*, 61 M.J. 30, 34 (C.A.A.F. 2005).

b) Pointing out that the defense did not call witnesses or produce evidence.

(1) Counsel cannot comment on the an accused's failure to call witnesses. *United States v. Mobley*, 31 M.J. 273 (C.M.A. 1990); *United States v. Swoape*, 21 M.J. 414 (C.M.A. 1986).

(2) *United States v. Turner*, 30 M.J. 1183 (A.F.C.M.R. 1990). During argument trial counsel presented a list of facts court would have to find before the panel could find the accused innocent. This was erroneous statement that shifted the burden of proof to the accused but was not prejudicial.

c) Counsel may want to look to the framework for commenting on the right not to testify before making these types of comments. If the defense has not presented *any* evidence (similar to not speaking at trial), then the trial counsel should not make any "unrebutted evidence" comments. If the defense has put on *some* evidence (similar to speaking at trial), then the trial counsel can comment on the failure to present other evidence along with any other weaknesses in the defense case. *See generally United States v. Paige*, 67 M.J. 442 (C.A.A.F. 2009).

6. Right to plead not guilty.

a) *United States v. Jones*, 30 M.J. 898 (A.F.C.M.R. 1990). It was impermissible for trial counsel to argue that accused should not be considered for rehabilitation because he had failed to admit his responsibility by pleading not guilty. *See also United States v. Turner*, 30 M.J. 1183 (A.F.C.M.R. 1990).

7. Right to confront witnesses.

a) *United States v. Carr*, 25 M.J. 637 (A.C.M.R. 1987). Trial counsel may not argue the adverse impact flowing from the accused's exercise of his constitutional rights to confront and cross-examine witnesses against him.

b) However, it may be permissible to elicit "a brief reference to the effect of the entire proceeding (including, but not limited to, the trial) on Appellant's victim." *United States v. Stephens*, 67 M.J. 233 (C.A.A.F. 2009).

8. Defense opens the door – the "invited response" or "invited reply."

a) If the defense says in opening statement that the accused will testify or produce certain evidence or call certain witnesses, places the issue before the members, or gives a disingenuous argument, the defense opens the door to government comment. *See generally United States v. Robinson*, 485 U.S. 25 (1988).

b) *United States v. Gilley*, 56 M.J. 113 (C.A.A.F. 2001). The defense counsel defense counsel brought up the issue of why an interview with investigators ended and argued that it ended because the contents of the written statement were false. In fairness, the government was allowed to argue that the accused never saw the contents of the statement to even know if the contents were false and did not sign the statement because he invoked his right to counsel. The court was still troubled by the government's repeated references to the invocation of rights.

c) *United States v. Espronceda*, 36 M.J. 535 (A.F.C.M.R. 1992). When defense counsel profers anticipated testimony of a potential witness and

then does not call that witness, the defense opens the door to a proper government response.

d) *United States v. Webb*, 38 M.J. 62 (C.M.A. 1993). Trial counsel properly commented that defense counsel did not live up to the promise he made during his opening statement to present an alibi witness.

e) *United States v. Haney*, 64 M.J. 101 (C.A.A.F. 2006). Not plain error when government commented on accused's invocation of right to silence and failure to seek counsel when those facts were introduced by the defense and integral to the defense theory.

f) *See also United States v. Carter*, 61 M.J. 30, 34 (C.A.A.F. 2005); *see generally United States v. Turner*, 30 M.J. 1183, 1184 (A.F.C.M.R. 1990); *Jenkins v. Anderson*, 447 U.S. 231 (1980).

C. Inflaming passions rather than hard but fair blows.

1. Counsel should not make arguments that are calculated to inflame passions. R.C.M. 919(b) discussion. The line between that and hard but fair blows is not always easy to see.

2. Characterizations of the accused. Counsel may not refer to accused in *unduly* demeaning terms.

a) *United States v. Erickson*, 65 M.J. 221 (C.A.A.F. 2007). Trial counsel erred by comparing the accused with Hitler, Saddam Hussein, and Osama bin Laden, and described the accused as a demon belonging in hell. Defense counsel did not object at trial, however, so the court tested for plain error under prosecutorial misconduct standards and under that high standard found no prejudice.

b) *United States v. Quarles*, 25 M.J. 761 (N.M.C.M.R. 1987). During findings argument, trial counsel characterized the accused as a prurient sex fiend and a deviant pervert. This improperly urged the members to cast aside reason and to impermissibly convict based on the accused alleged deviant character.

c) *United States v. Waldrup*, 30 M.J. 1126 (N.M.C.M.R. 1989). Portraying accused as a "despicable and disgusting" man who took advantage of the "sacred" relationship between a mother and child was improper.

d) *United States v. Barrazamartinez*, 58 M.J. 173 (C.A.A.F. 2003). The appellant pled guilty to wrongfully importing marijuana into the United States across the border from Mexico. At sentencing, the trial counsel argued that the appellant's actions were abhorrent because the United States was engaged in a war on drugs. He also argued that the appellant was "almost a traitor" because he brought drugs into the country when the nation was trying to stop drugs from coming into the country. Although the trial counsel's use of the word "traitor" was a matter of concern, it did not rise to the level of unduly inflaming the passions or prejudices of the panel members.

e) *United States v. McPhaul*, 22 M.J. 808 (A.C.M.R. 1986). Trial counsel's argument that accused was a degenerate scum and miserable human being was properly based on evidence in the record.

3. Characterizations of other witnesses.

a) Comparing a defense witness to Hitler was improper. *United States v. Nelson*, 1 M.J. 235 (C.M.A. 1975).

4. Asking the panel to "imagine" or "Golden Rule" arguments.

a) Counsel may not ask members to place themselves in position of victim's relative when determining punishment. *United States v. Shamberger*, 1 M.J. 377 (C.M.A. 1976).

b) Counsel may not ask the panel to place themselves in the position of the victim, as in, use the word "imagine." *United States v. Baer*, 53 M.J. 235 (2000). Trial counsel to asked the members to "imagine being [the victim] sitting there as these people are beating him," and "imagine the pain and agony . . . you can't move. You're being taped and bound almost like a mummy. Imagine as you sit there as they start binding." The court stated that such "Golden Rule arguments" are impermissible and improper. The court also warned that "trial counsel who make impermissible Golden Rule arguments and military judges who do not sustain proper objections based upon them are risking reversal." *See also United States v. McClary*, 68 M.J. 606 (C.G. Ct. Crim. App. 2010) (error to ask the panel to imagine what it would be like to have your neck squeezed while being choked). *But see United States v. Edmonds*, 36 M.J. 791 (A.C.M.R. 1993); *United States v. Melbourne*, 58 M.J. 682 (N-M. Ct. Crim. App. 2003).

c) However, counsel can ask the members to *consider* the fear and pain of the victim. *United States v. Baer*, 53 M.J. 235 (2000).

5. Arguing that an acquittal would have a negative impact on the command.

a) *United States v. Causey*, 37 M.J. 308 (C.M.A. 1993). In urinalysis case, trial counsel argued that if members accepted accused's innocent ingestion defense they would "hear it a million times again" in their units. Court held this improperly inflamed members with fear that urinalysis program would break down.

6. Counsel may not appeal to personal interests of sentencing authority.

a) *United States v. Nellum*, 21 M.J. 700 (A.C.M.R. 1985). It was improper for trial counsel to ask the military judge if he wanted the accused walking the streets of the judge's neighborhood.

VI. IMPERMISSIBLE ARGUMENT.

A. Counsel may not make racist comments.

1. Counsel should not make arguments that are calculated to inflame prejudices. R.C.M. 919(b) discussion.

2. *United States v. Lawrence*, 47 M.J. 572 (N.M. Ct. Crim. App. 1997). Trial counsel'' rebuttal argument referring to testimony by the accused and his "Jamaican brothers" was plain error and was unmistakenly pejorative, even if trial counsel did not intend to evoke racial animus.

3. *United States v. Thompson*, 37 M.J. 1023 (A.C.M.R. 1993). Trial counsel improperly argued that accused dealt drugs because of the "stereotypic view of what the good life is, Boyz in the Hood - drug dealing - sorry to say, the black male and the black population. But nevertheless, it is that look, it is that gold chain, it is that nice car that epitomizes a successful individual."

4. *United States v. Rodriguez*, 60 M.J. 87 (C.A.A.F. 2004). In a case involving a Latino accused, the prosecutor made a passing reference to a "Latin movie" during closing argument. The court declined to adopt a *per se* prejudice test for statements about race, but it did caution that improper racial comments could deny an accused a fair trial.

5. The trial counsel's use of the phrase "chilling with his boy" in describing a defense witness's association with the appellant was at the least insensitive sarcasm and could have been racist. *United States v. Walker*, 50 M.J. 749 (N-M. Ct. Crim. App. 1999).

B. Counsel may not argue a personal opinion or belief.

1. Counsel should not express a personal belief or opinion as to the truth or falsity of any testimony or evidence. R.C.M. 919(b) discussion; *United States v. Clifton*, 15 M.J. 26 (C.M.A. 1983).

a) Counsel should not phrase argument in personal terms. *United States v. Horn*, 9 M.J. 429 (C.M.A. 1980) (trial counsel's repeated use of term "I think" during argument was improper); *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005).

b) Telling the panel members that a witness testified truthfully and using the word "clearly" is not improper. *United States v. McClary*, 68 M.J. 606 (C.G. Ct. Crim. App. 2010).

c) Counsel may not express personal opinion as to guilt of accused. *United States v. Knickerbocker*, 2 M.J. 128 (C.M.A. 1977); *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005).

d) *United States v. Terlep*, 57 M.J. 344 (2002). Appellant, charged with burglary and rape, pled to LIOs of the unlawful entry and battery. In his argument, trial counsel noted that the victim had to undergo a rape protocol kit at the hospital and suffer the feelings of being "violated" and "contaminated" on the night the appellant entered her home. In rebuttal, the trial counsel stated: "[the victim] has weathered the storm of this whole incident with dignity and with a courageous spirit to get up there and tell you what happened that night, to tell you the truth." On appeal, the court found that the trial counsel's argument did not constitute plain error. The court noted that the argument did not personally vouch for the victim's credibility in general or with respect to her allegation of rape.

2. Expression of personal opinion by defense counsel does not confer license on trial counsel to respond in kind. *United States v. Young*, 470 U.S. 1 (1985).

C. Counsel may not disparage or malign the other counsel.

1. *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005).

D. Trial counsel may not to refer to the convening authority or argue command policies.

1. R.C.M. 1001(g).

2. *United States v. Thomas*, 44 M.J. 667 (N-M. Ct. Crim. App. 1996). Trial counsel argued in drug case that "the CNO . . . has a zero tolerance policy for anyone who uses any kinds of drugs." Court found TC reference improper, and noted, "references to command or departmental policies have no place in the determination of an appropriate sentence in a trial by court-martial." Error for military judge not to give instruction even though defense counsel failed to object.

3. *United States v. Grady*, 15 M.J. 275 (C.M.A. 1983). Military judge had *sua sponte* duty to correct counsel's improper comments on Strategic Air Command policies on drugs.

4. *United States v. Sparrow*, 33 M.J. 139 (C.M.A. 1991). It was improper for the trial counsel to mention the convening authority by name and then to tell the members to "do the right thing."

5. *United States v. Simpson*, 12 M.J. 732 (A.F.C.M.R. 1981). It was error for trial counsel to argue that referral to special court-martial was exercise of clemency by convening authority.

6. *United States v. Fortner*, 48 M.J. 882 (N-M. Ct. Crim. App. 1998). Trial counsel's reference in closing argument to Navy core values did not constitute improper reference to higher authority, as prohibited in RCM 1001(g). Such values are aspirational concepts that do not require specific punishment for failure to comply.

E. Counsel may not make inaccurate reference to law or cite legal authority to the members.

1. Counsel may not cite legal authority to members. *United States v. McCauley*, 25 C.M.R. 327 (C.M.A. 1958) (it was error for trial counsel to read from case in the Court-Martial Reports); *United States v. Clifton*, 15 M.J. 26 (C.M.A. 1983) (citing Wigmore before the panel).

F. Counsel should not argue the nonexistence of evidence after a successful suppression motion.

1. *ABA Standards for Criminal Justice*, Standard 4-7.8 and its Commentary: "A lawyer who has successfully urged the court to exclude evidence should not be allowed to point to the absence of that evidence to create an inference that it does not exist." The few reported cases on this issue take the position that such an argument misrepresents the facts to the tribunal.

2. Counsel may not mention evidence that has been suppressed or suggest that other evidence exists. *United States v. Clifton*, 15 M.J. 26 (C.M.A. 1983).

3. *State v. McNeely*, 664 P.2d 277 (Idaho Ct. App. 1983). After the defense successfully suppressed currency and cocaine, the prosecution filed a motion in limine to prevent the defense from arguing that the state produced no evidence because it had no evidence. The trial court granted the motion, and the Idaho Court of Appeals affirmed, citing treatises and commentary for the proposition that it is a form of misrepresentation for counsel to argue the absence of evidence when it is absent only because it was suppressed.

4. *Pritchard v. State*, 673 P.2d 291 (Alaska Ct. App. 1983) ("Defense counsel clearly has the right to argue in support of a Scotch verdict, *i.e.*, that the prosecution has failed to sustain its burden of proof. . . . He may not, however, state to be true something he knows to be false. Thus, for example, he may not base his argument on the nonexistence of evidence which in fact was present but was suppressed on motion by the defense.")

5. *State v. Provost*, 741 A.2d 295 (Conn. 1999). The defense claimed the prosecutor had committed misconduct by suppressing the statements of several witnesses and then arguing that the defense produced no evidence that a witness had an improper motivation for identifying the defendant. Citing, *inter alia*, the *McNeely* case for the proposition that it is improper to argue the nonexistence of suppressed

evidence, the court nevertheless held under the facts of the instant case, the prosecutor had not argued improperly.

G. Counsel may not argue evidence beyond its limited purpose.

1. *United States v. Sterling*, 34 M.J. 1248 (A.C.M.R. 1992). Accused was charged with two specifications of use of cocaine based on two positive urinalysis tests. Trial counsel improperly argued that one test corroborated the other.

H. Counsel may not make misleading arguments.

1. *United States v. Cassity*, 36 M.J. 759 (N.M.C.M.R. 1992) (finding error in government's disingenuous argument for leniency as to confinement which was designed to enhance punishment by operation of the pretrial agreement). Trial counsel may not argue for a quantum of punishment greater than that court-martial may adjudge. R.C.M. 1001(g).

2. *United States v. Martinez*, 30 M.J. 1194 (A.F.C.M.R. 1990). Where the government allowed an accused to plead guilty as an aider and abettor in providing the gun to actual shooter, it could not then argue that the accused pulled the trigger.

I. Impact on relations between military and civilian community.

1. Trial counsel may not comment on the probable effect of the court-martial's findings on relations between the military and civilian community. R.C.M. 919(b) discussion.

J. In sentencing, defense counsel may not argue for reconsideration of the findings.

1. Defense counsel may not argue during the sentencing argument that the panel should reconsider their findings on the merits. *United States v. Vanderslip*, 28 M.J. 1070 (N.M.C.M.R. 1989). The fact that members may reconsider findings does not authorize a request for reconsideration.

K. Trial counsel may not argue for a punitive discharge based on the needs of service.

1. *United States v. Motsinger*, 34 M.J. 255 (C.M.A. 1992). Trial counsel improperly blurred distinction between a punitive discharge and administrative separation by arguing "would you really want this individual working for you? I don't think so. . . . Is this really the individual . . . that we need in the United States Air Force?."

L. Trial counsel may not comment on "the average sentence."

1. *United States v. Simmons*, 31 M.J. 884 (A.F.C.M.R. 1990). Trial counsel improperly explained that "average" sentence was mathematical average between no punishment and the possible maximum punishment.

M. Trial counsel may not comment on the accused's duty position.

1. Trial counsel may not argue that an accused' should receive greater punishment because of their *duty position*, unless their position was integral to the commission of the offense. *United States v. Rhodes*, 64 M.J. 630, 632 (A.F. Ct. Crim. App. 2007), *United States v. Skidmore*, 64 M.J. 655, 661 (C.G. Ct. Crim. App. 2007).

2. However, counsel may mention accused's status as officer or NCO. *United States v. Everett*, 33 M.J. 534 (A.F.C.M.R. 1991). NCO status of accused was appropriate aggravating factor in drug use case.

N. Counsel may not argue for inferences where direct evidence of the same point would be impermissible.

1. *United States v. Hampton*, 40 M.J. 457 (C.M.A. 1994). A stipulation of expected testimony admitted during presentencing stated that in the witness' opinion, the accused did not have any rehabilitative potential. During sentencing argument, trial counsel stated that the expected testimony was that accused "doesn't have rehabilitative potential, doesn't deserve to be in the Army." The court held that even if trial counsel's misstatement is characterized as a reasonable inference drawn from the expected testimony, such argument is still improper.

VII. CONCLUSION.

TAB W

FINDINGS AND SENTENCING

TAB W

Table of Contents

I. FINDINGS – RULE FOR COURTS-MARTIAL 918. 1

A. GENERAL FINDINGS IN THE MILITARY – **RCM 918**(A) – AS TO A SPECIFICATION AND CHARGE: 1
B. WHAT MAY / MAY NOT BE CONSIDERED IN REACHING FINDINGS? **RCM 918(C)**. 1
C. DELIBERATIONS AND VOTING ON FINDINGS. **RCM 921**. 3
D. INSTRUCTIONS ON FINDINGS. **RCM 920**. 4
E. ANNOUNCEMENT OF FINDINGS. **RCM 922**. 4
F. RECONSIDERATION OF FINDINGS. **UCMJ ART. 52**, **RCM 924**. 5
G. DEFECTIVE FINDINGS. 5
H. IMPEACHMENT OF FINDINGS. **RCM 923**. 7

II. PRESENTENCING PROCEDURES. RCM 1001. 8

A. BASIC PROCEDURES. **RCM 1001(A)(1)**. 8
B. MATTERS PRESENTED BY THE PROSECUTION. **RCM 1001(B)**. 9
C. THE CASE IN EXTENUATION AND MITIGATION. **RCM 1001(C)**. 25
D. ARGUMENT. RCM 1001(G). 33
E. PERMISSIBLE PUNISHMENTS. **RCM 1003**. 33
F. INSTRUCTIONS. **RCM 1005**. 39
G. SENTENCE CREDIT. 41
H. DELIBERATIONS AND VOTING. **RCM 1006**. 44
I. ANNOUNCEMENT OF SENTENCE. **RCM 1007**. 45
J. IMPEACHMENT OF SENTENCE. **RCM 1008**. 46
K. RECONSIDERATION OF SENTENCE. **RCM 1009**. 48
L. APPELLATE REVIEW. 49

LtCol Derek Brostek, USMC
January 2011

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I. FINDINGS – RULE FOR COURTS-MARTIAL 918.

A. General Findings in the Military – **RCM 918**(a) – As to a Specification and Charge:

1. Guilty;

2. Not Guilty;

3. Guilty by Exceptions (with or without substitutions);

4. Guilty of Lesser Included Offense (LIO). **RCM 918(a)(1) Discussion.**

a) This rule permits a plea of "not guilty to an offense as charged, but guilty of a named lesser included offense."

b) When plea to an LIO is entered, defense counsel should provide a written revised specification. Revised specification should be an appellate exhibit.

c) Related amendment to RCM 918(a)(1) allows findings of guilty to be entered to named LIO. This applies to both contested and guilty plea cases.

d) There is no Manual provision for alternative or conjunctive findings, and it was error for military judge to find accused guilty of two different UCMJ articles for single specification. *United States v. Rhodes*, 47 M.J. 790 (Army Ct. Crim. App. 1998). *(Finding: "Of the Specification of Charge III: Guilty, as well as guilty of a violation of Article 134 with respect to that specification.")*

5. Not Guilty Only by Reason of Lack of Mental Responsibility.

B. What May / May Not Be Considered in Reaching Findings? **RCM 918(c)**.

1. Matters properly before the court (*e.g.*, testimony of witnesses, real and documentary evidence). Does not include documents provided *ex parte* to the military judge. *But see United States v. McCarthy*, 37 M.J. 595 (A.F.C.M.R. 1993) (finding no prejudice when military "finds" missing performance evaluation report during deliberations and "adds" it to the record without explaining where he got it).

2. Specialized knowledge – *i.e.*, gained by member from source outside court-martial – may <u>not</u> be considered.

a) *United States v. Davis*, 19 M.J. 689 (A.C.M.R. 1984). Improper for court member to visit the crime scene to determine quality of lighting. Convening authority should have ordered an evidentiary hearing to determine whether the accused was prejudiced.

b) *United States v. Johnson*, 23 M.J. 327 (C.M.A. 1987). During deliberations, demonstration by member with martial arts expertise did <u>not</u> constitute extraneous prejudicial information where the demonstration was merely an examination and evaluation of evidence already produced.

3. Member may NOT communicate with witnesses.

a) *United States v. Elmore*, 33 M.J. 387 (C.M.A. 1991). Blood expert witness had dinner with the members. Extensive *voir dire* established the lack of taint.

b) *United States v. White*, 36 M.J. 284 (C.M.A. 1993). Although any contact between witnesses and members gives rise to perceptions of unfairness, it is not automatically disqualifying. In this case the *voir dire* disclosed in full the innocuous nature of the contact.

4. Members may NOT seek information that is not available in open court. *United States v. Knight*, 41 M.J. 867 (Army Ct. Crim. App. 1995). Three members repeatedly quizzed bailiff/driver about matters presented in court out of presence of members, and sought his medical opinion – he was also an EMT – about bruising, which was a key issue in sexual assault prosecution.

5. Split Plea. Unless the defense requests (or offenses stand in greater – LIO relationship), panel members may not consider, and should not be told, that the accused earlier plead guilty to some offenses. *United States v. Kaiser*, 58 M.J. 146 (2003). MJ erred by advising panel members, prior to their deliberations on findings, that the accused previously plead guilty to two specifications of violating a command policy and two specifications of adultery. Accused plead not guilty to the following: two specifications of violating the same command policy to which he previously plead guilty, three specifications of maltreatment of a subordinate, two specifications of consensual sodomy, one specification of indecent assault and one specification of adultery. He was convicted, contrary to his pleas, of an additional command policy violation and adultery; findings as to contested offenses and sentence were set aside.

6. Use of providence inquiry statements in mixed plea cases.

a) Admissions in a plea of guilty to one offense cannot be used as evidence to support a finding of guilty of an essential element of a separate and different offense, but the elements established by the guilty plea inquiry and stipulation of fact may be considered in trial on contested charges, if the pled to charge is LIO of the contested charge. *United States v. Abdullah*, 37 M.J. 692 (A.C.M.R. 1993) (relying on *United States v. Caszatt*, 29 C.M.R. 521, 522 (1960)). *See also United States v. Rivera*, 23 M.J. 89, 95 (C.M.A. 1986) (guilty plea to one offense can only be considered on findings when the plea is to a lesser included offense of the same specification as to which the plea is being offered into evidence).

b) Plea of guilty may be used to establish common facts and elements of a greater offense within the same specification, but may not be used as proof of a separate offense. The elements of a LIO established by guilty plea (but not the accused's admissions made in support of that plea) can be used to establish common elements of the greater offense. *United States v. Ramelb*, 44 M.J. 625 (Army Ct. Crim. App. 1996).

c) *United States v. Grijalva*, 55 M.J. 223 (2001). Admissions concerning the elements of the LIO made during providence inquiry can be considered insofar as the admissions relate to common elements of the greater offense, but it was error for the military judge to consider the accused's admissions that pertained to different elements of the greater offense.

7. Matters taken into the deliberation room may be considered. **RCM 921(b)**.

a) Notes of the court members.

b) Exhibits admitted into evidence.

(1) Stipulations of fact are taken into the deliberation room. (Note however, CAAF found material prejudice to the accused's substantial rights occurred when the military judge (in a judge alone case) failed to sufficiently ensure that the accused understood the effect of the stipulation of fact entered into with the Government. CAAF stated that the record did not provide a sufficient basis to determine that the accused knowingly consented to the use of the stipulation and the adjoining exhibits in the Government's case on the merits of the greater charge, *US v. Resch*, 65 MJ 233 (2007)).

(2) Testimonial substitutes (depositions, stipulations of expected testimony) do not go into the deliberation room. *See United States v. Austin*, 35 M.J. 271 (C.M.A. 1992). Verbatim transcript of alleged victim's testimony at pretrial investigation was not an "exhibit" that members could take into the deliberation room.

8. Fact finder may not consider submitted Chapter 10. *United States v. Balagna*, 33 M.J. 54 (C.M.A. 1991). Character witness acknowledged (upon prodding in open court by MJ) that he could not vouch for accused because had seen a "report." When asked by the MJ what that report was, the witness responded "a request for Chapter 10." Court finds no "extraordinary circumstances" requiring the declaration of a mistrial since the "adverse impact can be neutralized by other means." *Id.* at 57. The MJ twice instructed the members that the evidence was inadmissible and prior to findings advised the members that it was to be "completely disregarded." *See also United States v. Vasquez*, 54 M.J. 303 (2001).

9. Findings worksheet is used to assist members in putting findings in order. *See* Appendix 10, Manual for Courts-Martial, Forms of Findings.

C. Deliberations and Voting on Findings. **RCM 921**.

1. Basic rules and procedures.

a) Deliberations. **RCM 921(a) and (b)**.

(1) Only members present. RCM 921(a).

(2) No superiority in rank used to influence other members. RCM 921(a).

(3) May request reopening of court to have record read back or for introduction of additional evidence. RCM 921(b).

b) Voting. **RCM 921(c)**.

(1) By secret written ballot, with all members voting.

(2) Guilty only if at least 2/3 vote for guilty.

(3) Fewer than 2/3 vote for guilty, then finding of not guilty results.

(4) Special procedure to find accused not guilty by reason of lack of mental responsibility.

c) Procedure. **RCM 921(c)(6)**.

2. Straw polls.

a) *United States v. Fitzgerald*, 44 M.J. 434 (1996). Two specifications each alleged multiple discrete acts of sodomy and indecent acts. As to discrete acts alleged in specifications, MJ suggested straw vote on specification as charged, then treating individual discrete acts separately as lesser included offenses. Instructions likely inured to benefit of accused, and brought no objection from counsel. Court found waiver by defense, no plain error, and affirmed findings and sentence.

b) *United States v. Lawson*, 16 M.J. 38 (C.M.A. 1983). Straw polls, *i.e.*, informal non-binding votes, are not specifically prohibited, but are discouraged. Cannot be used directly or indirectly to allow superiority of rank to influence opinion.

D. Instructions on Findings. **RCM 920**.

1. *United States v. Hardy*, 46 M.J. 67 (1997). MJ cannot direct panel to accept findings of fact, or to return verdict of guilty. In non-capital case, panel returns only general verdict. In answering panel question regarding required finding, MJ refused trial counsel request to instruct that proof beyond reasonable doubt as to all elements meant panel must find accused guilty.

2. *United States v. Gibson*, 58 M.J. 1 (2003). MJ erred by failing to give defense requested accomplice instruction. Three prong test to determine if failure to give requested instruction is reversible error: (1) was requested instruction accurate; (2) was requested instruction substantially covered by the instructions given; and (3) if not substantially covered, was the instruction on such a vital point that it (failure to give) deprived the accused of a defense or seriously impaired its effective presentation. If one through three are met, the burden of persuasion shifts to the Government to show that the error was harmless, that is, failure to give the instruction did not have a "substantial influence on the findings." If it had a substantial influence or the court is left in "grave doubt" as to the validity of the findings, reversible error has occurred.

3. *United States v. Hibbard*, 58 M.J. 71 (2003). MJ did not err by failing to give mistake of fact instruction in rape case where defense theory throughout trial, to include cross examination of victim, was that no intercourse occurred.

4. *United States v. Lewis*, 65 M.J. 85 (2007). MJ erred by giving an incomplete instruction regarding self-defense by failing to instruct the members that a mutual combatant could regain the right to self-defense when the conflict is escalated or, is unable to withdraw in good faith. "When the instructional error raises constitutional implications, the error is tested for prejudice using a "harmless beyond a reasonable doubt" standard." *US v Lewis*, 65 M.J. 85, __ (2007) citing *United States v. Wolford*, 62 M.J. 418, 420 (2006).

E. Announcement of Findings. **RCM 922**.

1. *United States v. Jones*, 46 M.J. 815 (N-M. Ct. Crim. App. 1997). In mixed plea case, MJ failed to announce findings of guilty of offenses to which accused had pled guilty, and as to which MJ had conducted providence inquiry. Upon realizing failure to enter findings, MJ convened post-trial Article 39(a) hearing and entered findings consistent with pleas of accused. Though technical violation of RCM 922(a) occurred, MJ commended for using post-trial session to remedy oversight.

2. *United States v. Perkins*, 56 M.J. 825 (Army Ct. Crim. App. 2002). MJ's failure to properly announce guilty finding as to Spec 3 of Charge II (MJ Announced Guilty to Spec 3 of Charge III) did not require court to set aside appellant's conviction of Specification 3 of Charge II when it was apparent from the record that the MJ merely misspoke and appellant had actually plead guilty to Specification 3 of Charge II. Court notes that a proceeding in revision under RCM 1102 would have been an appropriate course of action had the MJ or SJA caught the mistake.

F. Reconsideration of Findings. **UCMJ art. 52**, **RCM 924**.

1. Members may reconsider any finding before such finding is announced in open session. RCM 924(a).

a) *United States v. Thomas*, 39 M.J. 626 (N.M.C.M.R. 1993), *rev'd in part* 46 M.J. 311 (1997). (CAAF affirmed the findings and reversed the sentence due to a sentencing instruction error). Accepted practice is to instruct prior to deliberation on findings that if any member desires to reconsider a finding, the MJ should be notified so that reconsideration instructions may be given in open court. Instruction on reconsideration is required **only** if a court member indicates desire to reconsider.

b) *United States v. Jones*, 31 M.J. 908 (A.F.C.M.R. 1990). Appellate court orders rehearing on sentence. Can the second panel reconsider findings? HELD: No. RCM 924(a) states "Members may reconsider any finding <u>reached by them</u>." Also, the appellate court had already affirmed the findings of guilty. Once affirmed, "they are no longer subject to reconsideration."

2. Judge alone. MJ may reconsider guilty finding any time before announcement of sentence. RCM 924(c).

G. Defective Findings.

1. Concerns: Sufficient basis for court to base its judgment and protect against double prosecution.

2. Issue – Charging "divers" occasions

a) *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003). Appellant charged with drug use on divers occasions. The evidence put on by the government alleged six separate periods. The panel returned a finding by exceptions and substitutions (excepting the words "divers occasions" and substituting the words "one occasion"), but did not specify the time frame. The CAAF held that the findings were ambiguous, setting aside the findings and sentence. The court noted that where a specification alleges acts on divers occasions, the members must be instructed that any findings by exceptions and substitutions must reflect the specific instance of conduct on which the modified findings are made.

b) *United States v. Wilson*, 67 M.J. 423 (C.A.A.F. 2009). Appellant charged with rape of a child on divers occasion. The testimony of the victim, and a sworn statement of the appellant admitted at trial, indicated that there were two possible occasions when a rape may have occurred. The military judge found the appellant guilty, excepting the words "on divers occasions," but did not indicate which occasion was the basis for the single rape conviction. The CAAF held that a court of criminal appeals did even have the authority to review the cases because the findings where ambiguous – the appeals court would not know which occasion the appellant was guilty of. The CAAF dismissed the rape charge with prejudice. The CAAF identified two methods to prevent such a drastic remedy in future cases. First, when "on divers occasions" is excepted out, the substituted findings must clearly identify which conduct served as a basis for the findings. Second, in a judge alone trial, a clear statement from the military judge on the record explaining which conduct formed the basis for the conviction.

c) *United States v. Trew*, 68 M.J. 364 (C.A.A.F. 2010). Appellant charged with indecent acts on diverse occasions. Military judge finds him guilty of LIO of assault consummated by battery on a child under sixteen and excepts the words "divers occasions." Trial counsel asks military judge to clarify if the guilty finding was for "divers occasions as charged or is that just for—for one event or—will you clarify that further for us? The military judge replied "[i]t is on the one occasion." NMCCA found the findings "were not ambiguous when placed it in the context of the entire record." CAAF reversed the NMCCA, stating that NMCCA's "distinction between 'evaluat[ing] evidence' and 'consider[ing] the record as a whole to clarify the meaning and intent of the "military judge's words' appears to be a distinction without a difference." CAAF finds findings "ambiguous" and unreviewable, and dismissed the charges with prejudice.

d) *United States v. Ross*, 68 M.J. 415 (C.A.A.F. 2010). Appellant found guilty by military judge alone of possession of child pornography, excepting the words "on divers occasions." CAAF holds findings are ambiguous and dismisses charge with prejudice. Even though possession of child pornography is a continuing offense and the words "on divers occasions" may be "surplusage," on these facts they were not because the images were on three different media. Because the images could have been on more than one form of storage media, charging "on divers occasions" was appropriate, and excepting that language without identifying which media the child pornography was on created an ambiguous finding.

e) *United States v. Saxman*, 2010 WL 661096 (N. M. Ct. Crim. App.) (unpublished). Appellant charged with possession of twenty-two child pornography videos on a computer. Appellant was convicted by officer members by exceptions and substitutions of possessing only four of the charged twenty-two videos. The announced finding did not specify which four videos formed the basis of the guilty finding. NMCCA applies the *Walters* and *Wilson* divers occasions logic to these facts and dismisses charge with prejudice. Members' finding meant the appellant was not guilty of possessing eighteen of the twenty-two videos. Without knowing exactly which eighteen those are, the findings are ambiguous.

3. Issue – Variance

a) *United States v. Teffeau*, 58 M.J. 62 (2003). Modification of a lawful general order charge from "wrongfully providing alcohol to [JK]" to "wrongfully [ ] engaging in and seeking [ ] a nonprofessional, personal relationship with [JK], a person enrolled in the Delayed-Entry Program" held to be a material variance; finding of guilty to the Charge and Specification set aside. Variance can not change the nature of the offense or increase the seriousness of the offense or its maximum punishment.

b) *United States v. Pryor*, 57 M.J. 821 (N-M. Ct. Crim. App. 2003). MJ erred by not entering guilty findings by exceptions and substitutions when the evidence in the stipulation of fact and the accused's providence inquiry narrowed the period of the accused's criminality. By simply entering findings of guilty to the specifications as written, the appellant was prejudiced by a court-martial record that "indicates a pattern of criminal conduct occurring over a greater period of time than actually took place." The court provided relief by modifying the findings and reassessing the sentence based on the modified findings.

4. Issue – Bill of particulars

a) *United States v. Harman*, 66 M.J. 710 (Army Ct. Crim. App. 2008). MJ erred by accepting a verdict from the panel that specifically incorporated the bill of particulars. ACCA amended the specification and charge to implement the panel's clear intent.

5. Issue – Announcing findings

a) *United States v. Mantilla*, 36 M.J. 621 (A.C.M.R. 1992). After findings of guilty have been announced, MJ may seek clarification any time before adjournment, and error in announcement of findings may be corrected by new announcement before final adjournment of court-martial. Such correction is not reconsideration; accused, however, should be given opportunity to present additional matters on sentencing.

b) *United States v. Perez*, 40 M.J. 373 (C.M.A. 1994). President's disclosure of members' unanimous vote that overt act alleged in support of conspiracy specification had not been proven, during discussion of proposed findings as reflected on findings worksheet, was not announcement of finding of not guilty and had no legal effect. MJ had authority to direct reconsideration of the inconsistent verdict. Alternatively, MJ could have advised members that findings amounted to a finding of not guilty and advised them of their option to reconsider.

H. Impeachment of Findings. **RCM 923**.

1. Strong policy against the impeachment of verdicts.

a) Promotes finality in court-martial proceedings.

b) Encourages members to fully and freely deliberate.

2. General rule: Deliberative privilege – court deliberations are privileged (MRE 509).

3. Exceptions: Court members' testimony and affidavits cannot be used after the court-martial to impeach the verdict except in <u>three</u> limited situations. RCM 923; MRE 606. *See United States v. Loving*, 41 M.J. 213 (C.M.A. 1994).

a) Outside influence (*e.g.*, bribery, jury tampering).

b) Extraneous prejudicial information.

(1) *United States v. Witherspoon*, 16 M.J. 252 (C.M.A. 1983). Improper court member visit to crime scene.

(2) *United States v. Almeida*, 19 M.J. 874 (A.F.C.M.R. 1985). No prejudice where court member talked to witness about Thai cooking during a recess in the trial.

(3) *United States v. Elmore*, 33 M.J. 387 (C.M.A. 1991). Blood expert witness had dinner with the members. Extensive *voir dire* established the lack of taint.

c) Unlawful command influence.

(1) *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984). Unlawful command control for president to order a re-vote after a finding of not guilty had been reached. MJ should build a factual record at a post-trial Article 39(a) session.

(2) *United States v. Accordino*, 20 M.J. 102 (C.M.A. 1985). President of court can express opinions in strong terms and call for a vote when discussion is complete or further debate is pointless. It is improper, however, for the president to use superiority of rank to coerce a subordinate to vote in a particular manner.

d) Possible voting irregularity not enough. *United States v. Brooks*, 42 M.J. 384 (1995). Deliberative privilege precludes MJ from entering a finding of not guilty when he concludes that members may have come to guilty finding as a result of improperly computing their votes.

e) *United States v. Hardy*, 46 M.J. 67 (1997). "[T]he protection of the deliberative process outweigh[s] the consequences of an occasional disregard of the law by a court-martial panel." *Id*. at 74.

4. Discovery of impeachable information.

a) Polling of court members is prohibited. RCM 922(e). May not impeach findings with post-trial member questionnaires. *See United States v. Heimer*, 34 M.J. 541 (A.F.C.M.R. 1991). MRE 606 establishes the only three permissible circumstances to impeach a verdict. Post-trial questionnaires improperly "sought to impeach each panel member's subjective interpretation of the evidence – the precise material the rule seeks to protect." *Id*. at 546.

b) *United States v. Ovando-Moran*, 48 M.J. 300 (1998). Gathering information to impeach a verdict is not a proper basis for post-trial interviews by counsel of panel members. Information in counsel's post-trial affidavit that members improperly considered testimony and were impacted by military judge's comments during trial fell outside bounds of MRE 606(b) to impeach findings of court-martial.

c) Additional cases involving impeachment: *United States v. Hance*, 10 M.J. 622 (A.C.M.R. 1980*); United States v. Higdon*, 2 M.J. 445 (A.C.M.R. 1975); *United States v. Harris*, 32 C.M.R. 878 (A.F.B.R. 1962).

5. Evidence introduced at sentencing for the sole purpose of impeaching the findings is inadmissible. *See infra United States v. Johnson*, 62 M.J. 31 (2005).

PRESENTENCING PROCEDURES. RCM 1001.

I. Basic Procedures. **RCM 1001(a)(1)**.

1. Matters to be presented by the government. The Trial Counsel's case in "aggravation." **RCM 1001(b)**. Counsel may present:

a) Service data relating to the accused from the charge sheet.

b) Personnel records reflecting the character of the accused's prior service.

c) Prior convictions.

d) Circumstances directly relating to or resulting from the offense(s).

e) Opinion evidence regarding past duty performance and rehabilitative potential.

2. Defense counsel presents the case in extenuation and mitigation. **RCM 1001(c)**.

3. Rebuttal and surrebuttal. **RCM 1001(d)**.

4. Additional matters. **RCM 1001(f)**.

5. Arguments. **RCM 1001(g)**.

6. Rebuttal argument at MJ's discretion. **RCM 1001(a)(1)(F)**.

J. Matters Presented by the Prosecution. **RCM 1001(b)**.

1. Service data relating to the accused taken from the charge sheet. **RCM 1001(b)(1)**.

a) Name, rank and unit or organization.

b) Pay per month.

c) Current service (initial date and term).

d) Nature of restraint and date imposed.

e) Note: Personal data is ALWAYS subject to change and should be verified PRIOR to trial and announcement by the Trial Counsel in open court. Consider promotions, reductions, time-in-grade pay raises, calendar year pay changes, pretrial restraint, etc.

2. Personnel records reflecting character of prior service. **RCM 1001(b)(2).**

a) "*Under regulations of the Secretary concerned*, trial counsel may obtain and introduce from the personnel records of the accused evidence of . . . character of prior service" (emphasis added). These records may include personnel records contained in the Official Military Personnel File (OMPF) *or located elsewhere*, unless prohibited by law or other regulation. Army Regulation (AR) 27-10, para. 5-29*a* implements RCM 1001(b)(2).

b) AR 27-10, para. 5-29*a* illustrates, in a non-exclusive manner, those items qualifying for admissibility under RCM 1001(b)(2) and (d).

c) Personnel records are NOT limited to matters contained in a service member's Military Personnel Records Jacket (MPRJ), OMPF or Career Management Information File (CMIF). AR 27-10, para. 5-29*a*. The rule of *United States v. Weatherspoon*, 39 M.J. 762 (A.C.M.R. 1994) (holding that personnel records are only those records in the OMPF, MPRJ, and CMIF) is no longer good law. The key is whether the record is maintained IAW applicable departmental regulations.

(1) *United States v. Davis*, 44 M.J. 13 (1996). By failing to object at trial, appellant waived any objection to the admissibility of a Discipline and Adjustment (D&A) report created and maintained by the United States Disciplinary Barracks in accordance with a local regulation. The Court of Appeals for the Armed Forces (CAAF) did *not* decide whether the report was admissible under RCM 1001(b)(2).

(2) *United States v. Fontenot*, 29 M.J. 244 (C.M.A. 1989). Handwritten statements attached to appellant's DD Form 508s (Report of/or Recommendation for Disciplinary Action) made during the appellant's pretrial confinement not admissible under RCM 1001(b)(2). The miscellaneous pieces of paper that accompanied the DD 508s were not provided for in the applicable departmental regulation, AR 190-47. The Court of Military Appeals (CMA) did not decide whether the DD 508s themselves were admissible. *Id*. at 248 n.2.

(3) *United States v. Ariail*, 48 M.J. 285 (1998). National Agency Questionnaire, DD Form 398-2, completed by accused and showing history of traffic offenses, was admissible under RCM 1001(b)(2), where it did not meet admission criteria under RCM 1001(b)(3) [prior conviction].

(4) *United States v. Douglas, III*, 57 M.J. 270 (2002). A stipulation of fact from a prior court-martial as evidence of a prior conviction was properly admissible under RCM 1001(b)(2) *not* RCM 1001(b)(3) as part of a personnel record.

(5) *United States v. Lane*, 48 M.J. 851 (A.F. Ct. Crim. App. 1998). AF Form 2098 (reflecting the current AWOL status of the accused who was tried *in absentia*) was admissible pursuant to RCM 1001(b)(2).

(6) *United States v. Reyes*, 63 M.J. 265 (2006). During the sentencing phase, the trial counsel offered into evidence Prosecution Exhibit (PE) 6, which was represented to be "excerpts" from Reyes's Service Record Book. Apparently, neither the defense counsel nor the military judge checked PE 6 to make sure it was free of any defects, as it was admitted without objection. There were a variety of unrelated documents "[t]ucked between the actual excerpts" from the Service Record Book. Such documents included the entire military police investigation, the pretrial advice from the SJA, inadmissible photographs, and appellant's pretrial offer to plead guilty to charges on which the members had just acquitted appellant. The sentence was set aside and a rehearing authorized.

d) Article 15s.

(1) Ordinarily, to be admissible in sentencing, the proponent must show that that the accused had opportunity to consult with counsel and that accused waived the right to demand trial by court-martial. *United States v. Booker*, 5 M.J. 238 (C.M.A. 1978); *United States v. Mack*, 9 M.J. 300 (C.M.A. 1980). Absent objection by defense counsel, however, Military Rule of Evidence (MRE) 103 does *not* require the military judge to affirmatively determine whether an accused had an opportunity to consult with counsel and that the accused waived the right to demand trial by court-martial before admitting a record of nonjudicial punishment (NJP) (an accused's "*Booker*" rights). Absent objection, a military judge's ruling admitting evidence is subject plain error analysis. *See United States v. Kahmann*, 59 M.J. 309, 313 (2004). *See also United States v. Dyke*, 16 M.J. 426 (C.M.A. 1983) (suggesting without holding that MRE 103 applies to MJ's determination of admissibility of NJP records).

(2) *United States v. Edwards*, 46 M.J. 41 (1997). Whether a vessel is operational affects the validity of an Article 15 for its subsequent use at a court-martial. If the vessel is not operational, for a record of prior NJP to be admissible, the accused must have had a right to consult with counsel regarding the Article 15.

(3) *United States v. Dire*, 46 M.J. 804 (C.G. Ct. Crim. App. 1997). Accused was awarded Captain's Mast (NJP) for wrongful use of marijuana and lysergic acid diethylamide. He was later charged for several drug offenses, including the two that were the subject of the earlier NJP. He was convicted of several of the charged offenses, including one specification covering the same offense subject to the NJP. Defense counsel failed to object to personnel records with references to a prior NJP. That failure to object waived any objection.

(4) *United States v. Rimmer*, 39 M.J. 1083 (A.C.M.R. 1994) (per curiam). Exhibit of previous misconduct containing deficiencies on its face is not qualified for admission into evidence. Record of NJP lacked any indication of accused's election concerning appeal of punishment, and imposing officer failed to check whether he conducted an open or closed hearing.

(5) *United States v. Godden*, 44 M.J. 716 (A.F. Ct. Crim. App. 1996). Accused objected to the admission of a prior record of NJP based on government's failure to properly complete the form (absence of the typed signature block of the reviewing attorney and the dates the form was forwarded to other administrative offices for processing). The Air Force Court concluded that the omissions were "administrative trivia" and did not affect any procedural due process rights.

(6) *United States v. Gammons*, 51 M.J. 169 (1999). The accused was court-martialed for various offenses involving the use of illegal drugs. The accused had already received an Article 15 for one of those offenses. At the outset of the trial, the trial counsel offered a record of NJP. Defense counsel had no objection and, in fact, intended to use the Article 15 themselves. The court pointed out that under Article 15(f) and *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989), the defense had a gate keeping role regarding the Article 15. If defense says the Article 15 is going to stay out, it stays out.

(7) *United States v. LePage*, 59 M.J. 659 (N-M. Ct. Crim. App. 2003). Military judge erred by admitting PE 3, an NJP action which was stale by § 0141 of the JAGMAN because it predated any offenses on the charge sheet by more than two years. After noting that "plain error leaps from the pages of this record," the court determined that the MJ would not have imposed a BCD but for his consideration of the prior NJP.

(8) *United States v. Cary*, 62 M.J. 277 (2006). Trial counsel introduced personal data sheet of the accused erroneously indicating that the accused had received one prior Article 15. Without an objection from defense counsel, CAAF proceeded under a plain error standard. Although there may have been error and it may have been plain, the accused's rights were not materially prejudiced.

e) Letters of Reprimand.

(1) *United States v. Zakaria*, 38 M.J. 280 (C.M.A. 1993). Applying MRE 403, the court held that the MJ erred in admitting LOR given the accused for sexual misconduct with his teenage stepdaughter and other teenage girls where accused was convicted of larceny of property of a value less than $100.00. "[The reprimand's] probative value as to his military character was significantly reduced because of its obvious reliability problems. In addition, it is difficult to imagine more damaging sentencing evidence to a soon-to-be sentenced thief than also brandishing him a sexual deviant or molester of teenage girls." *Id*. at 283.

(2) *United States v. Williams*, 47 M.J. 142 (1997). Pursuant to a pretrial agreement, the prosecution withdrew a previously referred additional charge and specification alleging similar misconduct to original charge. The accused's commander then issued a memorandum of reprimand for the same misconduct as contained in the withdrawn charge. The CAAF held lack of objection at trial constituted waiver absent plain error, and found none "given the other evidence presented in aggravation." Court notes matter in letter of reprimand became uncharged misconduct on basis of mutual agreement, *i.e.*, pretrial agreement, and does not address the propriety of trying to "back door" evidence of uncharged misconduct.

(3) *United States v. Clemente*, 50 M.J. 36 (1999). Two letters of reprimand in accused's personnel file properly admitted pursuant to RCM 1001(b)(2), even though letters were for conduct dissimilar to charged offenses. The CAAF noted there was no defense challenge to the accuracy, completeness or proper maintenance of the letters, and the evidence directly rebutted defense evidence. The court applied an abuse of discretion standard and held that the LORs were personnel records that did reflect past behavior and performance, and MRE 403 was not abused.

f) Caveats.

(1) No "rule of completeness." Trial counsel cannot be compelled to present favorable portions of personnel records if unfavorable portions have been introduced in aggravation. *See* analysis to RCM 1001(b)(2).

(2) RCM 1001(b)(2) cannot be used as a "backdoor means" of admitting otherwise inadmissible evidence. *United States v. Delaney*, 27 M.J. 501 (A.C.M.R. 1988) (observing that government cannot use enlistment document (e.g., enlistment contract) to back door inadmissible prior arrests; cannot then use police report to rebut accused's attempted explanations of arrests). *Compare with Ariail*, 48 M.J. 285 (1998) (holding that information on NAQ that had information on prior convictions was admissible under RCM 1001(b)(2)).

(3) *United States v. Vasquez*, 54 M.J. 303 (2001). Plea-bargaining statements are not admissible (MRE 410) even if those statements relate to offenses that are not pending before the court-martial at which they are offered. It was error for the judge to admit into evidence a request for an administrative discharge in lieu of trial by court-martial. *See also United States v. Anderson*, 55 M.J. 182 (2001).

g) Defects in documentary evidence.

(1) *United States v. Donohue*, 30 M.J. 734 (A.F.C.M.R. 1990). Government introduced document that did not comply with AF Reg. requiring <u>evidence on the document or attached thereto</u> that accused received a copy and had an opportunity to respond. ISSUE: May Government cure the defect with testimony that accused did receive a copy and was offered an opportunity to respond? "The short answer is no." Why – because the applicable AF Reg. required evidence on the document itself. Absent a specific regulatory requirement such as that in *Donahue*, live testimony could cure a documentary/procedural defect. *See also*, *United States v. Kahmann*, 58 M.J. 667 (N-M. Ct. Crim. App. 2003), *aff'd*, 59 M.J. 309 (2004) *supra*.

(2) MJ must apply MRE 403 to RCM 1001(b)(2) evidence. *See United States v. Zengel*, 32 M.J. 642 (C.G.C.M.R. 1991) (suppressing a prior "arrest" that was documented in the accused's personnel records). *See also United States v. Stone*, 37 M.J. 558 (A.C.M.R. 1993); and *United States v. Zakaria*, 38 M.J. 280 (C.M.A. 1993).

3. Prior convictions - civilian and military. **RCM 1001(b)(3).**

a) There is a "conviction" in a court-martial case when a sentence has been adjudged. RCM 1001(b)(3)(A). **2002 Amendment to RCM 1001(b)(3)(A):** "In a civilian case, a 'conviction' includes any disposition following an <u>initial judicial determination or assumption of guilt</u>, such as when guilt has been established by guilty plea, trial, or **plea of nolo contendere**, regardless of the subsequent disposition, sentencing procedure, or final judgment. However, a 'civilian conviction' does not include a diversion from the judicial process without a finding or admission of guilt; expunged convictions; juvenile adjudications; minor traffic violations; foreign convictions; tribal court convictions; or convictions reversed, vacated, invalidated or pardoned because of errors of law or because of subsequently discovered evidence exonerating the accused."

(1) *United States v. Caniete*, 28 M.J. 426 (C.M.A. 1989). Convictions obtained between date of offense for which accused was on trial and date of trial were "prior convictions" per RCM 1001(b)(3)(A).

(2) Juvenile adjudications are not convictions within the meaning of RCM 1001(b)(3) and are therefore inadmissible in aggravation. *United States v. Slovacek*, 24 M.J. 140 (C.M.A. 1987).

b) Use of prior conviction.

(1) *United States v. Tillar*, 48 M.J. 541 (A.F. Ct. Crim. App. 1998). At sentencing, trial counsel offered evidence of 18-year-old special court-martial conviction for larceny of property of value less than $100.00. MJ allowed evidence, but instructed panel not to increase sentence solely on basis of prior conviction. The Air Force Court upheld admission of the conviction, noting only time limitation is whether such evidence is unfairly prejudicial (MRE 403).

(2) Military judge must apply the MRE 403 balancing test. *United States v. Glover*, 53 M.J. 366 (2000).

(3) *United States v. White*, 47 M.J. 139 (1997). Accused who testified during sentencing about prior bad check convictions waived issue of proper form of admission of such prior convictions under RCM 1001(b)(3). TC offered in aggravation four warrants for bad checks that indicated plea in civilian court of "*nolo*" by accused. Accused then testified she had paid the required fines for the offenses shown on the warrants. There was also no indication by the defense that accused would not have testified to such information if the MJ had sustained the original defense objection to the warrants when offered by the TC.

(4) *United States v. Cantrell*, 44 M.J. 711 (A.F. Ct. Crim. App. 1996). "The proper use of a prior conviction . . . is limited to the basic sentencing equation. Evidence is admissible in sentencing either because it shows the nature and effects of the crime(s) or it illumines the background and character of the offender." *Id*. at 714.

c) Pendency of appeal. RCM 1001(b)(3)(B).

(1) Conviction is still admissible.

(2) Pendency of appeal is admissible as a matter of weight to be accorded the conviction.

(3) Conviction by **summary court-martial or special court-martial without a military judge** is not admissible until review under UCMJ Article 64 or 66 is complete.

d) Authentication under Section IX of MRE required.

e) "MCM provides only for consideration of *prior convictions*, and not of *any* prior criminal record in sentencing." *United States v. Delaney*, 27 M.J. 501 (A.C.M.R. 1988).

f) Methods of proof.

(1) DA Form 2-2 (Insert Sheet to DA Form 2-1, Record of Court Martial Convictions).

(2) DD Form 493 (Extract of Military Records of Previous Convictions).

(3) Promulgating order (an order is not required for a SCM (RCM 1114(a)(3))).

(4) Record of trial. DD Form 490 (Record of Trial) or 491 (Summarized Record of Trial) for special and general courts-martial and DD Form 2329 for SCM.

(5) Arraignment calendar.

(6) State agency records. *United States v. Eady*, 35 M.J. 15 (C.M.A. 1992). Proof of conviction in form of letter from police department and by indictment and offer to plead guilty not prohibited under the MRE.

(7) Use of personnel records of the accused. *United States v. Barnes*, 33 M.J. 468 (C.M.A. 1992). Government may use Department of Defense Form 1966/3 to prove accused's prior conviction IAW:

(a) MRE 803(6), records of regularly conducted activity; or

(b) MRE 801(d)(2), admission by party opponent.

g) Other considerations

(1) So long as only relevant portions are used and the probative value outweighs the prejudicial effect. *United States v. Wright*, 20 M.J. 518 (A.C.M.R. 1985).

(2) A trial judge may, in his discretion, allow both parties to present evidence that explains a previous conviction, including the stipulation of fact from the record of trial of the accused's prior court-martial. *United States v. Nellum*, 24 M.J. 693 (A.C.M.R. 1987).

(3) *United States v. Kelly*, 45 M.J. 259 (1996) (holding that it was improper for court-martial to consider SCM conviction on sentencing when there was no evidence accused was ever advised of the right to consult with counsel or to be represented by counsel at his SCM).

(4) *United States v. Prophete*, 29 M.J. 925 (A.F.C.M.R. 1989). Properly authenticated computer print-out of calendar (reflecting guilty plea by accused) can provide proof of a civilian conviction for purposes of RCM 1001(b)(3)(A).

(5) *United States v. Mahaney*, 33 M.J. 846 (A.C.M.R. 1991). Civilian conviction is not self-authenticating because not under seal.

4. Aggravation Evidence. **RCM 1001(b)(4).** A military judge has broad discretion in determining whether to admit evidence under 1001(b)(4). *United States v. Rust*, 41 M.J. 472, 478 (1995); *United States v. Wilson*, 47 M.J. 152, 155 (1997); *United States v. Gogas*, 58 M.J. 96 (2003).

a) ". . . [E]vidence as to any aggravating circumstances *directly relating to or resulting from* the offenses of which the accused has been found guilty" (emphasis added). See *United States v. Hardison*, 64 M.J. 279 (2007)

b) Three components – "Evidence in aggravation includes, but is not limited to":

(1) Victim-Impact: "[E]vidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of the offense committed by the accused."

(2) Mission-Impact: "[E]vidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense."

(3) Hate-Crime Evidence: "[E]vidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person."

c) *United States v. Nourse*, 55 M.J. 229 (C.A.A.F. 2001). The CAAF held that it was permissible to admit evidence of other uncharged larcenies of property from the same victim by the accused because such evidence "directly related to the charged offenses as part of a continuing scheme to steal from the . . . [victim]." This evidence showed the "full impact of appellant's crimes" upon the victim. *See also United States v. Shupe*, 36 M.J. 431 (C.M.A. 1993); *United States v. Mullens*, 29 M.J. 398 (C.M.A. 1990).

d) *United States v. Patterson*, 54 M.J. 74 (C.A.A.F. 2000). Testimony by government expert regarding patterns of pedophiles, to include "grooming" of victims, admissible where the expert did not expressly testify that the accused was a pedophile. *Compare with United States v. McElhaney*, 54 M.J. 120 (2000) (holding that the military judge erred when he allowed a child psychiatrist to testify about future dangerousness).

e) *United States v. Maynard*, 66 M.J. 242 (C.A.A.F. 2008). Absent defense objection, the court will apply the plain error test to determine if a military judge erred in admitting aggravation evidence.

f) *United States v. Anderson*, 60 M.J. 548 (A.F. Ct. Crim. App. 2004). The court affirmed the MJ's decision to permit the TC to introduce portions of a Senate report detailing its findings related to child pornography (appellant convicted of various offenses related to child pornography). The excerpt specifically addressed the impact of child pornography on the children involved, particularly the physical and psychological harm they experience. The court observed that the children depicted are victims for RCM 1001(b)(4) purposes and the information in the report was sufficiently direct to qualify for admission as impact evidence under the same rule. "The increased predictable risk that child pornography victims may develop psychological or behavioral problems is precisely the kind of information the sentencing authority needs to fulfill" its function of discerning a proper sentence.

g) *United States v. Sittingbear*, 54 M.J. 737 (N-M. Ct. Crim. App. 2001). Victim's testimony that she sustained a rectal tear during a rape is admissible even where a sodomy charge had been withdrawn and dismissed.

h) *United States v. Cameron*, 54 M.J. 618 (A.F. Ct. Crim. App. 2000). Uncharged false statements about charged offenses, as a general rule, are not proper evidence in aggravation. *But see United States v. Driver*, 57 M.J. 760 (N-M. Ct. Crim. App. 2002). False official statement to NCIS agent relating to conspiracy to commit arson and arson charge admissible in aggravation despite appellant's acquittal of the Article 107 offense provided: there is sufficient evidence that the act (i.e., false official statement occurred); the MJ properly does an MRE 403 balancing; and the sentencing authority is fully aware of the acquittal on the charged offense.

i) *United States v. Alis*, 47 M.J. 817 (A.F. Ct. Crim. App. 1998). Accused's awareness of magnitude of crime, and remorseless attitude toward offenses, is admissible in sentencing.

j) *United States v. Sanchez*, 47 M.J. 794 (N-M. Ct. Crim. App. 1998). Victim's testimony about assault, extent of injuries suffered, hospitalization, and general adverse effects of assault admissible against accused found guilty of misprision of offense. TC also offered pictures of wounds and record of medical treatment of victim. Navy-Marine Court noted this evidence in aggravation under RCM 1001(b)(4) did not *result from* misprision conviction, but did *directly relate* to the offense and was therefore admissible.

k) *United States v. Wilson*, 47 M.J. 152 (1997). Accused convicted of disrespect for commenting to another party that, "Captain Power, that f_____g b____h is out to get me." Officer testified at sentencing to "concern" statement caused her. The CAAF held that the testimony was properly admissible.

l) *United States v. Jones*, 44 M.J. 103 (1996). HIV-positive accused charged with aggravated assault and adultery; convicted only of latter in judge alone trial and sentenced to the maximum punishment. In imposing his sentence, the MJ criticized the accused's "disregard for the health and safety of an unknown victim and this purposeful conduct committed immediately after being made aware of the circumstances . . . ." The CAAF held medical condition was a fact directly related to the offense under RCM 1001(b)(4) and essential to understanding the circumstances surrounding the offense.

m) *United States v. Zimmerman*, 43 M.J. 782 (Army Ct. Crim. App. 1996). Evidence that accused was motivated by white supremacist views when he wrongfully disposed of military munitions to what he believed was a white supremacist group constituted aggravating circumstances directly related to the offense.

n) *United States v. Gargaro*, 45 M.J. 99 (1996). Evidence that civilian drug dealer triggered the investigation when he was arrested with an AK-47 that he said he obtained from a Fort Bragg soldier showed the extent of the conspiracy and the responsibility of the accused's commander. Any unfair prejudice stemming from the fact that the weapon was found in the hands of a drug dealer was outweighed by the probative value showing the facts and circumstances surrounding the investigation of the charged offenses.

o) *United States v. Hollingsworth*, 44 M.J. 688 (C.G. Ct. Crim. App. 1996). Testimony of child victim to offense which was the basis of a withdrawn specification admissible when it showed extent of scheme with evidence of other transactions. Also, testimony of expert child psychologist that sexual abuse victim's recovery was affected or hindered by the pendency of legal proceedings admissible where defense raised factors affecting a victim's recovery rate and expert's testimony provided a "more complete" explanation of the victim's prognosis.

p) *United States v. Scott*, 42 M.J. 457 (1995). Initial findings to involuntary manslaughter and assault with a dangerous weapon set aside (accused fired into a crowd). On appeal, the charge that remained was carrying a concealed weapon. Evidence of death and injuries showed circumstances "directly related to or resulting from" the accused's carrying of a concealed weapon.

q) *United States v. Terlep*, 57 M.J. 344 (2002). Appellant, initially charged with burglary and rape, plead to unlawful entry and assault. On sentencing, victim testified she awoke from what she thought was a "sex dream" only to discover the appellant on top of her. She testified, in part, that "when I told him to get off of me, he had to take his private part out of me and get off. . . ." She also testified "He admitted—he said what he had done. He said, 'I raped you.'" The CAAF found that the victim's testimony did not constitute error. The court noted that although the appellant entered into a pretrial agreement to lesser offenses, the victim could testify to "her complete version of the truth, as she saw it" limited only by the terms of the pretrial agreement and stipulation of fact. Neither the pretrial agreement nor the stipulation of fact limited the evidence the government could present on sentencing. The court noted that "absent an express provision in the pretrial agreement or some applicable rule of evidence or procedure barring such evidence, this important victim impact evidence was properly admitted." RCM 1001(b)(4) provides for "accuracy in the sentencing process by permitting the judge to fully appreciate the true plight of the victim in each case."

r) *United States v. Marchand*, 56 M.J. 630 (C.G. Ct. Crim. App. 2001). Expert testimony describing impact of child pornography upon minors depicted in images admissible notwithstanding that expert did not establish that the particular victims in the images viewed by accused actually suffered any adverse impact, only that there was an increased risk to sexually abused minors generally of developing complications from abuse.

s) *United States v. Smith*, 56 M.J. 653 (Army Ct. Crim. App. 2001). Unwarned testimony by appellant to U.S.D.B. Custody Reclassification Board where appellant said "'it's an inmates duty to try and escape, especially long-termers" and that he is "'an escape risk and always will be'" admissible on aggravation.

t) *United States v. Gogas*, 58 M.J. 96 (2003). Letter from accused to his Congressman complaining about being prosecuted for LSD use admissible under 1001(b)(4) as directly related to the offense of drug use. The letter highlighted the appellant's "indifference to anything other than his own pleasure." The court did not rule on whether the evidence was also admissible on the issue of rehabilitative potential.

u) *United States v. Dezotell*, 58 M.J. 517 (N-M. Ct. Crim. App. 2003). Witness' testimony that appellant's unauthorized absence and missing movement adversely affected ship's mission and efficiency during a period of heightened responsibilities proper testimony despite the fact that the appellant, at the time, was not working for the witness and the witness' testimony was not subject "to precise measurement or quantification." All that is required is a "direct logical connection or relation between the offense and the evidence offered."

v) *United States v. Pertelle*, No. 9700689 (Army Ct. Crim. App., Jun. 30, 1998) (unpub.). Testimony of accused's company commander that he intended to publicize results of court-martial in company did not constitute proper evidence in aggravation. Such evidence related only to prospective application of sentence, and did not "directly relate to or result from the accused's offense."

w) *United States v. Powell*, 45 M.J. 637 (N.M. Ct. Crim. App. 1997), *aff'd*, 49 M.J. 360 (1998). Uncharged misconduct that accused lost government property, was financially irresponsible, and passed worthless checks was **not** directly related to offenses of which convicted - *i.e*., failure to report to work on time and travel and housing allowance fraud - and therefore not admissible at sentencing under RCM 1001(b)(4). The court also noted that "MRE 404(b) does not determine the admissibility of evidence of uncharged misconduct during sentencing . . . admissibility of such evidence is determined solely by RCM 1001(b)(4) . . . ." *Id*. at 640.

x) *United States v. Rust*, 41 M.J. 472 (1995). Prejudicial error to admit suicide note in aggravation phase of physician's trial for dereliction of duty and false official statement. The murder-suicide was too attenuated *even if* the government could establish link between accused's conduct and murder-suicide, and clearly failed MRE 403's balancing test.

y) *United States v. Davis*, 39 M.J. 281 (C.M.A. 1994). Victim's testimony as to how he would feel if the accused received no punishment not admissible as evidence of impact evidence under RCM 1001(b)(4) or as evidence regarding accused's rehabilitative potential under RCM 1001(b)(5).

z) *United States v. Lowe*, 56 M.J. 914 (N-M. Ct. Crim. App. 2002). During the sentencing phase of trial, the MJ relaxed the rules of evidence for defense admitting DE A, a letter from a Navy psychologist which assessed appellant, concluding "'in my professional opinion, he does not present a serious threat to society.'" In rebuttal, the MJ admitted over defense objection PE 3, a seventeen-page incident report with twenty-eight pages of attached statements alleging that appellant harassed and assaulted various women, only one of whom was the victim of an offense for which appellant was convicted. The MJ also admitted the evidence as aggravation evidence. Held – admission of PE 3 by the MJ was an abuse of discretion since the evidence did not directly relate to or result from the offenses. It involved different victims and did not involve a continuing course of conduct with the same victim. The court also found that despite the MJ's relaxation of the rules of evidence, the introduction of PE 3 was not proper rebuttal evidence. "Inadmissible aggravation evidence cannot be introduced through the rebuttal 'backdoor' after the military judge relaxed the rules of evidence for sentencing." *Id*. at 917. Specific instances of conduct are admissible on cross-examination to test an opinion, however, extrinsic evidence as to the specific instances is not.

aa) *United States v. Pope*, 63 M.J. 68 (2006). Air Force recruiters who received training at "Recruiter Technical School" received a letter signed by the Commander of the Air Force Recruiting Service, stating that if they failed to treat applicants respectfully and professionally, they "should not be surprised when, once you are caught, harsh adverse action follows." During the sentencing phase of appellant's trial, the military judge allowed the Government to admit the letter in aggravation, over defense objection. The sentence was set aside and a rehearing on sentence was authorized. The CAAF reviews a military judge's decision to admit evidence on sentencing for a clear abuse of discretion. *United States v. Manns*, 54 M.J. 164, 166 (2004). In the present case, CAAF was not convinced beyond reasonable doubt that the members were not influenced by the letter.

bb) *United States v. Bungert*, 62 M.J. 346 (2006). After appellant's misdeeds of drug use and distribution were discovered, he offered to identify other drug users with whom he worked in exchange for "a deal." Appellant implicated eleven individuals, and in doing so, launched an extensive investigation by the Coast Guard Investigative Service that uncovered no evidence. During presentencing, two witnesses testified primarily about the nature and scope of the investigation brought about as a result of Appellant's allegations. Defense counsel made no objection. Applying a plain error standard, CAAF found that Appellant offered no evidence that he was prejudiced in any substantial way by the testimony of the Government's sentencing witnesses.

cc) *United States v. Hardison*, 64 M.J. 279 (2007). The military judge committed plain error in admitting evidence of Appellant's pre-service drug use and a service waiver for that drug use. Admissible evidence in aggravation must be "directly related" to the convicted crime.

dd) *United States v. Palomares*, 2007 WL 2405293 (N-M. Ct. Crim. App. 2007) (unpublished): While serving in Afghanistan and engaged in combat operations, accused purchased and used valium. During sentencing, the CO talked about the nature of the unit's combat operations, how the accused's and other's use complicated relief in place and required a unit urinalysis and search upon redeployment. No defense objection. Even though the accused was not the only Marine who used Valium, his offense had an unnecessary and harmful impact on the mission, discipline, and efficiency.

ee) *United States v. Chapman*, 2007 WL 2059743 (NMCCA 2006) (unpublished): In missing movement case, sentencing witness allowed to testify about: (1) how accused's absence caused another Marine to deploy with little notice and one year ahead of scheduled deployment, and (2) injuries witness received on deployment. Military judge did not abuse his discretion because he limited his consideration of the injury testimony to the nature of the environment to which the accused was suppose to go and the type of danger. Military judge also performed MRE 403 balancing.

ff) *United States v. McKeague*, 2007 WL 2791701 (AFCCA 2007) (unpublished): No error when judicial notice taken that fatigue is a withdrawal symptom of methamphetamine. Supervisor testified, without objection, about how the accused was observed sleeping seven times in a two- person shop, thereby increasing the workload. It was a reasonable inference that Accused's chronic sleepiness was caused by unlawful drug use.

5. Opinion evidence regarding past duty performance and rehabilitative potential. **RCM 1001(b)(5).**

a) What does "rehabilitative potential" mean?

(1) The term "rehabilitative potential" means potential to be restored to "a useful and constructive place in *society*." **RCM 1001(b)(5).**

(2) *United States v. Williams*, 41 M.J. 134 (C.M.A. 1994). Psychiatric expert's prediction of future dangerousness was proper matter for consideration in sentencing under rule providing for admission of evidence of accused's potential for rehabilitation under RCM 1001(b)(5).

(3) *United States v. Davis*, 39 M.J. 281 (C.M.A. 1994). Victim's testimony as to how he would feel if the accused received no punishment was not admissible as evidence of accused's rehabilitative potential under RCM 1001(b)(5).

b) Foundation for opinion testimony. **RCM 1001(b)(5)(B).**

(1) The witness must possess sufficient information and knowledge about the accused's "character, performance of duty, moral fiber, determination to be rehabilitated, and nature and severity of the offenses" in order to offer a "helpful," rationally based opinion. **RCM 1001(b)(5)(B)**, codifying *United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989).

(2) *United States v. Powell*, 49 M.J. 460 (1998). In laying a foundation for opinion evidence of an accused's rehabilitative potential, a witness may not refer to specific acts.

(3) Quality of the opinion depends on the foundation. *United States v. Boughton*, 16 M.J. 649 (A.F.C.M.R. 1983). Opinions expressed should be based on personal observation, but may also be based on reports and other information provided by subordinates.

(4) *United States v. Sylvester*, 38 M.J. 720 (A.C.M.R. 1994). Opinion evidence regarding rehabilitative potential is not *per se* inadmissible merely because defense counsel establishes on cross-examination that witness's assessment goes only to potential for military service. Once proper foundation for opinion has been established, such cross examination goes to weight to be given evidence, not to its admissibility.

(5) *United States v. McElhaney*, 54 M.J. 120 (2000). Error for the military judge to allow testimony of psychiatrist regarding future dangerousness of the accused as related to pedophilia, where witness had not examined the accused or reviewed his records, and had testified that he was unable to diagnose the accused as a pedophile. *Compare with United States v. Patterson*, 54 M.J. 74 (2000).

c) What's a proper bases of opinion testimony? **RCM 1001(b)(5)(C).**

(1) Opinion evidence of rehabilitative potential may *not* be based solely on the severity of the offense; must be based upon relevant information and knowledge possessed by the witness of the accused's personal circumstances. RCM 1001(b)(5)(C); *United States v. Horner*, 22 M.J. 294 (C.M.A. 1986).

(2) *United States v. Armon*, 51 M.J. 83 (1999). Accused wrongfully wore SF tab, SF combat patch, CIB, and combat parachutist badge. COL answered negatively the question, "based upon what you've seen of the accused, if you were jumping into combat tomorrow, would you want him around?" COL did not know accused and was not familiar with his service record. The CAAF held testimony may have violated 1001(b)(5) but was not plain error and would be permissible in this context (to show the detrimental effect this misconduct had on other soldiers) under 1001(b)(4).

d) What's the proper scope of opinion testimony? **RCM 1001(b)(5)(D).**

(1) The scope "is limited to whether the accused has rehabilitative potential and to the magnitude or quality of any such potential. A witness may not offer an opinion regarding the appropriateness of a punitive discharge or whether the accused should be returned to the accused's unit."

(2) It is improper for a witness to use a euphemism for a punitive discharge in commenting on an accused's rehabilitative potential. *United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989).

(a) *United States v. Aurich*, 31 M.J. 95 (C.M.A. 1990). The commander's opinion that he does not want the accused back in his unit "proves absolutely nothing."

(b) *United States v. Yerich*, 47 M.J. 615 (Army Ct. Crim. App. 1997). Senior NCO testified that he could "form [an opinion] as to his military rehabilitation," and that accused did not have any such rehabilitative potential. The Army Court noted difficulty of grappling with claimed "euphemisms." Whether the words used by a witness constitute a euphemism depends on the circumstantial context. The court also noted that a noncommissioned officer is normally incapable of exerting improper command influence over an officer panel.

(c) *United States v. Warner*, 59 M.J. 590 (C.G. Ct. Crim. App. 2003). On cross-examination of appellant's supervisor (whom the defense called to establish that the appellant had rehabilitation potential), the government asked the witness about the appellant's rehabilitative potential "*in the Coast Guard*, given his drug abuse." The government's were improper because they linked the witness' opinion on rehabilitative potential with award of a punitive discharge.

e) Same rules may apply to the defense? "The mirror image might reasonably be that an opinion that an accused could 'continue to serve and contribute to the United States Army' simply is a euphemism for, 'I do not believe you should give him a punitive discharge.'" *United States v. Ramos*, 42 M.J. 392, 396 (1995).

(1) *United States v. Hoyt*, No. ACM 33145, 2000 CCA LEXIS 180 (A.F. Ct. Crim. App. July 5, 2000), *pet. denied*, 54 M.J. 365 (2000), held that defense witnesses cannot comment on the inappropriateness of a punitive discharge. *But see United States v. Bish*, 54 M.J. 860 (A.F. Ct. Crim. App. 2001) (noting that since the rule prohibiting euphemism falls under prosecution evidence (RCM 1001(b)(5)(D)), "it does not appear to prohibit the defense from offering evidence that a member of the accused's unit wants him back."

(2) *United States v. Griggs*, 61 M.J. 402 (2005). Appellant tried and convicted of various drug-related offenses. On sentencing, the DC offered six letters with opinions on to appellant's rehabilitative potential in the Air Force rather than as a productive member of society. The TC objected on the grounds that the statements were recommendations for retention and would confuse the members. The military judge ordered the disputed language redacted. The AFCCA held that the MJ did not abuse his discretion by ordering the redaction and, even if he did, the error was harmless (i.e., there was no prejudice to the appellant). The court cited confusion in this area of law as to whether such evidence is proper from the *accused* as a basis for its conclusion. The court also noted that the DC conceded that RCM 1001(b)(5) applied to the defense letters. CAAF granted review and concluded "the better view is that R.C.M. 1001(b)(5)(D) does not apply to defense mitigation evidence, and specifically does not preclude evidence that a witness would willingly serve with the accused again." However, CAAF further restated, as in *Aurich*, "if an accused 'opens the door' by bringing witnesses before the court to testify that they want him or her backing the unit, the Government is permitted to prove that that is not a consensus view of the command." 31 M.J. at 96-97.

(3) *United States v. Hill*, 62 M.J. 271 (2006). During the defense sentencing case, the appellant's battalion commander was called to testify about his rehabilitative potential. Before a military judge alone, he testified that he did not think he could come back to the unit as a physician's assistant. He further testified, "[i]f I was sitting in that panel over there as a juror would I allow him [Appellant] to remain in the Army? No-." The military judge promptly stated that the battalion commander's remarks were "not responsive" and consisted of testimony "that a witness is not allowed to make." However, following trial during a "Bridge the Gap" session, the military judge commented, "I was thinking of keeping him until his commander said he didn't want him back," or words to that effect. The CAAF determined from the record that the military judge was referring to back as a "physician's assistant" as opposed to "back in the Army."

f) Specific acts? RCM 1001(b)(5)(E) and (F).

(1) On direct, government may not introduce specific acts of uncharged misconduct that form the basis of the opinion. *See United States v. Rhoads*, 32 M.J. 114 (C.M.A. 1991).

(2) If the defense opens the door during cross-examination, on redirect the trial counsel should also be able to address specific incidents of conduct. *United States v. Clarke*, 29 M.J. 582 (A.F.C.M.R. 1989). *See also United States v. Gregory*, 31 M.J. 236 (C.M.A. 1990) (RCM 1001(b)(5) witness cannot testify about specific instance of misconduct as basis for opinion until cross-examined on specific good acts).

g) Future Dangerousness.

(1) *United States v. Williams*, 41 M.J. 134 (C.M.A. 1994). Psychiatric expert's prediction of future dangerousness was proper matter for consideration in sentencing under rule providing for admission of evidence of accused's potential for rehabilitation under RCM 1001(b)(5).

(2) *United States v. Scott*, 51 M.J. 326 (1999). During the presentencing phase of trial, the government offered an expert to testify about the accused's future dangerousness. Defense objected to the witness on the basis that the witness had never interviewed his client so he lacked an adequate basis to form an opinion. The judge overruled the objection. Defense's failure to object at trial that there was a violation of the accused's Fifth and Sixth Amendment rights at trial forfeited those objections, absent plain error. Although there was no evidence to indicate that the government witness had examined the full sanity report regarding the accused, the court concluded there was no plain error in this case where the doctor testified that based on the twenty offenses the accused had committed in the last two years, he was likely to re-offend.

(3) *United States v. George*, 52 M.J. 259 (2000). A social worker testified that the "accused's prognosis for rehabilitation was 'guarded' and 'questionable.'" The CAAF noted that evidence of future dangerousness is a proper matter under RCM 1001(b)(5).

h) Rebuttal Witnesses. *United States v. Pompey*, 33 M.J. 266 (C.M.A. 1991). The *Ohrt/Horner* rules apply to government rebuttal witnesses to keep unlawful command influence out of the sentencing proceedings (a rational basis for expressing opinion is still required). *But see United States v. Aurich*, 32 M.J. 95 (C.M.A. 1990) (observing that where defense witnesses testify they want accused back in unit, the government may prove that that is not a consensus of the command).

i) Absence of rehabilitative potential is a factor for consideration in determining a proper sentence; that absence is NOT a matter in aggravation. *United States v. Loving*, 41 M.J. 213 (C.M.A. 1994), *aff'd*, 517 U.S. 748 (1996). MJ's characterization of accused's disciplinary record and his company commander's testimony about accused's duty performance as aggravating circumstances was error since lack of rehabilitative potential is not an aggravating circumstance.

6. Matters admitted into evidence during findings. **RCM 1001(f)**.

a) **RCM 1001(f)(2).** The court-martial may consider any evidence properly introduced on the merits before findings, including evidence of other offenses or acts of misconduct even if introduced for a limited purpose.

b) Statements from providence inquiry.

(1) *United States v. Figura*, 44 M.J. 308 (1996). There is no demonstrative right way to introduce evidence from the providence inquiry, but MJ should permit parties to choose method of presentation.

(2) *United States v. English*, 37 M.J. 1107 (N.M.C.M.R. 1993). MJ does not have authority to consider statements of accused made during providence inquiry, absent offering of statements, and defense opportunity to object to consideration of any or all of providence inquiry.

(3) *United States v. Irwin*, 39 M.J. 1062 (A.C.M.R. 1994). The accused must be given notice of what matters are going to be considered and an opportunity to object to all or part of the providence inquiry. Tapes of the inquiry are admissible.

(4) *United States v. Holt*, 27 M.J. 57 (C.M.A. 1988). Sworn testimony given by the accused during providence inquiry may be received as admission at sentencing hearing.

(5) How to do it: authenticated copy of trial transcript, witness, tapes. *See United States v. Irwin*, 42 M.J. 479 (1995). Admissibility of various portions of providence inquiry should be analyzed in same manner as any other piece of evidence offered by the government under RCM 1001.

7. "Aggravation evidence" in stipulations of fact.

a) *United States v. Glazier*, 26 M.J. 268 (C.M.A. 1988).

(1) Inadmissible evidence may be stipulated to (subject to RCM 811(b) "interests of justice" and no government overreaching).

(2) Stipulation should be unequivocal that all parties agree stipulation is "admissible."

b) *United States v. DeYoung*, 29 M.J. 78 (C.M.A. 1989). Military judge must affirmatively rule on defense objections, even if the stipulation states that the contents are admissible. Parties cannot usurp the MJ's role.

c) *United States v. Vargas*, 29 M.J. 968 (A.C.M.R. 1990). The stipulated facts constitute uncharged misconduct not closely related to the facts alleged; therefore, they were "generally" inadmissible. BUT, the accused agreed to permit their use in return for favorable sentence limits, and there was no evidence of government overreaching.

8. Three-step process for analyzing sentencing matter presented by the prosecution per RCM 1001(b):

a) Does the evidence fit one of the enumerated categories of RCM 1001(b)?

(1) Evidence inadmissible under one theory (e.g., prior conviction under 1001(b)(4)) may be admissible under another theory (e.g., personnel record under 1001(b)(2)). *See e.g.*, *United States v. Ariail*, 48 M.J. 285 (1998); *United States v. Douglas*, 57 M.J. 270 (2002); *United States v. Gogas*, 58 M.J. 96 (2003).

b) Is the evidence in an admissible form? *United States v. Bolden*, 34 M.J. 728 (N.M.C.M.R. 1991).

c) Is the probative value substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence? MRE 403. *See United States v. Zengel*, 32 M.J. 642 (C.G.C.M.R. 1991); *United States v. Martin*, 20 M.J. 227 (C.M.A. 1985).

K. The Case in Extenuation and Mitigation. **RCM 1001(c)**.

1. Matters in extenuation. **RCM 1001(c)(1)(A).**

a) Explains circumstances surrounding commission of the offense, including those reasons that do not constitute a legal justification or excuse.

b) *United States v. Loya*, 49 M.J. 104 (1998). Evidence of quality of medical care was relevant evidence in extenuation and mitigation for an accused convicted of negligent killing, inasmuch as such evidence might reduce the appellant's blame.

2. Matters in mitigation. **RCM 1001(c)(1)(B).**

a) Personal factors concerning the accused introduced to lessen the punishment; *e.g.*, evidence of the accused's reputation or record in the service for efficiency, fidelity, temperance, courage, etc.

b) *United States v. Demerse*, 37 M.J. 488 (C.M.A. 1993). Counsel should pay particular attention to awards and decorations based on combat service.

c) *United States v. Perry*, 48 M.J. 197 (1998). The CAAF upheld military judge's decision not to instruct panel that accused stood to be found liable for $80,000 recoupment by USNA of accused's education expenses, when separated from service prior to completion of five year commitment due to misconduct, as too collateral in this case.

d) *United States v. Simmons*, 48 M.J. 193 (1998). The military judge's prohibition on the accused from offering evidence of a civilian court sentence for the same offenses that were the basis of his court-martial was error. Civilian conviction and sentence for same misconduct may be aggravating or mitigating, but defense counsel is in the best position to decide.

e) *United States v. Bray*, 49 M.J. 300 (1998). Proper mitigation evidence under RCM 1001(c) included the possibility that the accused suffered a psychotic reaction as a result of insecticide poisoning. Such evidence might lessen the adjudged sentence, and is therefore relevant.

f) Retirement benefits.

(1) *United States v. Washington*, 55 M.J. 441 (2001). At time of trial, accused was a senior airman (E-4) who could retire during her current enlistment. The military judge excluded defense evidence that estimated the accused's retirement pay if she retired after twenty years in the pay grades of E-4 and E-3. The military judge erred by refusing to admit a summary of expected lost retirement of approximately $240,000.00 if accused was awarded a punitive discharge.

(2) *United States v. Boyd*, 55 M.J. 217 (2001). The military judge declined to give a requested defense instruction on the loss of retirement benefits that could result from a punitive discharge. The accused had fifteen and a half years active service. The court held that there was no error in this case, but stated "we will require military judges in all cases tried after the date of this opinion (10 July 2001) to instruct on the impact of a punitive discharge on retirement benefits, if there is an evidentiary predicate for the instruction and a party requests it."

(3) *United States v. Luster*, 55 M.J. 67 (2001). The military judge erred when she prevented defense from introducing evidence that would show the financial impact of lost retirement resulting from a punitive discharge. The accused had eighteen years and three months of active service. The court cautioned against using the time left until retirement as the basis for deciding whether such evidence should be admitted. The probability of retirement was not remote and the financial loss was substantial. *Compare with United States v. Henderson*, 29 M.J. 221 (C.M.A. 1989). The military judge correctly denied defense introduction of financial impact data about accused's loss of retirement benefits if reduced in rank or discharged (accused was 3+ years and a reenlistment away from retirement eligibility). "[T]he impact upon appellant's retirement benefits was not 'a direct and proximate consequence' of the bad-conduct discharge."

(4) *United States v. Becker*, 46 M.J. 141 (1997). The MJ erred when he refused to allow accused with 19 years and 8-1/2 months active duty service at time of court-martial to present evidence in mitigation of loss in retired pay if discharged. "The relevance of evidence of potential loss of retirement benefits depends upon the facts and circumstances of the individual accused's case."

(5) *United States v. Greaves*, 46 M.J. 133 (1997). The military judge should give some instructions when the panel asks for direction in important area of retirement benefits. Accused was nine weeks away from retirement eligibility and did not have to reenlist.

(6) *United States v. Sumrall*, 45 M.J. 207 (1996). The CAAF recognized right of retirement-eligible accused to introduce evidence that punitive discharge will deny retirement benefits, and with proper foundation, evidence of potential dollar amount subject to loss.

(7) *United States v. Polk*, 47 M.J. 116 (1997). No Fifth Amendment due process violation where Master Sergeant lost substantial retired pay as result of bad-conduct discharge. Accused with twenty-three years of service proffered no other evidence of loss of retirement benefits, but in unsworn statement addressed loss if discharged. DC multiplied half of base pay times thirty years to argue severe penalty.

3. Statement by the accused. **RCM 1001(c)(2).**

a) Sworn statement. RCM 1001(c)(2)(B).

(1) Subject to cross-examination by trial counsel, military judge, and members.

(2) Rebuttable by:

(a) Opinion and reputation evidence of character for untruthfulness. RCM 608(a).

(b) Evidence of bias, prejudice, or any motive to misrepresent. RCM 608(c).

(c) Extrinsic evidence of prior inconsistent statements. RCM 613.

b) Unsworn statement by accused. **RCM 1001(c)(2)(C).**

(1) May be oral, written, or both.

(2) May be made by accused, counsel, or both.

(3) Matters covered in unsworn statement.

(a) *United States v. Grill*, 48 M.J. 131 (1998). The right of an accused to make a statement in allocution is not wholly unfettered, but must be evaluated in the context of statements in specific cases. It was error to sustain the government's objection to the accused making any reference to his co-conspirators being treated more leniently by civilian jurisdictions (*i.e*., not prosecuted, deported, probation). "The mere fact that a statement in allocution might contain matter that would be inadmissible if offered as sworn testimony does not, by itself, provide a basis for constraining the right of allocution."

(b) *United States v. Jeffery*, 48 M.J. 229 (1998). An accused's rights in allocution are broad, but not wholly unconstrained. The mere fact, however, that an unsworn statement might contain otherwise inadmissible evidence – *e.g*., the possibility of receiving an administrative rather than punitive discharge – does not render it inadmissible.

(c) *United States v. Britt*, 48 M.J. 233 (1998). There are some limits on an accused's right of allocution, but "comments that address options to a punitive separation from the service . . . are not outside the pale." Error for the military judge to redact portion of the accused's unsworn statement telling panel that commander intended to discharge him administratively if no punitive discharge imposed by court-martial.

(d) *United States v. Tschip*, 58 M.J. 275 (2003). Appellant, in his unsworn, told the panel "I know my commander can discharge me even if I do not receive a bad conduct discharge today." The military judge advised the panel that an unsworn was an authorized means of conveying information; they were to give the appellant's comments regarding an administrative discharge the consideration they believed it was due, to include none; administrative discharge information is generally not admissible at trial; and they were free to disregard any reference to the appellants comment made by counsel. The court held that the instruction was appropriate because the judge placed the appellant's comments "in context" for the decision makers. The court noted that the instruction was proper in light of appellant's "unfocused, incidental reference to an administrative discharge." The court left for another day whether it would be proper if the unsworn was specific and focused.

(e) *United States v. Sowell*, 62 M.J. 150 (2005). A military judge's decision to restrict an accused's sentencing statement is reviewed for abuse of discretion. In following *United States v. Grill*, 48 M.J. 132, although the right of allocution is "*generally* considered unrestricted," it is not "*wholly* unrestricted." However, CAAF distinguished this case, citing the Government's argument on findings opened the door to proper rebuttal during Appellant's unsworn statement on sentencing. The Court focused on the fact that trial counsel was aware of FC3 Elliott's acquittal the previous week. Her references to FC3 Elliott as a co-conspirator, implying criminal liability, during her findings argument indicated that FC3 Elliott was guilty of the same offense as Appellant, and therefore had a motive to lie.

(f) *United States v. Johnson*, 62 M.J. 31 (2005). Prior to trial, Appellant took a privately administered polygraph examination arranged by the defense. The examiner concluded that appellant was not deceptive when he denied knowing that he transported marijuana. During the sentencing hearing he sought to refer to his "exculpatory" polygraph test during his unsworn statement. The military judge ruled that the test results were inadmissible. The CAAF found that polygraph evidence squarely implicates its own admonition against impeaching or relitigating the verdict on sentencing. Furthermore, the court was not persuaded that exculpatory polygraph information qualifies as extenuation, mitigation, or rebuttal under R.C.M. 1001(c).

(g) *United States v. Barrier*, 61 M.J. 482 (2005). The military judge did not err when, over defense objection, he gave the "Friedmann" instruction. During appellant's unsworn statement, the military judge called the panel members' attention to the sentence received in an unrelated similar case. The military judge gave an instruction which essentially told the panel members that that part of the accused's unsworn statement was irrelevant and that they should not consider it in determining an appropriate sentence.

(4) When the accused makes an unsworn statement, he does not become a witness:

(a) Not subject to cross-examination. *See United States v. Grady*, 30 M.J. 911 (A.C.M.R. 1990) (noting that it was improper for MJ to question the unsworn accused).

(b) *United States v. Martinsmith*, 42 M.J. 343 (1995). No prejudicial error where MJ did not permit accused in unsworn statement to respond to member's question concerning whereabouts of money which accused admitted stealing. Further, the judge did not abuse discretion in denying defense request at that point to reopen its case, to introduce a "sworn statement" of the accused.

(c) *United States v. Satterley*, 55 M.J. 168 (2001). Defense counsel requested to reopen the defense case to answer a court member's question via an unsworn statement by the accused. The military judge denied the request but stated he would allow the defense to work out a stipulation of fact, or allow the accused to testify under oath. The court concluded that the military judge did NOT abuse his discretion in refusing to allow accused to make an additional, unsworn statement. The court did note, however, that "there may be other circumstances beyond legitimate surrebuttal which may warrant an additional unsworn statement . . . . Nevertheless, whether such circumstances exist in a particular case is a matter properly imparted to the sound discretion of the trial judge."

(d) *United States v. Adame*, 57 M.J. 812 (N-M. Ct. Crim. App. 2003). Error for military judge to conduct extensive inquiry regarding accused's desire for a punitive discharge in his unsworn where inquiry got into attorney-client communications. The court described the MJ's inquiry as "invasive," however, found no prejudice.

(5) *United States v. Friedmann*, 53 M.J. 800 (A.F. Ct. Crim. App. 2000), *pet. denied*, 54 M.J. 425 (2001). Proper for military judge to provide sentencing instruction to clarify for the members comments made in the accused's unsworn statement.

c) The defense may **not** present evidence or argument that challenges or re-litigates the prior guilty findings of the court. *United States v. Teeter*, 16 M.J. 68 (C.M.A. 1983).

d) If accused made an unsworn statement, government may only rebut statements of fact.

(1) *United States v. Manns*, 54 M.J. 164 (2000). "I have tried throughout my life, even during childhood, to stay within the laws and regulations of this country," was held to be a statement of fact and could be rebutted by evidence of the accused's admission to marijuana use.

(2) *United States v. Willis*, 43 M.J. 889 (A.F. Ct. Crim. App. 1996), *aff'd*, 46 M.J. 258 (1997). Government allowed to rebut accused's expression of remorse with inconsistent statements made previously by accused on psychological questionnaire and audio tape of telephone message to brother of victim.

(3) *United States v. Cleveland*, 29 M.J. 361 (C.M.A. 1990). "Although I have not been perfect, I feel that I have served well and would like an opportunity to remain in the service. . . ." The court determined that the statement was more in the nature of an opinion, "indeed, an argument;" therefore, not subject to rebuttal.

(4) *United States v. Thomas*, 36 M.J. 638 (A.C.M.R. 1992). Accused's unsworn statement commented on his upbringing, pregnant girlfriend, reasons for enlisting in the Army, and the extenuating circumstances surrounding his offenses. The accused also apologized to the Army and the victim. The court held that it was improper rebuttal to have the 1SG testify that the accused was not truthful since character for truthfulness was not at issue.

e) Relaxed rules of evidence. **RCM 1001(c)(3)**. *United States v. Saferite,* 59 M.J. 270. The rules of evidence apply at sentencing, but the MJ may relax the rules of evidence. A relaxation of the rules, however, goes more toward whether evidence is reliable and authentic; otherwise inadmissible evidence is still not admitted (citing *United States v. Boone*, 49 M.J. 187, 198 n.14 (1998)). *See also United States v. Steward*, 55 M.J. 630 (N-M. Ct. Crim. App. 2001) (observing that relaxed rules of evidence is not limited to only documentary evidence).

4. Right to a "Complete Sentencing Proceeding." *United States v. Libecap*, 57 M.J. 611 (C.G. Ct. Crim. App. 2002) [*Libecap I*]. On appeal, the appellant argued that a term of his pretrial agreement that required him to request a punitive discharge was both a violation of RCM 705 and contrary to public policy. The court agreed, setting aside the sentence and authorizing a rehearing on sentence. The court found that the provision violated RCM 705(c)(1)(B) because "as a practical matter, it deprived the accused of a complete sentencing proceeding." The court also found that the provision was contrary to public policy.

5. Mental Impairment. *United States v. Doss*, 57 M.J. 182 (2002). Noting that defense counsel was ineffective for failing to present "extant" psychological evidence.

6. Rebuttal. **RCM 1001(d)**. Government rebuttal evidence must actually "explain, repel, counteract or disprove the evidence introduced by the opposing party." *United States v. Wirth*, 18 M.J. 214, 218 (C.M.A. 1984).

a) *United States v. Hursey*, 55 M.J. 34 (C.A.A.F. 2001). The military judge abused his discretion when he admitted the testimony of NCOIC of the base Military Justice Division to testify that the accused was late for his court-martial as rebuttal to defense evidence of the accused's dependability at work (where NCOIC unable to say whether the accused was at fault or whether his being late was unavoidable). Testimony had little probative value, was potentially misleading, and time wasting.

b) *United States v. Reveles*, 41 M.J. 388 (C.A.A.F. 1994). Accused is not entitled to present his sentencing case free from the chilling effect of legitimate government evidence (if DC introduces too much evidence of the accused's life then military judge might allow government to introduce victim life video).

c) *United States v. Edwards*, 39 M.J. 528 (A.F.C.M.R. 1994). Air Force Regulation 111-1 prohibits admission of records of NJP at courts-martial if the record is over five years old as of the date the charges were referred. Accordingly, admission of a five year-old NJP was error, even though it properly rebutted matter submitted by the defense.

d) *United States v. Dudding*, 37 M.J. 429 (C.M.A. 1993). A Licensed Clinical Social Worker (LCSW) testified that accused was good candidate for group therapy and recommended eighteen months of group treatment. A government witness, from USDB, testified that accused would be exposed to more treatment groups if sentenced to ten years versus five years. The defense interposed no objection. The court held not plain error.

e) *United States v. Roth*, 52 M.J. 187 (C.A.A.F. 1999). The defense sought to call a witness to testify that there was no gang problem in the housing area discussed by the CID agent. The witness had been in the courtroom during the testimony of the CID agent. The judge held that the defense had violated the sequestration rule and refused to let the witness testify. The CAAF held that the military judge abused her discretion. The court noted that the ultimate sanction of excluding a witness should ordinarily be used to punish intentional or willful disobedience of a military judge's sequestration order.

f) *Horner* and *Ohrt* apply to government rebuttal witnesses. *See United States v. Pompey*, 32 M.J. 547 (A.F.C.M.R. 1990).

g) When to allow rebuttal? *United States v. Tilly*, 44 M.J. 851 (N-M. Ct. Crim. App. 1996). The military judge began to deliberate on sentence, then granted trial counsel motion to reopen sentencing to allow rebuttal with newly-discovered evidence. The court found that the beginning of the judge's deliberation was not a bar to reopening the taking of evidence for rebuttal.

h) *United States v. Henson*, 58 M.J. 529 (Army Ct. Crim. App. 2003). During the presentencing case, the defense presented good military character evidence which the government rebutted by offering extrinsic evidence of bad acts: evidence of the wrongful taking and pawning of a microwave; evidence of racially insensitive acts by appellant in the barracks; evidence of substandard performance and appearance; evidence of uniform violations; and evidence of an unkempt room. The military judge abused his discretion when, over defense's objection, he allowed extrinsic evidence to rebut the good character and reputation evidence presented by the defense. The Army Court found, however, that the error did not prejudice a material right of the appellant especially in light of the clemency recommendation made by the military judge and the convening authority's following that recommendation. The court did, however, reduce the appellant's period of confinement by one month to "moot any claim of possible prejudice." *Id*. at 533.

i) *United States v. Saferite*, 59 M.J. 270 (C.A.A.F. 2004). The appellant was charged and convicted of various offenses including larceny, and faced over 230 years confinement. After arraignment but before trial, the appellant escaped from confinement and was tried *in absentia*. The defense called the appellant's spouse to talk about him as a husband and father. In rebuttal, the government offered two sworn statements that implied that the appellant's spouse was complicit in the appellant's escape, an escape already known to the panel and for which the military judge gave an instruction on sentencing that the appellant was NOT to be sentenced for the escape. The government offered the two statements to show the witness' bias. The court held that the judge abused his discretion, under MRE 403, in admitting the statements. The court found that the government's theory of complicity was "tenuous at best" and the government improperly focused its argument on the two statements and the spouse's alleged complicity in the escape.

j) *United States v. Bridges*, 66 M.J. 246 (C.A.A.F. 2008). Under Article 59(a) UCMJ an error of law regarding the sentence does not provide a basis for relief unless the error materially prejudiced the substantial rights of the accused.

7. Surrebuttal. **RCM 1001(d)**. *United States v. Provost*, 32 M.J. 98 (C.M.A. 1991). After government rebuttal to accused's first unsworn statement, accused was entitled to make a second unsworn statement. *But see United States v. Satterley*, 55 M.J. 168 (2001).

8. Witnesses. **RCM 1001(e)**.

a) Who must the government bring?

(1) *United States v. Mitchell*, 41 M.J. 512 (A.C.M.R. 1994). The military judge did not err by denying accused's request for Chief of Chaplains as character witness. While acknowledging accused's right to present material testimony, court upheld judge's exercise of discretion in determining the form of presentation. Proffered government stipulation of fact detailed the witness's background, strong opinions favoring the accused, and the government's refusal to fund the witness's travel.

(2) *United States v. Briscoe*, 56 M.J. 903 (A.F. Ct. Crim. App. 2002). The appellant alleged the military judge erred by not ordering the government to produce the appellant's father as a sentencing witness. The court held that there was no evidence of "extraordinary circumstances" that required the production of a live witness; therefore, the military judge's ruling, in light of the government's offer to enter into a stipulation of fact, was not an abuse of discretion.

L. Argument. RCM 1001(g). See the "Arguments" Outline for a discussion of proper and improper sentencing arguments.

M. Permissible Punishments. **RCM 1003**.

1. Reprimand. **RCM 1003(b)(1).** "A court-martial shall not specify the terms or wording of a reprimand. A reprimand, if approved, shall be issued, in writing, by the convening authority [CA]." The reprimand, when issued, is placed in the CA's action.

2. Forfeiture of pay and allowances. **RCM 1003(b)(2).**

a) Adjudged Forfeitures. At a general court-martial (GCM), the court may adjudge forfeiture of ALL pay and allowances (a.k.a., "total forfeitures"). At a special court-martial (SPCM), the court may adjudge forfeiture of 2/3 pay only. Allowances at a special court-martial are NOT subject to forfeiture.

b) Automatic Forfeitures (**Art. 58b, UCMJ**). Confined soldiers from GCMs shall, subject to conditions below, forfeit all pay and allowances due them during confinement or parole. Soldiers confined as a result of SPCMs, subject to conditions below, shall forfeit 2/3 pay during confinement. Sentences covered are those which include:

(1) Confinement of MORE THAN 6 months, or death, or

(2) ANY confinement **AND** a punitive discharge.

c) Art. 58b, UCMJ, waiver. If an accused has dependents, the convening authority may ***waive*** any/all AUTOMATIC (i.e., Art. 58b, UCMJ) forfeitures for a period not to exceed six (6) months, with money waived to be paid to the dependents of the accused. Adjudged forfeitures may NOT be waived. See also, RCM 1101(d).

d) Effective date of forfeitures (**Art. 57(a), UCMJ**). ANY forfeiture of pay or allowances (or *adjudged* reduction) in a court-martial sentence takes effect on the earlier of:

(1) fourteen (14) days after sentencing, or

(2) the date on which the CA approves the sentence.

e) Deferment of forfeitures. On application of accused, CA may ***defer*** forfeiture (and reduction and confinement) until approval of sentence; but CA may rescind such deferral at any time. Deferment ceases automatically at action, unless sooner rescinded. Rescission prior to action entitles accused to minimal due process. See RCM 1101(c).

f) *United States v. Short*, 48 M.J. 892 (A.F. Ct. Crim. App. 1998). The court finds ineffective assistance of counsel when DC failed to make timely request for deferment or waiver of automatic forfeitures, notwithstanding recommendation of military judge that convening authority waive such forfeitures. Defense counsel relied on SJA office to process action for deferment and waiver.

g) *United States v. Clemente*, 46 M.J. 715, 719 (A.F. Ct. Crim. App. 1997). The CA has broad discretion in deciding to waive forfeitures, and need not explain his decision to an accused. Unlike a request for deferment of confinement, an accused does not have standing to challenge the CA's decision as to waiver of forfeitures.

h) *United States v. Zimmer*, 56 M.J. 869 (Army Ct. Crim. App. 2002). Error for the CA to deny the defense deferment request in a one-sentence action without providing reasons for the denial. Court set aside four months of confinement and the adjudged forfeitures.

i) *United States v. Dewald*, 39 M.J. 901 (A.C.M.R. 1994). Forfeitures may not exceed two-thirds pay per month during periods of a sentence when an accused is not in confinement. Accordingly, during periods that adjudged confinement is suspended, forfeitures are limited to two-thirds pay per month. *See* RCM 1107(d)(2), discussion.

j) Partial forfeitures. Unless total forfeitures are adjudged (i.e., forfeiture of ALL pay and allowances), partial forfeitures MUST be stated in whole dollar amounts for a specific number of months and the number of months the forfeitures will last. RCM 1003(b)(2).

k) Forfeitures are calculated at reduced pay grade WHETHER suspended or not. *United States v. Esposito*, 57 M.J. 608 (C.G. Ct. Crim. App. 2002). *See also* RCM 1003(b)(2).

l) *United States v. Stewart*, 62 M.J. 291 (2006). Where a sentence to forfeiture of all pay and allowances is adjudged, such sentence shall run until such time as the servicemember is discharged or returns to a duty status, whichever comes first, unless the sentencing authority expressly provides for partial forfeitures post-confinement.

3. Fine. RCM 1003(b)(3).

a) *United States v. Tualla*, 52 M.J. 228 (2000). A special court-martial is not precluded from imposing a sentence that includes both a fine and forfeitures as long as the combined fine and forfeitures do not exceed the maximum two-thirds forfeitures that can be adjudged at a special court-martial. A 2002 amendment to RCM 1003(b)(3) reflects this holding.

b) *United States v. Williams*, 18 M.J. 186 (C.M.A. 1984). Other than limits on cruel and unusual punishment, there are no limits on the amount of fine. Provision that fines are "normally for unjust enrichment" is directory rather than mandatory. Unless there is some evidence the accused was aware that a fine could be imposed, a fine cannot be imposed in a guilty plea case.

c) *United States v. Morales-Santana*, 32 M.J. 557 (A.C.M.R. 1990). "Because a fine was not specifically mentioned in the pretrial agreement and the military judge failed to advise the accused that a fine might be imposed, the accused may have entered a plea of guilty while under a misconception as to the punishment he might receive." The court disapproved the fine.

d) *United States v. Motsinger*, 34 M.J. 255 (C.M.A. 1992). The military judge's failure to mention fine in oral instructions did not preclude court-martial from imposing fine, where sentence worksheet submitted to court members with agreement of counsel addressed the issue.

e) *United States v. Smith*, 44 M.J. 720 (Army Ct. Crim. App. 1996). Accused pled guilty to kidnapping, rape and felony murder of child. Sentenced by MJ to DD, confinement for life, total forfeitures, reduction to E-1, and fine of $100,000.00. The military judge included a fine enforcement provision as follows: "In the event the fine has not been paid by the time the accused is considered for parole, sometime in the next century, that the accused be further confined for 50 years, beginning on that date, or until the fine is paid, or until he dies, whichever comes first." The Army Court found fine permissible punishment, but found the fine enforcement provision not "legal, appropriate and adequate." Fine enforcement provision void as matter of public policy, so court approved sentence, including fine, but without enforcement provision.

f) *United States v. Phillips*, 64 M.J. 410 (2007). Accused found guilty of various charges and was sentenced to a reprimand, 5 years, dismissal, and $400,000 fine. The military judge included a contingent confinement provision that if the fine was not paid, Phillips would serve an additional 5 year confinement. The Convening Authority reduced the fine to $300,000 and suspended for 24 months execution of the sentence adjudging a fine in excess of $200,000. Upon Phillips failure to pay the fine, the commanding general ordered a fine enforcement hearing. After the hearing, Phillips was ordered to serve an additional 5 years for willful failure to pay the unsuspended fine. CAAF held that the CG who executed the contingent confinement provision was authorized to do so and he was not required to consider alternatives to contingent confinement after concluding that Phillips was not indigent. Fine is due on the date that the Convening Authority takes action on the sentence.

4. Reduction in grade. RCM 1003(b)(4); UCMJ art. 58a.

a) "Unless otherwise provided in regulations to be prescribed by the Secretary concerned, a court-martial sentence of an enlisted member in a pay grade above E-1, as approved by the convening authority, that includes

(1) a dishonorable or bad conduct discharge;

(2) confinement; or

(3) hard labor without confinement,

reduces that member to pay grade E-1."

b) ARMY. The automatic reduction to pay grade E-1 mandated by Article 58a applies only to enlisted soldiers with an approved sentence, whether or not suspended, that includes EITHER a punitive discharge OR confinement of more than 180 days (if adjudged in days) or six months (if adjudged in months). AR 27-10, para. 5-28*e*.

c) NAVY. The Navy and Marine Corps' implementing regulation provides for automatic reduction to the grade of E-1 when sentence, whether suspended or not, includes EITHER a punitive discharge OR confinement in excess of ninety days or three months. JAGMAN, 0152c(1).

d) AIR FORCE. Requires, as part of the approved sentence, a reduction AND either confinement, a punitive discharge, or hard labor without confinement before an airman is "automatically reduced" HOWEVER only reduced to the grade approved as part of the adjudged sentence (i.e., there is no automatic reduction to the grade of E-1). AFI 151-201, para. 9.10 (26 Nov 03).

e) COAST GUARD. As a matter of policy does NOT permit an automatic reduction. Military Justice Manual, Commandant Instruction M5810.1D, Chapter 4, Para. 4.E.1.

f) *United States v. Combs*, 47 M.J. 330 (1997). Punishment to reduction in rank, when unlawfully imposed, warrants sentence relief. The accused's court-martial sentence included reduction to the grade of E-1, but was subsequently set aside. Pending rehearing on sentence, the accused's chain of command ordered that he wear E-1 rank on his uniform and that he get a new identification card showing his grade as E-1. The court awarded the accused twenty months sentence credit, equal to the period of time he was ordered to wear reduced rank pending a rehearing.

g) Rank of retiree, in Army, may not be reduced by court-martial, or by operation of law. *United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992).

5. Restriction. **RCM 1003(b)(5)**. No more than 2 months; confinement and restriction may be adjudged in the same case but together may not exceed maximum authorized confinement (where 1 month confinement equals 2 months restriction).

6. Hard labor without confinement. **RCM 1003(b)(6)**. No more than 3 months; confinement and hard labor may be adjudged in the same case but together may not exceed maximum authorized confinement (where 1 month confinement equals 1.5 months hard labor w/o confinement); enlisted members only; court-martial does not prescribe the hard labor to be performed.

7. Confinement. **RCM 1003(b)(7)**.

a) FY98 DOD Authorization Act created new U.C.M.J. Article 56a, creating new sentence of "confinement for life without eligibility for parole." Applicable to any offense occurring after 18 Nov 97 that carries possible punishment of life. *United States v. Ronghi*, 60 M.J. 83 (2004) (holding that confinement for life without eligibility for parole was authorized punishment for accused who committed premeditated murder on January 13, 2000, which was before the President amended the MCM to incorporate Executive Order dated April 11, 2002). Sentence subject to modification only by the convening authority, or the military appellate courts, the President, or the Supreme Court.

b) *United States v. Andrade*, 32 M.J. 520 (A.C.M.R. 1990). Consecutive and concurrent sentences ("life plus five years") have never been part of military law.

c) Instruction on *Allen* Credit. *United States v. Balboa*, 33 M.J. 304 (C.M.A. 1991). Proper for military judge to instruct panel that accused would get sixty-eight days *Allen* credit. Panel adjudged a BCD, confinement for twelve months *and sixty-eight days*.

d) Contingent Confinement. *United States v. Palmer*, 59 M.J. 362 (2004). Appellant convicted of larceny of government property valued in excess of $100,000 and was sentenced to a BCD, thirty months confinement, total forfeitures, reduction to E-1, a $30,000 fine, and an additional twelve months confinement if the fine was not paid. The court held that the evidence sported a finding of "no indigency," that the appellant was afforded the process due under RCM 1113, and that the appellant's "untimely unilateral efforts to make partial payments" after the time for said payments expired did not create any obligation on the part of the CA to accept the payment or amend his action remitting the outstanding balance of the fine and ordering the appellant into confinement.

8. Punitive Separation. **RCM 1003(b)(8)**.

a) Dismissal.

(1) Applies to commissioned officers and warrant officers who have been commissioned. *United States v. Carbo*, 37 M.J. 523 (A.C.M.R. 1993).

b) DD is available to non-commissioned warrant officers or enlisted.

c) BCD is available <u>only</u> to enlisted.

9. Death. RCM 1003(b)(9).

a) Death may be adjudged in accordance with RCM 1004 (mechanics, aggravating factors, votes). *Loving v. United States*, 517 U.S. 748 (1996).

b) Specifically authorized for thirteen different offenses, including aiding the enemy, espionage, murder, and rape.

c) Requires the concurrence of all the members as to: (1) findings on the merits of capital offense, (2) existence of at least one aggravating factor under RCM 1004(c), (3) extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances, including aggravating factors, and (4) sentence of death.

d) *Loving v. Hart*, 47 M.J. 438, 444 (1998). In denying extraordinary writ to set aside death penalty, the CAAF held "that the aggravating factor in RCM 1004(c)(8) – that appellant was the 'actual perpetrator of the killing' – is constitutionally valid on its face, provided that it is understood to be limited to a person who kills intentionally or acts with reckless indifference to human life."

e) *United States v. Simoy*, 50 M.J. 1 (1998). Lower court approved sentence of death where accused convicted of felony murder, notwithstanding accused did not actually commit murder. On appeal, the CAAF set aside the sentence and ordered a rehearing because the military judge committed plain error in advising the panel to vote on death before life. On rehearing, accused sentenced to DD, life, and reduction to E-1. *United States v. Simoy, ACM 30496, 2000 CCA LEXIS 183 (unpub. op, July 7, 2000).*

f) Panel Membership. UCMJ art. 25a. For offenses committed after 31 December 2002 – no less than twelve members for a death sentence. "In a case in which the accused may be sentenced to a penalty of death, the number of members shall be not less than 12, unless 12 members are not reasonably available because of physical conditions or military exigencies, in which case the convening authority shall specify a lesser number of members not less than five, and the court may be assembled and the trial held with not less than the number of members so specified. In such a case, the convening authority shall make a detailed written statement, to be appended to the record, stating why a greater number of members were not reasonably available."

10. Maximum Punishment. *See* Manual for Courts-Martial, Appendix 12.

a) Generally – lesser of jurisdiction of court or punishment in Part IV.

b) Offenses not listed in the Table of Maximum Punishments.

(1) Included or related offenses.

(2) United States Code.

c) Habitual offenders. **RCM 1003(d).**

(1) Three or more convictions within one year – DD, TF, one year confinement.

(2) Two or more convictions within three years – BCD, TF, three months confinement.

(3) Two or more offenses which carry total authorized confinement of 6 months automatically authorizes BCD and TF.

11. Article 133 punishment. *United States v. Hart*, 32 M.J. 101 (C.M.A. 1991). In mega-article 133 specification, the maximum possible punishment is the largest maximum punishment for any offense included in the mega-specification.

12. Prior NJP for same offense.

a) *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989). Accused must be given credit for prior Article 15 punishment for same offense: day for day, dollar for dollar, and stripe for stripe.

b) *United States v. Redlinski*, 56 M.J. 508 (C.G. Ct .Crim. App. 2001), *rev'd on other grounds*, 58 M.J. 177 (C.A.A.F. 2003). Explaining how credit can be "administrative"/confinement credit applied to the approved sentence, or can be "judicial"/punishment credit applied to the adjudged sentence.

c) *United States v. Edwards*, 42 M.J. 381 (1995). When accused has received NJP for same offense, the military judge may, on defense request, give *Pierce* credit, obviating need for CA to do so.

d) *United States v. Flynn*, 39 M.J. 774 (A.C.M.R. 1994). When military judge is the sentencing authority, he is to announce the sentence and then state on the record the specific credit given for prior nonjudicial punishment in arriving at the sentence.

e) *United States v. Zamberlan*, 45 M.J. 491 (1997). Accused tested positive for THC, causing commander to vacate suspended Art. 15 punishment and also to prefer court-martial charge. Defense counsel requested instruction to panel that they must consider punishment already imposed by virtue of vacation action taken by commander with regard to suspended Art. 15 punishment. The court noted, "vacation of a suspension of nonjudicial punishment is not itself nonjudicial punishment."

f) *United States v. Bracey*, 56 M.J. 387 (2002). Appellant convicted at a special court-martial of, among other offenses, disrespect to a superior commissioned officer and was sentenced to forfeiture of $630.00 pay per month for six months, reduction to E-1, confinement for six months and a BCD. Appellant argued, for the first time on appeal, that the disobedience handled at the Article 15 and the disrespect charge arose out of the same incident thus entitling him to *Pierce* credit. The CAAF held that the appellant was not entitled to *Pierce* credit since the offenses in question resulted from separate and distinct incidents despite their occurrence close in time and involving the same officer (i.e. victim). *See also United States v. Anastacio*, 56 M.J. 830 (C.G. Ct. Crim. App. 2002).

g) *United States v. Minyen*, 57 M.J. 804 (C.G. Ct. Crim. App. 2002). The appellant was convicted of unauthorized absence and missing movement; sentenced to eighty days confinement and a bad conduct discharge. One of the two unauthorized absence specifications was for a four and a half month absence for which the accused previously received nonjudicial punishment, specifically thirty days restriction, thirty days extra duty, and reduction to E-1. At trial, the military judge awarded the appellant thirty-three days of *Allen* credit (pretrial confinement credit) and thirty days of *Pierce* credit (prior nonjudicial punishment credit). The military judge advised the appellant that the sixty-three days credit would be deducted from the adjudged eighty day sentence. On appeal, the court noted that although the judge failed to follow the CAAF's "guidance" in *United States v. Gammons*, 51 M.J. 169, 184 (1999), by failing to state on the record how he arrived at the specific *Pierce* credit awarded, *Gammons* was nonetheless satisfied by the award of the thirty days of *Pierce* credit (fifteen days for the restriction and fifteen for the extra duty). As for the action's failure to specify the credit awarded, the court found no error, finding that the action complied with RCM 1107(f). The court did go on, however, to again recommend that a Convening Authority expressly state all applicable credits in his or her action.

13. Prior board proceedings. *United States v. Blocker*, 30 M.J. 1152 (A.C.M.R. 1990). Accused entitled to credit for consequences of administrative board proceedings arising from same misconduct that is the subject of the court-martial.

N. Instructions. **RCM 1005**.

1. *United States v. Boyd*, 55 M.J. 217 (2001). Military judges must instruct on the impact of a punitive discharge on retirement benefits, if there is an evidentiary predicate for the instruction and a party requests it.

2. *United States v. Hopkins*, 55 M.J. 546 (A.F. Ct. Crim. App. 2001), *aff'd*, 56 M.J. 393 (2002). The military judge sustained government's objection to the defense counsel's request that the judge instruct the members that they should consider the accused's expression of remorse as a matter in mitigation. The Air Force Court held that RCM 1005(e) lists the required instructions that must be given on sentencing and that case law "does not require the military judge to list each and every possible mitigating factor for the court members to consider."

3. *United States v. Rush*, 54 M.J. 313 (2001). Following the sentencing instructions to the members that included the standard bad-conduct discharge instruction, the defense counsel requested the ineradicable stigma instruction. The judge, without explanation as to why, refused to give the requested instruction. The CAAF held that while the military judge abused his discretion when he failed to explain why he refused to give the standard sentencing instruction after a timely request by the defense, there was no prejudice.

4. *United States v. Duncan*, 53 M.J. 494 (2000). The members interrupted their deliberations to ask the military judge if rehabilitation/therapy would be required if the accused were incarcerated, and if parole or good behavior were available to someone with a life sentence. Instructions on collateral consequences are permitted, but need to be clear and legally correct. It is appropriate for the judge to answer questions if he/she can draw upon a reasonably available body of information which rationally relates to sentencing considerations (here the panel members questions related to both aggravation evidence (heinous nature of the crimes) and rehabilitation potential (his potential unreformed release into society).

5. *United States v. Friedmann*, 53 M.J. 800 (A.F. Ct. Crim. App. 2000), *review denied*, 54 M.J. 425 (2001). During his unsworn statement, the accused told the members that others received Article 15s and general discharges for the same misconduct and to permit his commander to administratively discharge him. The military judge provided a sentencing instruction seeking to clarify for the members the administrative discharge process and the irrelevance of using sentencing comparisons to adjudge an appropriate sentence. It was not error for the judge to give the instruction.

6. *United States v. Stargell*, 49 M.J. 92 (1998). Court found proper curative instruction by military judge in response to trial counsel argument that accused with nineteen and a half years of service "will get an honorable retirement unless you give him a BCD." In response to defense objection, judge instructed members that their decision "is not a vote to retain or separate the member but whether or not to give the accused a punitive discharge as a form of punishment." The majority cited to common knowledge in the military that an accused at twenty years is eligible to retire, usually under honorable conditions, and if processed for administrative discharge following court-martial would be entitled to special consideration.

7. *United States v. Perry*, 48 M.J. 197 (1998). The court upheld the military judge's decision not to instruct the panel that the accused stood to be found liable for an $80,000 recoupment by the U.S. Naval Academy for educational costs. The defense requested an instruction at sentencing, based on evidence of the practice of recoupment of the cost of education when separated prior to completion of a five year commitment due to misconduct. The defense did not, however, offer any evidence of likelihood of such recoupment in this case.

8. *United States v. Simmons*, 48 M.J. 193 (1998). Absent direct evidence that the accused was "emotionally or physically abused during his childhood," there was no requirement for the military judge to give an instruction to the panel to consider such information. The court noted a dispute over whether the accused actually suffered such abuse. Therefore, the instruction required modification so the members *could*, not *must*, consider such evidence *if* they found the accused had in fact been abused.

9. *United States v. Hall*, 46 M.J. 145 (1997). Failure of defense to object at trial to military judge's instruction regarding collateral benefits constitutes waiver. Accused captain was dependent of Air Force retiree. At sentencing phase of her court-martial, panel asked effect of dismissal on her benefits as dependent. The judge answered that neither conviction nor sentence would have any effect on benefits she would receive as a dependent. No objection by the defense to this correct instruction by the MJ.

10. *United States v. Thompson*, 43 M.J. 703 (A.F. Ct. Crim. App. 1995). Accused introduced evidence of child's upcoming surgery, and offered medical testimony that accused should be present for surgery and a few weeks thereafter. In response to member question, the military judge informed panel that CA has discretion to defer confinement. No abuse of discretion or improper advice to panel on collateral matters where assisted panel in making informed decision.

11. *United States v. Burt*, 56 M.J. 261 (2002). Accused, at time of trial, was retirement eligible (i.e., 225 mos. of active service). The military judge asked the defense if they wanted an instruction, which covered the Service Secretary's authority to allow the accused to retire even if a punitive discharge was awarded. The defense objected to the instruction. The panel ultimately adjudged a BCD, which the CA approved. The CAAF rejected an IAC attack noting that the decision to object to the instruction was a reasoned tactical decision.

12. *United States v. Blough*, 57 M.J. 528 (A.F. Ct. Crim. App. 2002). Defense counsel requested a specific, detailed instruction that focused the panel on the appellant's age, performance report, lack of prior disciplinary actions, his character as reflected in several defense, the testimony of the defense witnesses, and the appellant's expressed desire to remain in the Air Force. The military judge denied the defense request and gave the panel general guidance on what they should consider on sentencing consistent with *United States v. Hopkins*, 55 M.J. 546 (A.F. Ct. Crim. App. 2001), *aff'd*, 56 M.J. 393 (2002). The military judge did NOT instruct the panel that a guilty plea (mixed plea case) was a matter in mitigation. A military judge is not required to detail each piece of evidence that may be considered by the panel in arriving at a sentencing. Rather, the judge need only give general guidelines to the members on the matters they should consider on sentencing (e.g., extenuation and mitigation such as good character, good service record, pretrial restraint, mental impairment, etc.). Also, absent plain error, failure to request an instruction or to object to an instruction as given waives any issue. The court noted that perhaps counsel had a valid tactical reason for not requesting the instruction. Finally, the court noted that even if there were error, any error was harmless.

13. *U.S. v Rasnick*, 58 M.J. 9 (2003). The military judge did not err in failing to give the "punitive discharge is an 'ineradicable' stigma" instruction despite a specific request by defense counsel when the instruction advised the members that a punitive discharge was severe punishment, that it would entail specific adverse consequences, and that it would affect appellant's future with regard to his legal rights, economic opportunities, and social acceptability. The instructions were sufficient to require the members to consider the enduring stigma of a punitive discharge." *See also United States v. Greszler*, 56 M.J. 745 (A.F. Ct. Crim. App. 2002) (observing that judge's decision to use other terms to describe a punitive discharge other than "ineradicable" not error; instruction must convey that a punitive discharge is severe punishment and other terminology may be used).

14. *United States v. Miller*, 58 M.J. 266 (2003). The military judge erred by failing to advise panel to consider appellant's pretrial confinement (three days) in arriving at an appropriate sentence. It is a mandatory instruction, therefore, waiver did not apply. The judge also failed to give a defense requested pretrial confinement sentence credit instruction. This failure was not error because although the requested instruction was correct and not covered by the other instructions, it was not on so vital a point as to deprive the appellant of a defense or seriously impair its presentation.

O. Sentence Credit.

1. *United States v. Rock*, 52 M.J. 154 (1999). The CAAF held the military judge did not err in applying the sentence credit received by the accused for illegal pretrial punishment against the accused's adjudged sentence rather than the approved sentence (accused was awarded 240 days credit against his adjudged confinement as a result of pretrial conditions on his liberty not amounting to confinement; the military judge credited the 240 days against the accused's adjudged sentence not the approved sentence; the accused was sentenced to sixty-one months of confinement, thus the judge only gave the accused fifty-three months; the accused's pretrial agreement further reduced the sentence to thirty-six months, minus three days of actual pretrial confinement). The court distinguished between actual or constructive confinement credit and pretrial punishment credit. Actual confinement credit and constructive confinement credit are administrative credits that come off of the approved sentence. Pretrial punishment credit for something other than confinement (like restrictions on liberty that do not rise to the level of being tantamount to confinement) is generally judicial credit and thus comes off of the adjudged sentence. If the military judge determines that *Allen*, *Mason*, or *Suzuki* credit is warranted, that sentence credit will be tacked on to the sentence after the pretrial agreement is considered.

2. *United States v. Rosendahl*, 53 M.J. 344 (2000). The accused's original approved sentence included a BCD, four months confinement, and suspended forfeitures of $150 per month for four months and suspended reduction below the grade of E-4 for six months. On rehearing, he was sentenced to a BCD and reduction to the lowest enlisted grade. The convening authority approved this sentence, again suspending reduction below the grade of E-4 for six months. The accused argued he was entitled to credit (in the form of disapproval of his BCD) for the 120 days confinement he served as a result of his first sentence. The CAAF disagreed stating that reduction and punitive separations are qualitatively different from confinement and, therefore, credit for excess confinement has no "readily measurable equivalence" in terms of reductions and separations. NOTE: The CAAF declined to address whether a case involving lengthy confinement might warrant a different result. It also distinguished this situation from the "unrelated issue of a convening authority's clemency power to commute a BCD to a term of confinement."

3. *United States v. Smith*, 56 M.J. 290 (2002). No requirement that accused be given credit for lawful pretrial confinement when no confinement is adjudged.

4. *United States v. Chapa III*, 57 M.J. 140 (2002). Failure to raise RCM 305(k) credit waives the issue, absent plain error.

5. *United States v. King*, 58 M.J. 110 (2003). Failure to raise *Mason* credit (i.e., pretrial restriction tantamount to confinement) waives the issue, absent plain error.

6. *United States v. Coreteguera*, 56 M.J. 330 (2002). When placed into PTC, the appellant was forced to run to several windows yelling he "couldn't get it right," was made to sing the Air Force song or "song of choice," and was asked by a cadre member whether he wanted to pawn "this" jewelry while being shown a pair of shackles. The appellant was in pretrial confinement for, in part, pawning government computers. Additionally, appellant was made to perform duties similar to post-trial inmates BUT not with the inmates. The military judge denied the defense's motion for additional credit under Article 13. The judge found no intent to punish on the part of the cadre, the conditions of confinement were not unduly harsh or rigorous, and the actions of AF personnel were not excessively demeaning or of a punitive nature. The CAAF held that discomforting administrative measures and "de minimis" imposition on detainees, even if unreasonable, do not warrant credit under Article 13. As for the work, the court looked to the nature, duration, and purpose of the work to determine whether it was punitive in nature – it was not, therefore, no credit. The court noted that although the judge did not err in denying the credit, the court did not "condone" the actions of the AF personnel.

7. *United States v. Mosby*, 56 M.J. 309 (2002). Solitary confinement, in and of itself, does not equal an intent to punish warranting additional credit under Article 13, UCMJ.

8. *United States v. Bracey*, 56 M.J. 387 (2002). Appellant was not entitled to *Pierce* credit since the offenses in question resulted from separate and distinct incidents despite their occurrence close in time and involving the same officer (i.e., victim). The CAAF, in holding that the appellant was not entitled to *Pierce* credit stated: "Neither the Constitution nor the UCMJ precludes a person from being convicted for multiples offenses growing out of the same transaction, so long as the offenses are not multiplicious . . . . Likewise, although *Pierce* precludes double punishment for the same offense, it does not preclude multiple punishments for multiple offenses growing out of the same transaction when the offenses are not multiplicious."

9. *United States v. Spaustat*, 57 M.J. 256 (2002). Accused sentenced to reduction to the grade of E-1, ten months confinement, and a BCD. The accused's PTA had a confinement limitation of eight months. At trial, the accused successfully brought an Article 13 motion for his treatment while in pretrial confinement and was awarded ninety-two days Article 13 credit (day-for-day) as well as 102 days *Allen* credit, all of which the judge applied against the lesser sentence provided for in the PTA. In announcing the sentence, the judge initially announced a sentence, after incorporating the Article 13 credit of 202 days and then announced another sentence of 212 days after he was advised by the TC that the Article 13 violations did not begin until after day ten of the accused's placement into pretrial confinement, thus reducing the Article 13 credit from 102 days to ninety-two days. Appellant argued that the judge, in increasing the sentence from 202 days to 212 days, unlawfully reconsidered the sentence. The CAAF held that the judge did not unlawfully reconsider the sentence. The sentence was always ten months. All that the judge did was correct his calculation of sentence credits and clarify his calculations. Further, the judge did not err in applying the sentence credit to the lesser sentence provided for in the PTA. Recognizing the confusion created by its *Rock* decision, the court established a bright line rule for use by all courts effective 30 August 2002:

> *[I]n order to avoid further confusion and to ensure meaningful relief in all future cases after the date of this decision, this Court will require the convening authority to direct application of all confinement credits for violations of Article 13 or RCM 305 and all Allen credit against the approved sentence, i.e., the lesser of the adjudged sentence or the sentence that may be approved under the pretrial agreement, as further reduced by any clemency granted by the convening authority, unless the pretrial agreement provides otherwise.*

10. *United States v. Josey*, 58 M.J. 105 (2003). Service member spent thirty months and twenty-eight days in post-trial confinement before the findings in his case was partially set aside. On reassessment, the CA only approved forfeiture of $600 pay/month for four months and reduction from E-8 to E-6. Appellant argued he was entitled to sentence credit against both forfeitures and the reduction. The CAAF disagreed, finding that "reprimands, reductions in rank, and punitive separations are so qualitatively different from other punishment that conversion is not required as a matter of law." *See also United States v. Stirewalt*, 58 M.J. 552 (C.G. Ct. Crim. App. 2003); *United States v. Rosendahl*, 53 M.J. 344 (2000).

11. *United States v. Rendon*, 58 M.J. 221 (2003). RCM 305(k) credit for non-compliance with RCM 305(f), (h), (i), or (j) does NOT apply to restriction tantamount to confinement UNLESS restriction rises to the level of physical restraint depriving appellant of his or her freedom (i.e., equivalent of actual confinement) (abrogating *United States v. Gregory*, 21 M.J. 952 (A.C.M.R. 1986), *aff'd*, 23 M.J. 246 (C.M.A. 1986) (summary disposition)).

12. *United States v. Oliver*, 56 M.J. 779 (A.F. Ct. Crim. App. 2002). A day of pretrial confinement warrants *Allen* credit unless that day is the day the accused is sentenced, then the day counts as post-trial confinement.

13. *United States v. Sherman*, 56 M.J. 900 (A.F. Ct. Crim. App. 2002). Time spent in civilian confinement for offenses forming the basis of a subsequent court-martial warrant confinement credit under *Allen*. *See also United States v. West*, 56 M.J. 626 (C.G. Ct. Crim. App. 2001).

14. *United States v. Inong*, 58 M.J. 460 (2003). "[F]ailure at trial to raise the issue of illegal pretrial punishment waives that issue for purposes of appellate review absent plain error," overruling *United States v. Huffman*, 40 M.J. 225 (C.M.A. 1994). Additionally, *United States v. Southwick*, 53 M.J. 412 (2000) and *United States v. Tanksley*, 54 M.J. 169 (2000) were overruled to the extent that they establish a "'tantamount to affirmative waiver rule' in the Article 13 arena."

15. *United States v. Regan*, 62 M.J. 299 (2006). After the third positive test, Regan's commander gave her the choice of voluntarily admitting herself for inpatient treatment or going into pretrial confinement. The military judge concluded that appellant was really given no choice at all and based on the "totality of the conditions imposed" and "the facts and circumstances" of the case, the time appellant was in the treatment facility (twenty-one days) amounted to restriction tantamount to confinement and determined that appellant was entitled to *Mason* credit. However, the military judge denied the defense motion for additional credit under R.C.M. 305(k) for failure to comply with the requirements of R.C.M. 305. Affirmed.

P. Deliberations and Voting. **RCM 1006**.

1. What May be Considered. **RCM 1006.**

a) Notes of the members.

b) Any exhibits.

c) Any written instructions.

(1) Instructions must have been given orally.

(2) Written copies, or any part thereof, may also be given to the members unless either party objects.

d) Pretrial agreement (PTA) terms.

(1) RCM 705(e). Except in a court-martial without an MJ, no member of a court-martial shall be informed of the existence of a PTA.

(2) *United States v. Schnitzer*, 41 M.J. 603 (Army Ct. Crim. App. 1994), *aff'd* 44 MJ 380 (1996). Mention of sentencing limitation in co-actor's PTA constituted unlawful command influence and plain error. Rehearing on sentencing required. *See United States v. Royster*, 9400201 (Army Ct. Crim. App. 15 June 1995) (unpub.), limiting *Schnitzer* to its facts.

2. Deliberations and Voting on Sentence. **UCMJ art. 52, RCM 1006.**

a) Number of votes required:

(1) Death – unanimous.

(2) Confinement for more than ten years – at least three-fourths of the members.

(3) All other sentences – at least two-thirds of the members.

b) *Garrett v. Lowe*, 39 M.J. 293 (C.M.A. 1994). Members must vote on sentences in their entirety. Accordingly, it was error for the court to instruct jurors that only two-thirds of the members were required to vote for sentence for felony murder, where that sentence must, by law, include confinement for life.

c) *United States v. Weatherspoon*, 44 M.J. 211 (1996). Court-martial panel asked if must impose confinement for life, or merely vote for life, in premeditated murder conviction. The military judge advised the members that sentence must include confinement for life, but they could, collectively or individually, recommend clemency. The judge made clear individual rights of members to recommend clemency.

d) *United States v. Thomas*, 46 M.J. 311 (1997). In capital sentencing procedures under RCM 1004(b)(7), the President extended to capital cases the right of having a vote on the least severe sentence first. At sentencing phase of accused's capital court-martial, the judge instructed the panel first to vote on a death sentence, and if not unanimous, then to consider a sentence of confinement for life and other types of punishments. The CAAF held RCM 1006(d)(3)(A) required voting on proposed sentences "*beginning with the least severe*." *See also United States v. Simoy*, 50 M.J. 1 (1998) (holding that the military judge committed plain error when he fails to advise a panel to vote on the sentences in order of least severe to most severe).

Q. Announcement of Sentence. **RCM 1007**.

1. Sentence worksheet is used to put the sentence in proper form (*See* Appendix 11, MCM, Forms of Sentences).

2. President or military judge makes announcement.

a) *United States v. Dodd*, 46 M.J. 864 (Army Ct. Crim. App. 1997). Announcement by court-martial president of sentence did not include bad conduct discharge, and court adjourned. When president notified the military judge of incorrect announcement within two minutes of adjournment, judge convened a proceeding in revision to include bad conduct discharge. The Army Court noted that proceeding in revision inappropriate where it increases severity of sentence, no matter how clear that announcement was erroneous. NOTE: Court commends to trial judges practice of enforcing requirement that president mark out all inapplicable language on findings and sentence worksheets, rather than pursuing own means to clarify intended sentence of court.

b) *United States v. Goddard*, 47 M.J. 581 (N-M. Ct. Crim. App. 1997). Upon a rehearing the N-M Ct. Crim. App. set aside appellant's conviction for maltreatment because the evidence was legally and factually insufficient, but affirmed a conviction for the lesser-included offense of a simple disorder, the court then reassessed appellant's sentence. 54 M.J. 763 (N-M Ct. Crim. App. 2000). In case alleging maltreatment and fraternization, judge, in announcing finding of guilty, stated offense against one victim was "tantamount to rape." The court noted comments of judge were mere surplusage on findings, but raised concern that the judge may have based sentence on more serious crime of rape, than maltreatment alleged. The ordered a rehearing on sentence.

c) *United States v. Stewart*, 62 M.J. 291 (2006). Where a sentence to forfeiture of all pay and allowances is adjudged, such sentence shall run until such time as the servicemember is discharged or returns to a duty status, whichever comes first, unless the sentencing authority expressly provides for partial forfeitures post-confinement.

3. Polling prohibited (MRE 606; RCM 1007(c)).

R. Impeachment of Sentence. **RCM 1008**.

1. Policy: Strong policy against the impeachment of verdicts.

a) Promotes finality.

b) Encourages full and free deliberation.

2. General rule: Deliberative privilege – court deliberations are privileged (MRE 509). *United States v. Langer*, 41 M.J. 780 (A.F. Ct. Crim. App. 1995) (observing that post-trial questionnaire purportedly intended for feedback to counsel improperly invaded members' deliberative process).

3. Exceptions: Court members' testimony or affidavits cannot be used to impeach the verdict except in three limited situations. RCM 1008; MRE 606. *See United States v. Loving*, 41 M.J. 213 (C.M.A. 1994).

a) Outside influence (e.g. bribery, jury tampering).

b) Extraneous prejudicial information.

(1) *United States v. Witherspoon*, 16 M.J. 252 (C.M.A. 1983) (holding that it was improper for court member visit to crime scene).

(2) *United States v. Almeida*, 19 M.J. 874 (A.F.C.M.R. 1985) (finding no prejudice where court member talked to witness about Thai cooking during a recess in the trial).

(3) *United States v. Elmore*, 33 M.J. 387 (C.M.A. 1991) (holding that blood expert witness who had dinner with the members was not err because extensive *voir dire* established the lack of taint).

(4) *United States v. McNutt*, 62 M.J. 16 (2005). The military judge improperly considered the collateral administrative effect of the "good-time" policy in determining Appellant's sentence and this error prejudiced Appellant. "Courts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration." *United States v. Griffin*, 25 M.J. 423, 424 (C.M.A. 1998). The general preference for prohibiting consideration of collateral consequences is applicable to the military judge's consideration of the Army "good-time" credits.[1]

c) Unlawful command influence.

(1) *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984) (holding that it was unlawful command control for president to order a re-vote after a finding of not guilty had been reached).

(2) *United States v. Accordino*, 20 M.J. 102 (C.M.A. 1985) (observing that president of court can express opinions in strong terms and call for a vote when discussion is complete or further debate is pointless; but improper for him to use superiority of rank to coerce a subordinate to vote in a particular manner).

(3) *United States v. Dugan*, 58 M.J. 253 (2003). Post-trial, member submitted RCM 1105/6 memorandum to defense counsel expressing several concerns, two of which raised potential UCI during the sentencing phase: that some members believed a punitive discharge was "a given" and that mention was made of a commanders call and that the commander (i.e., convening authority) would review the sentence in the case and know what they decided to do. On receipt of the memorandum, the defense counsel sought a post-trial 39a session, which the military judge denied, citing the deliberative privilege, and finding no UCI. The lower court affirmed. The CAAF directed a *DuBay* hearing to examine the allegation of UCI in the sentencing phase with the following limitations: questions regarding the objective manifestation of the members during deliberations was permitted whereas questions surrounding the subjective manifestations were not.

4. Threshold relatively high. *See United States v. Brooks*, 41 M.J. 792 (Army Ct. Crim. App. 1995) (observing that there must be colorable allegations to justify judicial inquiry, and even then the judge must be very cautious about inquiring into voting procedures).

[1] *See United States v. Howell*, 16 M.J. 1003 (A.C.M.R. 1983) (Naughton, J. concurring) (finding it improper for the trial counsel to argue that the appellant would not serve the full confinement time adjudged by the members because of "good-time" credit).

5. *United States v. McConnell*, 46 M.J. 501 (A.F. Ct. Crim. App. 1997). To impeach a sentence that is facially proper, the claimant must show that extraneous prejudicial information, outside influence, or command influence had an impact on the deliberations. Accused asserted in post-trial submissions that the panel was confused over how the period of confinement and BCD would affect his retirement. The court noted unique personal knowledge of a court member might constitute extraneous prejudicial information, but "general and common knowledge that a court member brings to deliberations is an intrinsic part of the deliberative process."

6. *United States v. Combs*, 41 M.J. 400 (C.M.A. 1994). Court member's statement that accused would have received a lighter sentence if there had been evidence of cooperation did not reflect consideration of extraneous prejudicial information which could be subject of inquiry into validity of sentence.

S. Reconsideration of Sentence. **RCM 1009**.

1. Time of reconsideration.

a) May be reconsidered any time before the sentence is announced.

b) After announcement, sentence may not be increased upon reconsideration <u>unless</u> sentence was less than mandatory minimum.

c) *United States v. Jennings*, 44 M.J. 658 (C.G. Ct. Crim. App. 1996). Error in sentence may be corrected if announced sentence not one actually determined by court-martial. But confusion of military judge's intended sentence and application of *Allen* credit arose from comments by judge after court closed. If ambiguity exists on record as to sentence, must be resolved in favor of accused.

2. Procedure for reconsideration.

a) Any member may propose reconsideration.

b) Proposal to reconsider is voted on in closed session by secret written ballot.

3. Number of votes required.

a) <u>With a view to increasing sentence</u> – may reconsider only if at least a majority votes for reconsideration.

b) <u>With a view to decreasing sentence</u> – may reconsider if the following vote:

(1) For death sentence, only one vote to reconsider required.

(2) For sentence of life or more than ten years, more than one-fourth vote for reconsideration.

(3) For all other sentences, more than one-third vote for reconsideration.

4. Objections Required. *United States v. Moreno*, 41 M.J. 537 (N-M. Ct. Crim. App. 1994). Rule for Courts-Martial 1109 does not permit members to consider increasing a sentence when a request for reconsideration has been made with a view to decreasing the sentence and accepted by the affirmative vote of less than a majority of the members. The judge erred when he indicated that the members could "start all over again" and consider the full spectrum of authorized punishments once any request for reconsideration had been accepted, without regard to whether it was with a view to increasing or decreasing the sentence.

T. Appellate Review.

1. Under Article 59(a) UCMJ an error of law regarding the sentence does not provide a basis for relief unless the error materially prejudiced the substantial rights of the accused. *United States v. Bridges*, 66 M.J. 246 (C.A.A.F. 2008).

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TAB X

POST-TRIAL PROCEDURES AND APPEALS

Table of Contents

I. REFERENCES. 1

II. GOALS OF THE PROCESS. 1

III. SUMMARY OF THE PROCESS. 1

IV. DUTIES OF COUNSEL. ARTICLE 38, UCMJ; RCM 502(D)(5)-(6); RCM 1103(B)(1). . 2

V. NOTICE CONCERNING POST-TRIAL AND APPELLATE RIGHTS. RCM 1010. 4

VI. REPORT OF RESULT OF TRIAL; POST-TRIAL RESTRAINT; DEFERMENT OF CONFINEMENT, FORFEITURES AND REDUCTION; WAIVER OF FORFEITURES. ARTICLES 57, 57A, 58, 58A, 58B, AND 60, UCMJ; RCM 1101. 4

VII. POST-TRIAL SESSIONS. ARTICLE 39, UCMJ; RCM 905, 1102. 8

VIII. PREPARATION OF RECORD OF TRIAL. ARTICLE 54, UCMJ; RCM 1103; MCM, APPENDIX 13 AND 14. 11

IX. RECORDS OF TRIAL; AUTHENTICATION; SERVICE; LOSS; CORRECTION; FORWARDING. ARTICLE 54, UCMJ; RCM 1104. 15

X. MATTERS SUBMITTED BY THE ACCUSED. ARTICLE 60, UCMJ; RCM 1105. 17

XI. RECOMMENDATION OF THE SJA OR LEGAL OFFICER AND DC SUBMISSION. ARTICLE 60, UCMJ; RCM 1106. 20

XII. ACTION BY CONVENING AUTHORITY. ARTICLE 60, UCMJ; RCM 1107. 36

XIII. POST-TRIAL PROCESSING TIME. 46

XIV. SUSPENSION OF SENTENCE; REMISSION. ARTICLE 71, UCMJ; RCM 1108. 53

XV. VACATION OF SUSPENSION OF SENTENCE. ARTICLE 72, UCMJ; RCM 1109. .. 54

XVI. WAIVER OR WITHDRAWAL OF APPELLATE REVIEW. ARTICLE 61, UCMJ; RCM 1110. 54

XVII. DISPOSITION OF RECORD OF TRIAL AFTER ACTION. RCM 1111. 55

MAJ ANDREW D. FLOR

JANUARY 2011

XVIII. REVIEW BY A JUDGE ADVOCATE. ARTICLE 64, UCMJ; RCM 1112. 55

XIX. EXECUTION OF SENTENCE. UCMJ, ARTICLE 71, UCMJ; RCM 1113. 56

XX. PROMULGATING ORDERS. ARTICLE 76, UCMJ; RCM 1114. 57

XXI. ACTION BY THE JUDGE ADVOCATE GENERAL. ARTICLES 66 AND 69, UCMJ; RCM 1201. 58

XXII. REVIEW BY THE COURT OF APPEALS FOR THE ARMED FORCES. ARTICLES 67 & 142, UCMJ; RCM 1204. 62

XXIII. REVIEW BY THE SUPREME COURT. ARTICLE 67A, UCMJ; RCM 1205. 63

XXIV. POWERS AND RESPONSIBILITIES OF THE SECRETARY. RCM 1206..... 63

XXV. SENTENCES REQUIRING APPROVAL BY THE PRESIDENT. RCM 1207. 63

XXVI. FINALITY OF COURTS-MARTIAL. RCM 1209. 63

XXVII. PETITION FOR A NEW TRIAL. ARTICLE 73, UCMJ; RCM 1210 64

XXVIII. ASSERTIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL. 65

XXIX. RELEASE FOR CONFINEMENT *PENDENTE LITE*. 66

XXX. CONCLUSION. 66

POST-TRIAL PROCEDURES AND APPEALS

Outline of Instruction

"It is at the level of the convening authority that an accused has his best opportunity for relief." *United States v. Boatner*, 43 C.M.R. 216, 217 (C.M.A. 1971).

"The essence of post-trial practice is basic fair play – notice and an opportunity to respond." *United States v. Leal*, 44 M.J. 235, 237 (C.A.A.F. 1996).

"[T]he following is [the] process for resolving claims of error connected with a convening authority's post-trial review. First, an appellant must allege the error. . . . Second, an appellant must allege prejudice. . . . Third, an appellant must show what he would do to resolve the error if given such an opportunity." *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998).

"All this court can do to ensure that the law is being followed and that military members are not being prejudiced is to send these cases back for someone TO GET THEM RIGHT." *United States v. Johnston*, 51 M.J. 227, 230 (C.A.A.F. 1999).

I. REFERENCES.

A. UCMJ, Articles 55-76a.

B. Manual for Courts-Martial (2008 Edition), United States; Rules for Courts-Martial, Chapters XI, XII; and Appendices 13-20.

C. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE ch. 5 (16 Nov. 2005) [hereinafter AR 27-10].

D. Francis A. Gilligan and Frederic I. Lederer, *Court-Martial Procedure*, 2006 (vol. 2), Chapter 24.

E. United States Army Court of Criminal Appeals, Office of the Clerk of Court, Post Trial Handbook (2009).

II. GOALS OF THE PROCESS.

A. Prepare a timely record of trial adequate for appellate review.

B. Identify, correct, curtail or kill incipient appellate issues.

C. Accused's best chance for clemency.

D. Defense notice and opportunity to be heard before convening authority (CA) takes initial action on a case.

E. Help CA make informed decision when taking initial action on a case.

III. SUMMARY OF THE PROCESS.

A. Trial counsel (TC) coordinates with unit *before* trial to coordinate transportation to confinement facility.

B. Sentence is announced and the court is adjourned.

C. Trial counsel prepares report of result of trial, confinement order.

D. Request for deferment of confinement, if any.

E. Request for deferment of reduction, if any.

MAJ ANDREW D. FLOR
JANUARY 2011

F. Request for deferment and/or waiver of forfeitures, if any.

G. Exhibits accounted for and reproduced.

H. Post-trial sessions, if any.

I. Record of trial (ROT) created, reproduced.

J. Trial counsel / defense counsel (DC) review ROT for errata.

K. Military judge (MJ) authenticates ROT (or substitute authentication if required).

L. Staff Judge Advocate (SJA) signs the Staff Judge Advocate's Recommendation (SJAR).

M. SJAR and authenticated ROT served on accused / DC.

N. Accused / DC submits clemency petition (RCM 1105 matters) and response to SJAR (RCM 1106 matters) – often done simultaneously.

O. SJA signs addendum.

P. Addendum served on DC and accused if contains "new matter."

Q. CA considers DC / accused submissions, takes initial action.

R. Promulgating order signed.

S. Record reproduced and mailed.

T. Appellate review.

U. Final action.

IV. DUTIES OF COUNSEL. ARTICLE 38, UCMJ; RCM 502(d)(5)-(6); RCM 1103(b)(1).

A. RCM 502(d)(5), discussion, para. (F), addresses the trial counsel's (TC's) post-trial duties.

1. Prepare Report of Result of Trial. "[P]romptly provide written notice of the findings and sentence adjudged to the convening authority or a designee, the accused's immediate commander, and (if applicable) the officer in charge of the confinement facility."

2. Supervise preparation, authentication and distribution of the ROT. RCM 1103(b)(1).

3. Review ROT for errata. *United States v. Ayers*, 54 M.J. 85 (C.A.A.F. 2000). On appeal, appellant alleged that the ROT was not truly authenticated since the assistant trial counsel (ATC) executed the authentication. The ATC signed the authentication document that stated, "I have examined the record of trial in the forgoing case." The ATC also made several corrections to the ROT. The defense claimed that for the authentication to be proper, the authenticating individual must state that the ROT accurately reports the proceedings. Also, defense claimed that an ATC cannot authenticate a ROT unless he is under the supervision of the TC (as required by RCM 502(d)(2)). The court disagreed, holding that by signing the authentication document, the ATC was stating that the ROT was correct. Also, since the defense did not allege any error in the ROT, or prejudice from having the ATC authenticate the ROT, no relief was appropriate.

4. Ensure the record of trial is served on the accused and counsel, as appropriate. RCM 1104(b)(1), 1106(f)(3). *See generally* RCM 502(d)(5), discussion, para. (F).

B. RCM 502(d)(6), discussion, para. (E) addresses the defense counsel's (DC's) post-trial duties.

1. Advise the accused of post-trial and appellate rights (not technically post-trial – RCM 1010).

2. Deferment of confinement / reduction / forfeitures. RCM 1101(c).

3. Examination of the record of trial. RCM 1103(b)(3)(c).

4. Submission of matters: RCM 1105; 1106(f)(4), (7); and, 1112(d)(2). *See also* UCMJ, Article 38(c).

5. Right to appellate review and waiver thereof, in writing, within specified time period. RCM 1110.

6. Examine Staff Judge Advocate's Recommendation (SJAR). RCM 1106(f).

7. *See also United States v. Palenius*, 2 M.J. 86, 93 (C.M.A. 1977). "The trial defense attorney . . . should maintain the attorney-client relationship with his client subsequent to the [trial] . . . until substitute trial [defense] counsel or appellate counsel have been properly designated and have commenced the performance of their duties . . . ."

a) Advice on the right to appellate review and appellate process.

b) Raising appellate issues. *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

c) Act in accused's interest. *See United States v. Martinez*, 31 M.J. 524 (A.C.M.R. 1990).

d) Maintain an attorney-client relationship. RCM 1106(f)(2) (for substitute counsel); *United States v. Schreck*, 10 M.J. 226 (C.M.A. 1981), *supplemented by*, 10 M.J. 374 (C.M.A. 1981); *United States v. Titsworth*, 13 M.J. 147 (C.M.A. 1982); *United States v. Jackson*, 34 M.J. 783 (A.C.M.R. 1992) (some responsibility placed on the SJA).

C. Effectiveness of counsel in the post-trial area is governed by *Strickland v. Washington*, 466 U.S. 668 (1984), and *United States v. Lewis*, 42 M.J. 1 (C.A.A.F. 1995). *See also United States v. MacCulloch*, 40 M.J. 236 (C.M.A. 1994); *United States v. Brownfield*, 52 M.J. 40 (C.A.A.F. 1999); and, *United States v. Lee*, 52 M.J. 51 (C.A.A.F. 1999). *See also* Section XXVIII *infra*.

1. *United States v. Gilley*, 56 M.J. 113 (C.A.A.F. 2001). Defense counsel ineffective by submitting, as part of the accused's clemency matters, a letter from the accused's mother that "undercut [his] plea for clemency," a separate letter from the father that was "acerbic" and a "scathing diatribe directed toward trial counsel, trial defense counsel, the members, the judge, and the convening authority," and an e-mail from the accused's brother that "echoed the theme of appellant's father." *Id*. at 124. Returned for a new clemency submission, PTR, and action.

2. *United States v. Key*, 57 M.J. 246 (C.A.A.F. 2002). The CAAF, without ruling, hints that defense counsel might be ineffective if counsel fails to advise the client on waiver of forfeitures and the right to request waiver. The CAAF avoids the issue in *Key* because appellant could not recall if his counsel advised him. Appellant's equivocal statement re: his recollection was insufficient to overcome the presumption that counsel's performance was competent.

3. *United States v. Gunderman*, 67 M.J. 683 (A. Ct. Crim. App. 2009). The appellant claimed that his defense counsel did not inform him that he could request disapproval of the adjudged forfeitures, deferral under Article 57, and waiver of automatic forfeitures under Article 58b. Based upon the facts, the court finds that there was sufficient advice given about forfeitures and the ability to request waiver and deferral after trial. Three factors weighed in favor of the decision: 1) the appellant signed a post-trial advice form that informed him of his ability to request waiver and deferral; 2) the appellant agreed on the record that he had been properly informed of his post-trial rights; and, 3) the appellant submitted a letter to the convening authority pursuant to RCM 1105 void of any indication that he wanted deferral or waiver.

4. *United States v. Fordyce*, 69 M.J. 501 (A. Ct. Crim. App. 2010) (en banc). The ACCA did not reach the issue of whether defense counsel was ineffective for submitting clemency matters to the convening authority without the input from appellant and for failing to submit a request to defer and waive forfeitures for the benefit of the accused's wife and five children. However, the ACCA held that appellant made the requisite showing of prejudice because defense counsel admitted she did not cover waiver since the standardized post-trial and appellate rights form she had used did not include that provision. Case remanded for new SJAR and action. The ACCA also recommends two things:

a) Defense counsel should have an accused co-sign RCM 1105/1106 submissions, or sign an acknowledgement that the matters submitted are all that the accused wishes to submit; and,

b) A practice that would demonstrate on the record that the appellant received both proper written advice on post-trial rights and the opportunity to submit post-trial matters to the convening authority. The ACCA notes with approval the amendments to the Military Judges' Benchbook, DA Pam 27-9, paras. 2-4-2 and 2-6-14 (1 Jan. 2010), which includes in inquiry into the accused's knowledge of what he can submit to the convening authority.

V. NOTICE CONCERNING POST-TRIAL AND APPELLATE RIGHTS. RCM 1010.

A. Before adjournment of any general and special court-martial, the MJ shall ensure that the DC has informed the accused orally and in writing of:

1. The right to submit post-trial matters to the CA;

2. The right to appellate review, as applicable, and the effect of waiver or withdrawal of such rights;

3. The right to apply for relief from TJAG if the case is neither reviewed by a Court of Criminal Appeals nor reviewed by TJAG under RCM 1201(b)(1); and,

4. The right to the advice and assistance of counsel in the exercise or waiver of the foregoing rights.

B. The written advice to the accused concerning post-trial and appellate rights shall be signed by the accused and DC and inserted in the record as an appellate exhibit. Absent a post-trial Article 39(a) session, the written advice will usually be the last Appellate Exhibit (AE) in the record of trial.

C. The Military Judge should:

1. Examine the form submitted by the defense counsel and used to advise the client.

2. Confirm on whom the record of trial is to be served – the accused or counsel. If more than one defense counsel is on the case, she should determine, on the record, who is responsible for post-trial matters.

D. See also amendments to the Military Judges' Benchbook, DA Pam 27-9, paras. 2-4-2 and 2-6-14 (1 Jan. 2010).

VI. REPORT OF RESULT OF TRIAL; POST-TRIAL RESTRAINT; DEFERMENT OF CONFINEMENT, FORFEITURES AND REDUCTION; WAIVER OF FORFEITURES. ARTICLES 57, 57a, 58, 58a, 58b, AND 60, UCMJ; RCM 1101.

A. Result of Trial and Post-Trial Restraint.

1. TC notifies accused's immediate commander, CA or designee, and confinement facility of results (DA Form 4430, Department of the Army Report of Result of Trial). *See* RCM 502(d)(5). *See also* AR 27-10, para. 5-29.

2. The accused's commander may order the accused into post-trial confinement. The accused's commander may delegate to TC authority to order accused into post-trial confinement. RCM 1101(b)(2). Note: Summary Court Martial Officer (SCMO) may NOT order a servicemember into post-trial confinement.

B. Deferment of confinement.

1. Accused may request, in writing, deferment of confinement.

2. Accused burden to show "the interests of the accused and the community in deferral outweigh the community's interest in imposition of the punishment on its effective date."

3. Factors CA may consider include, "where applicable: the probability of the accused's flight; the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice; the nature of the offenses (including the effect on the victim) of which the accused was convicted; the sentence adjudged; the command's immediate need for the accused; the effect of deferment on good order and discipline in the command; [and] the accused's character, mental condition, family situation, and service record." RCM 1101(c)(3).

4. CA's action on deferment request MUST be in writing and a copy provided to the accused.

5. CA's written action on deferment request is subject to judicial review for abuse of discretion. The request and action thereon MUST be attached to the record of trial. RCM 1103(b)(3)(D).

6. CA must specify why confinement is not deferred.

a) *United States v. Schneider*, 38 M.J. 387 (C.M.A. 1993). The CA refused to defer confinement "based on seriousness of the offenses of which accused stands convicted, amount of confinement imposed by the court-martial and the attendant risk of flight, and the adverse effect which such deferment would have on good order and discipline in the command." Accused alleged abuse of discretion in refusing to defer confinement. Held – even though explanation was conclusory, it was sufficient. The court noted other matters of record supporting decision to deny deferment.

b) *United States v. Dunlap*, 39 M.J. 1120 (A.C.M.R. 1994). Remedy for failure to state reasons for denying deferment request is petition for extraordinary relief. The court reviewed facts and determined that deferment was not appropriate.

c) *United States v. Edwards*, 39 M.J. 528 (A.F.C.M.R. 1994). Accused not entitled to relief where deferment would have expired before appellate review. The court recommended that the DC ask for "statement of reasons" or petition for redress under Article 138.

d) *United States v. Sebastian*, 55 M.J. 661 (A. Ct. Crim. App. 2001). One week prior to his trial, accused submitted a deferment request requesting that any confinement be deferred until after the upcoming Easter holiday. He also asked for deferral and waiver of forfeitures. The CA never acted on first request. One week after trial (which included confinement as part of the adjudged sentence), the accused submitted a second request regarding forfeitures. Approximately six weeks later (five weeks after the forfeitures went into effect), the SJA responded recommending disapproval. Contrary to the SJA's advice, the CA granted the

forfeitures request. "While there is no requirement for a convening authority to act 'instantaneously' on a deferment request, there is also no authority for a convening authority to fail to act at all when a deferment request is submitted in a timely manner." *Id*. at 663. The court found prejudice both in the failure to respond to the first deferment request and in the untimely response to the second request. The court reduced the accused's confinement from nine months to five months and set aside the adjudged forfeitures.

e) *United States v. McClary*, 68 M.J. 606 (C.G. Ct. Crim. App. 2010). At the end of trial, the appellant submitted a request to the convening authority requesting deferment of confinement "until at least" four days after trial. The convening authority responded the same day by writing, "Considered and denied." Forty days later, the convening authority signed a memorandum to the appellant providing his reasons for the denial. The appellant alleged error for failure to provide the rationale at the time of denial. The CGCCA agreed, and held that "[c]ertainly there was error at the time of denial." However, even though the court found error, the court was not able to provide relief since the rationale had eventually been provided. The court denied relief.

C. Deferment of forfeitures.

1. Accused may request, in writing, deferment of forfeitures. RCM 1101(c)(2).

2. Accused burden to show "the interests of the accused and the community in deferral outweigh the community's interest in imposition of the punishment on its effective date [e.g., forfeitures]." RCM 1101(c)(3).

3. Applies to adjudged forfeitures (Article 57(a)(2), UCMJ; RCM 1101(c)) AND automatic forfeitures (Article 58b(a)(1), UCMJ)). *United States v. Lundy*, 60 M.J. 52 (C.A.A.F. 2004); *United States v. Adney*, 61 M.J. 554 (A. Ct. Crim. App. 2005).

4. Factors CA may consider include, "where applicable: the probability of the accused's flight; the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice; the nature of the offenses (including the effect on the victim) of which the accused was convicted; the sentence adjudged; the command's immediate need for the accused; the effect of deferment on good order and discipline in the command; [and] the accused's character, mental condition, family situation, and service record." RCM 1101(c)(3).

5. CA's action on deferment request MUST be in writing and a copy provided to the accused. RCM 1101(c)(3).

6. CA's written action on deferment request is subject to judicial review for abuse of discretion. The request and action thereon MUST be attached to the record of trial. RCM 1103(b)(3)(D).

7. CA must specify why forfeitures are not deferred. *United States v. Zimmer*, 56 M.J. 869 (A. Ct. Crim. App. 2002). Error for the CA to deny the defense deferment request in a one-sentence action without providing reasons for the denial. Four months of confinement and the adjudged forfeitures were set aside. *See also United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992).

8. *United States v. Brown*, 54 M.J. 289 (C.A.A.F. 2000). CA denied accused's deferment request. The SJA memorandum to CA recommending denial was never served on the accused who argued prejudice because he was not afforded the opportunity to rebut the memorandum. The CAAF found no prejudice; however, they strongly suggested that new rules be created regarding deferment and waiver requests – rules could require an

SJA recommendation with deferment and waiver requests with a corresponding notice and opportunity to respond provision.

9. *United States v. Key*, 55 M.J. 537 (A.F. Ct. Crim. App. 2001), *aff'd*, 57 M.J. 246 (C.A.A.F. 2002). Nine days after being sentenced, the accused submitted a request asking for deferment of forfeitures and reduction. The SJA's written response recommended disapproval, advice the CA followed. The SJA's advice was never served on the accused. He argued prejudice claiming deferment requests should be processed like a clemency request. Although the Air Force requires that waiver requests be treated like clemency requests (*United States v. Spears*, 48 M.J. 768 (A.F. Ct. Crim. App. 1998) (overruled in part on other grounds)) subject to the requirements of Article 60, deferment of forfeitures and reductions in rank do not have to be treated similarly. No requirement that an SJA recommendation regarding deferment be served on defense. Note: the CAAF affirmed without reaching the issue of whether service of the SJA's memo is a *per se* requirement. The court noted the absence of "new matter" and the non-inflammatory nature of the SJA's memo in affirming.

10. *United States v. Moralez*, 65 M.J. 665 (A. Ct. Crim. App. 2007). Forfeitures were adjudged at trial. After trial, the accused submitted request to the CA to (1) defer adjudged and automatic forfeitures until action, and (2) disapprove adjudged forfeitures and waive automatic forfeitures at action. The SJA advised the CA to grant the deferrals, but postpone any decision on disapproval or waiver until action. The SJAR, the defense clemency submission, and the addendum were silent to the requested disapproval/waiver request. At action, the CA approved the adjudged sentence (including forfeitures). The ACCA held that SJA should have further advised the CA on his options regarding the disapproval of adjudged and waiver of automatic forfeitures at action.

D. Waiver of forfeitures.

1. Accused may request waiver of automatic forfeitures (Article 58b, UCMJ) or the CA may waive *sua sponte*. The accused's request should be in writing.

2. Waiver is allowed for a period not to exceed six months and is for the purpose of providing support to the accused's dependents, as defined in 37 U.S.C. § 401.

3. Factors CA may consider include: "the length of the accused's confinement, the number and age(s) of the accused's family members, whether the accused requested waiver, any debts owed by the accused, the ability of the accused's family members to find employment, and the availability of transitional compensation for abused dependents permitted under 10 U.S.C. 1059." RCM 1101(d)(2).

4. Unlike the CA's action on a deferral of forfeitures, there is no requirement that a similar decision on waiver of forfeitures be in writing or that it be served on the accused. *United States v. Zimmer*, 56 M.J. 869, 872 n.4 (A. Ct. Crim. App. 2002). According to *Zimmer*, such a decision is also not subject to judicial review. *Id*.

5. Waiver of forfeitures is authorized as soon as they become effective; need not wait until action.

6. *United States v. Nicholson*, 55 M.J. 551 (A. Ct. Crim. App. 2001). SJA advice stating that waiver request prior to action is premature and must be submitted as part of the RCM 1105 submissions was incorrect. The convening authority may waive and direct payment of any automatic forfeitures when they become effective by operation of Article 57(a) – the earlier of fourteen days after sentence is adjudged or date the sentence is approved by the CA. *See also United States v. Kolodjay*, 53 M.J. 732 (A. Ct. Crim. App. 1999) (noting that the CA's action apparently would not achieve his objective of a six month waiver

because the waiver dated back to the date the sentence was adjudged rather than fourteen days thereafter; a waiver is valid only when there are forfeitures to waive).

E. Deferment of reduction in rank. Processed like a request for deferment of confinement or forfeitures. *See supra* Sections VI.B. and VI.C.

VII. POST-TRIAL SESSIONS. ARTICLE 39, UCMJ; RCM 905, 1102.

A. Types of post-trial sessions.

1. Proceedings in revision. "[T]o correct an apparent error, omission, or improper or inconsistent action by the court-martial which can be rectified by reopening the proceeding without material prejudice to the accused." RCM 1102(b)(1).

2. Article 39(a) sessions. "[To inquire] into, and, when appropriate, [resolve] any matter which arises after trial and which substantially affects the legal sufficiency of any findings of guilty or the sentence. The military judge may also call an Article 39(a) session, upon motion of either party or *sua sponte*, to reconsider any trial ruling that substantially affects the legal sufficiency of any findings of guilty or the sentence." RCM 1102(b)(2). "The military judge shall take such action as may be appropriate**,** including appropriate instructions when members are present. The members may deliberate in closed session, if necessary, to determine what corrective action, if any, to take." RCM 1102(e)(2); *United States v. Jackson*, 34 M.J. 1145 (A.C.M.R. 1992).

B. Timing.

1. The MJ may call a post-trial session before the record is authenticated. The CA may direct a post-trial session any time before taking initial action or at such later time as the convening authority is authorized to do so by a reviewing authority, except that no proceeding in revision may be held when any part of the sentence has been ordered executed. RCM 1102(d).

2. *United States v. Scaff*, 29 M.J. 60, 65 (C.M.A. 1989). Until MJ authenticates the ROT, MJ may conduct a post-trial session to consider newly discovered evidence, and in proper cases, may set aside findings of guilty and the sentence.

3. MJ need not wait for guidance or directive from reviewing authority or CA. "The military judge may also call an Article 39(a) session, upon motion of either party or *sua sponte*, to reconsider any trial ruling that substantially affects the legal sufficiency of any findings of guilty or the sentence." RCM 1102(b)(2).

C. Format. Rule essentially adopts the *DuBay* "hearing" concept but it expands the jurisdiction of the MJ into post-trial proceedings. Article 39(a) requires that "these proceedings shall be conducted in the presence of the accused." *See also United States v. Caruth*, 6 M.J. 184 (C.M.A. 1979) (holding that a post-action hearing held in accused's absence found "improper and . . . not a part of the record of trial").

D. Limitations. RCM 1102(c). *See United States v. Boland*, 22 M.J. 886 (A.C.M.R. 1986). Post-trial sessions cannot:

1. Reconsider a finding of not guilty as to a specification, or a ruling which amounts to a finding of not guilty.

2. Reconsider a finding of not guilty as to a charge unless a finding of guilty to some other Article is supported by a finding as to a specification.

3. Increase the severity of a sentence unless the sentence is mandatory.

E. Cases.

1. *United States v. Webb*, 66 M.J. 89 (C.A.A.F. 2008). Prior to authentication of the record of trial the defense moved for a new trial based upon the government's failure to disclose impeachment evidence of one of the government's key witness. The judge granted a new trial and on appeal, the government argued that Article 73 and RCM 1210 only allowed new trial petitions after the CA's action. The CAAF agreed that Article 73 does not allow a military judge to order a new trial – but Article 39(a) does. The CAAF declared unequivocally that military judges have authority under Article 39(a) to convene post-trial sessions to consider newly discovered evidence and to take whatever remedial action the military judge finds appropriate (to include a new trial).

2. *United States v. Meghdadi*, 60 M.J. 438 (C.A.A.F. 2005). After trial, appellant requested an Article 39(a) session seeking to inquiry into alleged witness misconduct, or, alternatively, a mistrial or a new trial. A different military judge than who presided over the trial heard evidence at the post-trial session and denied the motion. The defense based its motion on allegations that the primary CID investigator lied at trial when he testified that: he had not promised the informant who testified against the appellant that the informant would not go to jail if he helped CID; that he had not told the informant that CID would assist him with his case if the informant went to work for CID; and, that he had not met with the informant after CID terminated the informant as a registered source. An audio tape surreptitiously recorded by the informant in a conversation with the agent shed light on each of these allegations. The CAAF noted that the MJ failed to recognize the purpose of the requested inquiry, which was to examine the request for a mistrial or a new trial, rather than to establish a basis for correction or discipline of the witnesses themselves. The CAAF also criticized the findings made by the MJ. With respect to the evidentiary value of the tape, which the MJ discounted, the CAAF held that the appellant "firmly established" the potential impeachment value of the tape. The CAAF noted that the MJ denied himself the opportunity for meaningful assessment of whether the investigator's trial testimony was perjured, and if so, whether the effect of the perjury substantially contributed to the sentence.

3. *United States v. Humpherys*, 57 M.J. 83 (C.A.A.F. 2002). Post-trial 39(a) session held by MJ to question two panel members about a rater-ratee relationship that they failed to disclose during *voir dire*. After making extensive findings of facts and conclusions of law, the MJ indicated he would not have granted a challenge for cause based on the relationship had it been disclosed. Petition for a new trial denied. The CAAF noted the following regarding the MJ's post-trial responsibilities:

> The post-trial process empowers the military judge to investigate and resolve allegations, such as those in this case, by interviewing the challenged panel members. It allows the judge to accomplish this task while the details of trial are still fresh in the minds of all participants. The judge is able to assess firsthand the demeanor of the panel members as they respond to questioning from the bench and counsel.

Id. at 96.

4. *United States v. Jones*, 46 M.J. 815 (N-M. Ct. Crim. App. 1997). In mixed-plea case, MJ failed to announce findings of guilty of offenses to which accused had pled guilty, and as to which MJ had conducted providence inquiry. Upon realizing failure to enter findings, MJ convened post-trial Article 39(a) hearing and entered findings consistent with pleas of accused. Though technically a violation of RCM 922(a), MJ commended for using post-trial session to remedy oversight.

5. *United States v. Perkins*, 56 M.J. 825 (A. Ct. Crim. App. 2001). MJ's failure to properly announce guilty finding as to Spec 3 of Charge II (MJ announced Guilty to Spec

3 of Charge III) did not require court to set aside appellant's conviction of Specification 3 of Charge II when it was apparent from the record that the MJ merely misspoke and appellant had actually plead guilty to Specification 3 of Charge II. The court notes that a proceeding in revision UP of RCM 1102 would have been an appropriate course of action had the MJ or SJA caught the mistake.

6. *United States v. Kulathungam*, 54 M.J. 386 (C.A.A.F. 2001). Proceeding in revision to correct erroneous omission of findings from the record and to formally announce findings was appropriate. Omission was the only procedural deviation by the MJ during the court-martial. Note: upon discovery of the omission, the TC and court reporter "inserted" the findings in the record. DC was aware of the omission during trial but for tactical reasons chose to remain silent. On appeal, the CAAF advised counsel, in the future, to seek the advice of the MJ or a more senior counsel to avoid the "train wreck" that occurred in that case.

7. *United States v. Mayfield*, 45 M.J. 176 (C.A.A.F. 1996). Accused's written judge alone (JA) request never signed by parties and made part of the record. Additionally, no timely oral request for judge alone was made on the record. Before authentication, MJ realized omission and called a post-trial Article 39(a), during which accused acknowledged he had made request in writing and that JA trial had been his intent all along. The CAAF reversed the NMCCA, which had found the failure to formally request JA to be a jurisdictional error.

8. *United States v. Avery*, No. 9500062 (A. Ct. Crim. App. May 17, 1996) (unpublished). Post-trial 39(a) session held to inquire into allegations that a sergeant major (SGM) slept through part of the trial. Testimony of MAJ H, panel president, about "SGM A's participation during deliberations . . . was relevant and admissible." MJ "properly stopped appellant's trial defense counsel from asking MAJ H about any opinions expressed by SGM A during deliberations."

9. *United States v. Gleason*, 43 M.J. 69 (C.A.A.F. 1995). Proceeding in revision is inappropriate to correct erroneous sentencing instruction. Proper procedure is a rehearing. Article 63 prohibits members who sat in original proceeding from sitting on a rehearing. No such prohibition exists for a proceeding in revision. There is no problem in having the same members for a proceeding in revision. *See also United States v. Roman*, 46 C.M.R 78, 81 (C.M.A. 1972).

10. *United States v. Crowell*, 21 M.J. 760 (N.M.C.M.R. 1985). Post-trial 39(a) appropriate procedure to repeat proceedings to reconstruct portions of a record of trial resulting from loss of recordings.

11. *United States v. Jordan*, 32 M.J. 672 (A.F.C.M.R. 1991). MJ erred in entering findings of guilty on two specifications. After authentication he noticed error and notified SJA, who advised CA to only approve proper findings, but to approve sentence as adjudged. "If the error were detected before authentication, the better method of handling this type of error would have been for the military judge to direct a post-trial session under RCM 1102(d)." Such a post-trial session could have been used to reconsider the erroneous findings of guilty and re-determine the sentence. *See* RCM 1102(b), (c), and (e). As requested by the trial defense counsel, the CA could have also ordered a rehearing on sentence and avoided this issue. *See* RCM 1107(e)(1)." *Id*. at 673-4 n.1.

12. *United States v. Wallace*, 28 M.J. 640 (A.F.C.M.R. 1989). MJ became aware of possible extraneous information received by the panel on the "ease of converting a BCD to a general discharge." MJ had an obligation to *sua sponte* convene a post-trial Article 39(a) session to assess facts and determine any possible prejudice. Findings affirmed; sentence set aside and rehearing authorized.

13. *United States v. Wilson*, 27 M.J. 555 (C.M.A. 1988). TC failed to administer oath to two enlisted panel members. MJ held a proceeding in revision to correct the "substantial omission, to wit: a sentence and a sentencing proceeding." Ministerial act of swearing court members is essential to legal efficacy of proceedings but not a matter affecting jurisdiction.

14. *United States v. Baker*, 32 M.J. 290 (C.M.A. 1991). MJ held a post-trial Article 39(a) session to correct the omission in sentence announcement (the president of the panel failed to announce the adjudged DD). Held – Error; presents the appearance of UCI. *See also United States v. Dodd*, 46 M.J. 864 (A. Ct. Crim. App. 1997) (holding that it was error for court to re-convene two minutes after adjourned to state they had also adjudged a bad-conduct discharge).

15. *United States v. Jones*, 34 M.J. 270 (C.M.A. 1992). MJ held proceeding in revision two months after adjournment to correct "erroneous announcement of sentence" (failure to announce confinement). Held – Error. "Article 69(e)(2)(c) disallows such corrective action, to assure the integrity of the military justice system." *Id.* at 271.

16. *United States v. Jackson*, 34 M.J. 1145 (A.C.M.R. 1992). MJ held post-trial Article 39(a) session one month after adjournment, declared mistrial as to sentence based on procedural error (court members used improper voting procedures), and ordered new session with same members. Held – post-trial session was actually a proceeding in revision, and since the error was substantive, was inappropriate; even if not error, inappropriate to use same sentencing authority. *See also United States v. Roman*, 46 C.M.R 78, 81 (C.M.A. 1972).

17. *United States v. Miller*, 47 M.J. 352 (C.A.A.F. 1997). MJ abused his discretion when he denied the accused's request for delay of a post-trial Article 39(a) session in order to obtain civilian defense counsel. MJ was more concerned with expediency and convenience to government than protecting rights of the accused.

18. *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984). Unlawful command control for president to order a re-vote after a finding of not guilty had been reached. MJ should build a factual record at a post-trial Article 39(a) session.

19. *United States v. Steck*, 10 M.J. 412 (C.M.A. 1981). Proceeding in revision, directed by CA, appropriate to conduct a more thorough inquiry into the terms of the pretrial agreement and accused's understanding thereof.

20. *United States v. LePage*, 59 M.J. 659 (N-M. Ct. Crim. App. 2003). MJ erroneously admitted NJP record and considered evidence in arriving at a punitive discharge. At a post-trial Article 39(a) session, the MJ held that he erred and that the error prejudiced appellant. He further held, erroneously, that he lacked authority to correct the defect, citing to RCM 1009, which addresses reconsideration of sentences. Held – MJ could have corrected the error under RCM 1102 at a post-trial Article 39(a) session since the erroneous admission of the evidence "substantially affect[ed] the sufficiency of the sentence."

21. MJ may, any time until authentication, "reconsider any ruling other than one amounting to a finding of not guilty." RCM 905(f).

VIII. PREPARATION OF RECORD OF TRIAL. ARTICLE 54, UCMJ; RCM 1103; MCM, APPENDIX 13 AND 14.

A. Requires every court-martial to keep a record of proceedings.

B. RCM 1103(b)(2)(B). In a GCM, TC shall, under the direction of the MJ, cause the ROT to be prepared and the reporters' notes, however compiled, to be retained. The ROT must be verbatim if:

1. Any part of the sentence exceeds six months confinement, forfeiture of pay greater than two-thirds pay per month, any forfeiture of pay for more than six months, or other punishments which may be adjudged by a SPCM.

2. A BCD has been adjudged.

3. *United States v. Embry*, 60 M.J. 976 (A. Ct. Crim. App. 2005). Appellant spoke with social work assistant prior to trial. The intake notes of that assistant were litigated before trial. The intake notes were not marked or attached to the record as an appellate exhibit. The notes could not be located when asked for by the ACCA. The court determined that the MJ erred in not marking and attaching the intake notes to the record. Because the MJ considered them, the notes must be included in the ROT to effect appellate review of a ruling affecting the rights of the accused at trial. The court found that the government failed to rebut the presumption of prejudice arising from the incomplete ROT.

4. *United States v. Madigan*, 54 M.J. 518 (N-M. Ct. Crim. App. 2000). Appellant asserted (among other allegations of error) that the ROT was incomplete because the Article 32 investigation was not included and the Article 34 SJA advice was also missing. Both allegations were without merit. The appellant waived his allegation of error regarding the Article 34 advice because no objection had been made, before, during or after trial. Also, the appellant alleged no prejudice from this error. The Article 32 was missing because the appellant had pled guilty and waived the Article 32 investigation.

C. RCM 1103 and the discussion list what must be included in or attached to the ROT. The rule is supplemented by AR 27-10.

D. For a special court-martial, a verbatim transcript is required if a BCD is adjudged, confinement is greater than six months, or any forfeiture is for more than six months.

E. Summary court-martial records are governed by RCM 1305. *See* Appendix 15, MCM, and DD Form 2329.

F. Acquittals still need a ROT (summarized).

G. If an Article 39(a) session is called to order by the court a ROT is required. *See* RCM 1103(e). For example, accused is arraigned and subsequent to arraignment, the charges are withdrawn and dismissed – prepare a summarized ROT.

H. What if a verbatim ROT cannot be prepared? *See* RCM 1103(f). *But see United States v. Crowell*, 21 M.J. 760 (N.M.C.M.R. 1985) (can reconstruct the record of trial to make it "verbatim").

I. How verbatim is verbatim? No substantial omissions.

1. Verbatim does not mean word-for-word. *See United States v. Gray*, 7 M.J. 296 (C.M.A. 1979); *United States v. Behling*, 37 M.J. 637 (A.C.M.R. 1993). Insubstantial omissions do not make a record non-verbatim, but substantial omissions create a rebuttable presumption of prejudice that the government must rebut. *United States v. McCullah*, 11 M.J. 234 (C.M.A. 1981).

2. The government can reconstruct the record of trial to rebut the presumption of prejudice. *United States v. Lashley*, 14 M.J. 7 (C.M.A. 1982); *United States v. Eichenlaub*, 11 M.J. 239 (C.M.A. 1981); *United States v. Crowell*, 21 M.J. 760 (N.M.C.M.R. 1985).

3. *United States v. Cudini*, 36 M.J. 572 (A.C.M.R. 1992). Failure to attach copy of charges and specifications as appellate exhibit not substantial omission; where omission is insubstantial, accused must show specific prejudice.

4. *United States v. Washington*, 35 M.J. 774 (A.C.M.R. 1992). Pretrial conferences under RCM 802 need not be recorded; matters agreed upon, however, must be made a part of the record.

5. *United States v. Marsh*, 35 M.J. 505 (A.F.C.M.R. 1992). Off-the-record discussion of administrative discharge not a substantial omission where issue had been raised on the record and military judge ruled on the record that trial would proceed.

6. *United States v. Clemons*, 35 M.J. 767 (A.C.M.R. 1992). ROT qualified as verbatim record although it included three off-the-record pauses; sessions involved purely administrative matters, what took place was not essential substance of trial, and sessions were not recorded for legitimate purposes.

7. *United States v. Kyle*, 32 M.J. 724 (A.F.C.M.R. 1991). After reviewing documents *in camera*, MJ must seal the documents and attach them to the ROT. *See* RCM 702(g)(2) and Article 54(c)(1). "A military judge must make a record of every significant *in camera* activity (other than his legal research) adequate to assure that his decisions are reviewable on appeal." *Id*. at 726.

8. *United States v. Harmon*, 29 M.J. 732 (A.F.C.M.R. 1989). Tape recorder failed. MJ attempted to reconstruct. Because of substantial omission, burden on government to rebut presumption of prejudice. In this case, an almost impossible task.

9. *United States v. Sneed*, 32 M.J. 537 (A.F.C.M.R. 1990). DC argued *ex parte* motion telephonically to MJ. Defense complained that record was not verbatim because the *ex parte* telephone conversation was not recorded and was not made a part of the required verbatim ROT. Held: "Although the omission may have sufficient 'quantitative' substance to raise the presumption of prejudice . . . we have no hesitancy in finding that presumption effectively rebutted, not so much by affirmative government action (*e.g*., reconstruction of the record) as by the totality of circumstances." *Id*. at 540.

10. *United States v. Alston*, 30 M.J. 969 (N.M.C.M.R. 1990). Omission of testimony relating to offenses of which accused was acquitted was a substantial omission.

11. *United States v. Chollet*, 30 M.J. 1079 (C.G.C.M.R. 1990). Several bench conferences had "inaudible" sections. "We believe that these inaudible portions were substantial omissions which, along with other non-transcriptions, render the record non-verbatim." BCD disapproved.

12. *United States v. Seal*, 38 M.J. 659 (A.C.M.R. 1993). Omission of videotape viewed by MJ before imposing sentence renders ROT "incomplete," resulting in reversal.

13. *United States v. Maxwell*, 2 M.J. 1155 (N.M.C.M.R. 1975). Two audiotapes were inadvertently destroyed, resulting in loss of counsel's arguments, a brief Article 39(a) session on instructions, and announcement of findings. All but DC argument reconstructed. "We do not view the absence of defense counsel's argument as a substantial omission to raise the presumption of prejudice . . . [and] no prejudice has been asserted." *Id*. at 1156.

14. *United States v. Sylvester*, 47 M.J. 390 (C.A.A.F. 1998). ROT did not contain RCM 1105/1106 submissions from CDC and request for deferment or the CA's action thereon. Held: No error for failing to include the RCM 1105/1106 submissions (CDC did not submit written matters, but made an oral presentation to the CA). The CAAF refused to create a requirement that all such discussions be recorded or memorialized in the ROT,

but made it clear they prefer written post-trial submissions. The CAAF did find error, although harmless, for not including the deferment request and action in the ROT (the accused was released six days after the request).

15. *United States v. Simmons*, 54 M.J. 883 (N-M. Ct. Crim. App. 2001). During appellant's trial, there were two gaps in which the government had technical difficulty with its recording devices. An Article 39(a) session had to be reconstructed due to a tape malfunction and approximately fifty minutes of testimony were lost due to the volume being too low. Article 54(a) requires the preparation of a complete ROT in a general court-martial where the accused receives a discharge. A complete ROT should include a verbatim transcript. If the government cannot provide a verbatim ROT, it can either establish the accused suffered no prejudice or only approve the sentence that could be adjudged if the accused had been tried by a straight special court-martial. The court did a line-by-line analysis of the portions of the ROT that were missing and concluded that no prejudice occurred. The court agreed that the ROT was not verbatim, but the government had overcome the presumption of prejudice applied by the court.

16. *United States v. Henthorn, Jr.*, 58 M.J. 556 (N-M. Ct. Crim. App. 2003). ROT omitted approximately twenty-four pornographic images considered by the MJ on sentencing. Held: "such presumed prejudice [was] adequately rebutted" and any error stemming from the omission was harmless beyond a reasonable doubt. *Id*. at 559. Factors considered by the court: the case was a guilty plea; the omitted evidence did not go to guilt or innocence; the appellant did not question the validity of his plea; the images were adequately described in the ROT; the DC was aware of the MJ's proposed handling of the images (i.e., ordered sealed in NCIS case file); and neither DC or appellate DC questioned the nature of the omitted documents.

17. *United States v. Usry*, 68 M.J. 501 (C.G. Ct. Crim. App. 2009). There was a fifty-second gap during the inquiry into the appellant's competence. The CGCCA holds that this was not a substantial omission. Even though that fifty-second gap occurred when the military judge was inquiring into the appellant's competence to stand trial, which is an important issue, the court holds that a decision on competence is "unlikely to turn on the precise words being spoken during a fifty-second period." The military judge had an opportunity to observe the appellant's behavior during trial, which was more probative of the appellant's competence than his answers to a few questions.

18. *United States v. Miller*, No. 20090826, 2010 WL 3620471 (A. Ct. Crim. App. May 20, 2010) (unpublished). The ROT did not include a DVD showing the accused at work that was played at trial during sentencing. The ACCA, finding prejudice, approved non-verbatim ROT punishment (six months confinement and a reduction to E-1).

19. *United States v. Gaskins*, 69 M.J. 569 (A. Ct. Crim. App. 2010) (en banc). During sentencing, the appellant admitted into evidence his "Good Soldier Book," which allegedly contained "a compilation of . . . awards, certificates, letters of commendation and character letters from family and friends, as well as a number of photographs." The exhibit was not included in the record of trial. The trial defense counsel noted this omission in the post-trial submissions. The SJAR addendum responded to this by stating that the exhibit "could not be located." The SJA provided a memorandum describing the exhibit, written by the senior court reporter (not the court reporter that sat in on appellant's trial). The SJA also provided the appellant's Official Military Personnel File (OMPF) for the convening authority to review. The post-trial submissions from the defense included twenty-one letters of support. The adjudged sentence was approved. In this case, the ACCA held that, despite the efforts to include a substitute memorandum, there is still an omission from the record of trial. However, the court was unable to determine whether or not this omission is substantial or not. The description provided by the government did

not include "adequate detail" for the court to analyze whether or not it was a substantial omission. The court then turned to the three options available and found that approving a sentence below the threshold for a verbatim record (like the dissent encourages), would be a particularly harsh remedy "[i]n light of the seriousness of appellant's offenses, the substantial sentence he received, and the fact that the omission in this case relates only to sentencing" rather than guilt. Over a rigorous dissent, the court sent the case back for a *DuBay* hearing to determine the contents of the exhibit, and any prejudice. The CAAF granted an extraordinary writ of prohibition to prevent this *DuBay* hearing and sent the case back to the ACCA. *See Gaskins v. Hoffman, Conn, Johnson, Cook, Baime, and United States Army*, Misc. No. 11-8004, 69 M.J. __ (C.A.A.F. Dec. 9, 2010).

J. Additional TC duties.

1. Correct number of copies of ROT specified.

2. Security classification of ROT.

3. Errata. Examine the ROT before authentication and make corrections. RCM 1103(i)(1)(A).

K. Unless unreasonable delay will result, DC will be given an opportunity to examine the ROT before authentication. RCM 1103(i)(1)(B). *United States v. Bryant*, 37 M.J. 668 (A.C.M.R. 1993). Review by DC before authentication is preferred, but will not result in return of record for new authentication absent showing of prejudice. *See also United States v. Smith*, 56 M.J. 711 (A.F. Ct. Crim. App. 2001).

L. Videotaped ROT procedures. Authorized in exceptional circumstances by the RCM. Not authorized in AR 27-10.

M. Military Judges Duties / Responsibilities. *United States v. Chisholm*, 58 M.J. 733 (A. Ct. Crim. App. 2003), *aff'd*, 59 M.J. 151 (C.A.A.F. 2003) (holding that lower court's decision was not "advisory" in nature; issue of whether a Trial Judge has the authority noted by the lower court not reached by the court). Both Article 38(a), UCMJ, and RCM 1103(b)(1)(A) make the military judge responsible for overseeing and ensuring that the record of trial is prepared. The court, after noting that preparation of the record of trial is a "shared responsibility" between the SJA and military judge, found that military judges "have both a duty and responsibility to take active roles in 'directing' the timely and accurate completion of court-martial proceedings." 58 M.J. at 737. The court highlighted a military judge's "inherent authority to issue such reasonable orders as may be necessary to enforce that legal duty," noting that the manner in which he or she directs completion of the record is a matter within his or her "broad discretion." Having said that, the court suggested several "remedial actions" available to a military judge:

> The exact nature of the remedial action is within the sound judgment and broad discretion of the military judge, but could include, among other things: (1) directing a date certain for completion of the record with confinement credit or other progressive sentence relief for each day the record completion is late; (2) ordering the accused's release from confinement until the record of trial is completed and authenticated; or, (3) if all else fails, and the accused has been prejudiced by the delay, setting aside the findings and the sentence with or without prejudice as to a rehearing.

Id. at 737-38. Jurisdictions that choose to ignore a military judge's order regarding preparation of the record of trial "do so at their peril." *Id*. Note: although the CAAF found that the lower court decision was NOT advisory, the CAAF also noted that "the parties in a subsequent case are free to argue that specific aspects of an opinion . . . should be treated as non-binding dicta." 59 M.J. at 152.

IX. RECORDS OF TRIAL; AUTHENTICATION; SERVICE; LOSS; CORRECTION; FORWARDING. ARTICLE 54, UCMJ; RCM 1104.

A. Authentication by MJ or judges in GCM or SPCM with adjudged BCD. Authentication IAW service regulations for SPCM (same as GCM in AR 27-10). Substitute authentication rules provided (*Cruz-Rijos* standard).

1. Dead, disabled or absent: only exceptions to MJ authentication requirement. Article 54(a). *United States v. Cruz-Rijos*, 1 M.J. 429 (C.M.A. 1976).

2. TC may authenticate the ROT only if the military judge is genuinely unavailable for a lengthy period of time.

a) PCS to distant place may qualify as absence. *United States v. Lott*, 9 M.J. 70 (C.M.A. 1980). Reduced precedential value in light of spread of technology (facsimiles, overnight delivery, etc.). Also justification for substitute authentication is less given the demise of the 90-day post-trial/confinement *Dunlap* rule. *See United States v. Banks*, 7 M.J. 92 (C.M.A. 1979).

b) An extended leave may be sufficient. *United States v. Walker*, 20 M.J. 971 (N.M.C.M.R. 1985) (leave of thirty days is prolonged absence). *But see United States v. Batiste*, 35 M.J. 742 (A.C.M.R. 1992) (fifteen day leave does not equal prolonged absence); RCM 1104(a)(2)(B), discussion (substitute authentication only for emergencies; the brief, temporary absence of the MJ is not enough).

c) Military judge's release from active duty authorizes substitute authentication UP of RCM 1104(a)(2)(B). *See United States v. Garman*, 59 M.J. 677 (A. Ct. Crim. App. 2003); *United States v. Gibson*, 50 M.J. 575, 576 (N-M. Ct. Crim. App. 1999).

d) A statement of the reasons for substitute authentication should be included in the ROT. *United States v. Lott*, 9 M.J. 70 (C.M.A. 1980).

e) *United States v. Allende*, 66 M.J. 142 (C.A.A.F. 2008). Trial counsel made corrections to the record of trial, authenticated the record of trial "because of absence of the military judge," and served it on the defense counsel. Absent objection from the defense counsel, the CAAF held that this was insubstantial or non-prejudicial.

B. If more than one MJ, each must authenticate his portion. *United States v. Martinez*, 27 M.J. 730 (A.C.M.R. 1988).

C. TC shall cause a copy of ROT to be served on the accused after authentication. Substitute service rules provided. RCM 1104(b).

1. UCMJ, Article 54(c) requires such service as soon as the ROT is authenticated.

2. In *United States v. Cruz-Rijos*, 1 M.J. 429 (C.M.A. 1976), the CMA added the requirement that this be done well before CA takes action.

3. Substitute service on the DC is a permissible alternative. *See United States v. Derksen*, 24 M.J. 818 (A.C.M.R. 1987).

D. What to do if the authenticated ROT is lost? Produce a new ROT for authentication.

1. *United States v. Garcia*, 37 M.J. 621 (A.C.M.R. 1993). Holding that SJA-prepared certification that all allied documents were true copies of originals was sufficient substitute for original documents.

2. *United States v. Godbee*, 67 M.J. 532 (N-M. Ct. Crim. App. 2008). The original ROT was lost. The copy of the ROT submitted for appellate review was internally consistent and contained all numbered pages and exhibits. The ROT also contained a copy of the

authentication page signed by the military judge. As a result, the NMCCA applies a presumption of regularity to its creation, authentication, and distribution. Harmless error.

E. Rules for correcting an authenticated ROT. Certificate of correction process. Correction to make the ROT conform to the actual proceedings. RCM 1104(d).

F. The authenticated ROT will be forwarded to the CA for action or referred to the SJA for a recommendation before such action. SJA recommendation required prior to taking action in a GCM or SPCM in which a punitive discharge or confinement for one year was adjudged. RCM 1106(a).

G. If defense time for errata is unreasonable, MJ can authenticate without errata. RCM 1103(i)(1)(B).

X. MATTERS SUBMITTED BY THE ACCUSED. ARTICLE 60, UCMJ; RCM 1105.

"[W]hile the case is at the convening authority . . . the accused stands the greatest chance of being relieved from the consequences of a harsh finding or a severe sentence." *United States v. Dorsey*, 30 M.J. 1156 (A.C.M.R. 1990) (quoting *United States v. Wilson*, 26 C.M.R. 3, 6 (C.M.A. 1958)).

A. After being sentenced, the accused has the right to submit matters for the CA's consideration.

1. *See United States v. Davis*, 20 M.J. 1015 (A.C.M.R. 1985) (holding that DC's failure to submit matters under RCM 1105 and failure to mention under RCM 1106(f) that MJ strongly recommended suspension of the BCD was ineffective assistance). *See* RCM 1106(d)(3)(B) that now requires the SJA to bring to the CA's attention recommendations for clemency made on the record by the sentencing authority. *See also United States v. Gilley*, 56 M.J. 113 (C.A.A.F. 2001) (holding that DC's submission of three enclosures which reduced the accused's chances for clemency was ineffective).

2. *United States v. Harris*, 30 M.J. 580 (A.C.M.R. 1990). DC is responsible for determining and gathering appropriate post-trial defense submissions.

3. *United States v. Martinez*, 31 M.J. 524 (A.C.M.R. 1990). DC sent the accused one proposed RCM 1105 submission. When the defense counsel received no response (accused alleged he never received it), DC submitted nothing; ineffective assistance found.

4. *United States v. Tyson*, 44 M.J. 588 (N-M. Ct. Crim. App. 1996). Substitute counsel, appointed during 15-month lapse between end of the SPCM and service of the PTR, failed to generate any post-trial matters (in part because accused failed to keep defense informed of his address). No government error, but action set aside because of possible IAC.

5. *United States v. Sylvester*, 47 M.J. 390 (C.A.A.F. 1998). Written submissions are preferred, even if only to document an oral presentation.

B. Accused can submit anything, but the CA need only consider written submissions. *See* RCM 1105.

1. The material may be anything that may reasonably tend to affect the CA's action, including legal issues, excluded evidence, previously unavailable mitigation evidence, and clemency recommendations. *See United States v. Davis*, 33 M.J. 13 (C.M.A. 1991).

2. Query: How much must he "consider" it? Read it entirely? Trust SJA's (realistically COJ's or TC's) summary? As DCs, what are your options here? DC should provide a complete summary of the accused's RCM 1105 matters – highlight for the CA the key documents/submissions.

C. Time periods.

1. GCM or SPCM – due on later of ten days after service of SJAR on BOTH DC and the accused and service of authenticated ROT on the accused.

2. SCM – within seven days of sentencing.

3. The failure to provide these time periods is error; however, the accused must make some showing that he would have submitted matters. *United States v. DeGrocco*, 23 M.J. 146 (C.M.A. 1987). *See also United States v. Sosebee*, 35 M.J. 892 (A.C.M.R. 1992). "A staff judge advocate who discourages submissions to the convening authority after the thirty-day time limit but prior to action creates needless litigation and risks a remand from this Court." *Id*. at 894.

D. Waiver rules. The accused may waive the right to make a submission under RCM 1105 by:

1. Failing to make a timely submission.

a) *United States v. Maners*, 37 M.J. 966 (A.C.M.R. 1993). CA not required to consider late submission, but may do so with view toward recalling and modifying earlier action.

b) *But see United States v. Carmack*, 37 M.J. 765 (A.C.M.R. 1993). Government "stuck and left holding the bag" when defense makes weak or tardy submission, even though no error or haste on part of the government.

c) *United States v. Doughman*, 57 M.J. 653 (N-M. Ct. Crim. App. 2002). Failure to submit matters in a timely manner constitutes a waiver of the right to submit matters.

> Article 60, UCMJ, 10 U.S.C. § 860, affords an accused the right to submit matters for the convening authority's consideration, prior to the convening authority taking action on the case . . . . With this statutory right . . . also comes a responsibility: to submit matters in a timely fashion. Both Article 60, UCMJ, and RCM 1105 clearly require that matters in clemency be submitted within 10 days of the service of the record of trial or the staff judge advocate's recommendation (SJAR), whichever is later, unless an extension is sought or granted.

Id. at 654. Held: absent evidence of an approved extension, the appellant waived the right to submit matters. Despite finding waiver, a review of the record revealed no prejudice since the appellant's submissions were in the proper place in the record and the action post-dated the appellant's submission. Citing *United States v. Stephens*, 56 M.J. 391 (C.A.A.F. 2002), the court noted that nothing requires the CA to list everything considered prior to taking action; in the absence of evidence to the contrary, the presumption is that the CA considered clemency matters submitted by the appellant prior to taking action.

2. By making a partial submission without expressly reserving in writing the right to submit additional matters. *United States v. Scott*, 39 M.J. 769 (A.C.M.R. 1994).

3. Filing an express, written waiver.

4. Being AWOL so that service of the ROT on the accused is impossible and no counsel is qualified or available under RCM 1106(f)(2) for service of the ROT. This circumstance only waives the right of submission during the ten day period after service of the ROT.

5. *United States v. Travis*, 66 M.J. 301 (C.A.A.F. 2008). Defense requested two short delays after the initial ten day response period to gather a letter from LtGen Mattis (now Gen Mattis, Commander, USCENTCOM). Addendum served and three days later, CA took action. Defense submitted letter from LtGen Mattis; filed writ to NMCCA claiming

prejudice because no clemency matters were considered by CA. Denied. The CAAF held that there was no material prejudice to the appellant because CA purported to withdraw his action later, and approve the sentence as adjudged after considering the letter from LtGen Mattis. Note: CA had no authority to withdraw his first action because case had been forwarded to NMCCA. Also, because SJA was in Iraq and defense counsel was at Camp Pendleton, much of this was communication related. Take affirmative action to ensure matters are received before action taken.

6. *United States v. Rosenthal*, 62 M.J. 261 (C.A.A.F. 2005). Waiver of submission of matters in first post-trial process does not automatically mean appellant waives submission of matters in second or subsequent post-trial process. Appellant must be afforded the opportunity to submit matters.

E. Submission of matters contrary to client's directive. *United States v. Williams*, 57 M.J. 581 (N-M. Ct. Crim. App. 2002). Error for the defense counsel to submit a Memorandum for Record that documented his advice to his client and his client's decision not to submit clemency matters; however, the appellant suffered no harm as a result of the error. *See also United States v. Blunk*, 37 C.M.R. 422 (C.M.A. 1967).

F. Claims of post-trial cruel and unusual punishment.

1. *United States v. Roth*, 57 M.J. 740 (A. Ct. Crim. App. 2002), *aff'd*, 58 M.J. 239 (C.A.A.F. 2003) (summary disposition). Claims of post-trial cruel and unusual punishment in violation of the Eighth Amendment or Article 55, UCMJ, are within a CCA's Article 66, UCMJ, review authority. In order to succeed on his claim of injury to his testicle while at the DB, injury resulting from improper frisks without "penological justification," the appellant must satisfy both an objective and subjective test regarding the alleged injury. Objectively, the appellant must show that the "alleged deprivation or injury was 'sufficiently serious' to warrant relief." *Id*. at 742. Second, the appellant must show that the person causing the injury had a "culpable state of mind and subjectively intended to maliciously or sadistically harm [him] through the use of wanton or unnecessary force, and that the injury was not caused by a good faith effort to maintain or restore discipline." *Id*. Held: although appellant satisfied the objective test, he failed to present any subjective evidence of culpability or use of wanton or unnecessary force.

2. *United States v. Brennan*, 58 M.J. 351 (C.A.A.F. 2003), *aff'd after remand*, 60 M.J. 119 (C.A.A.F. 2004) (summary disposition). The test for post-trial claims of cruel and unusual punishment is two pronged with an objective component and subjective component: "whether there is a sufficiently serious act or omission that has produced a denial of necessities . . . [and] whether the state of mind of the prison official demonstrates deliberate indifference to inmate health or safety," respectively. *Id*. at 353. Additionally, "to sustain an Eighth Amendment violation, there must be a showing that the misconduct by prison officials produced injury accompanied by physical or psychological pain." *Id*. at 354. During the post-trial processing of the appellant's case, the appellant's counsel requested clemency based on seven separate grounds, one of which was an allegation that while confined at the USACFE, Mannheim, Germany, she was subjected to cruel and unusual punishment in violation of the Eighth Amendment and Article 55, UCMJ (i.e., sexual harassment and assaults by an E-6 cadre member over a two-month period). In responding to the allegations, the government argued that the appellant failed to establish harm and additionally, relief was not warranted because the CA already granted clemency. The CAAF disagreed with both assertions. First, the court found that it was clear that the appellant suffered harm at the hands of the cadre member. Next, although the CA granted some clemency (reducing confinement by three months), the CA's action was unclear as to why he granted the clemency. The appellant's counsel raised seven separate bases for relief and the SJAR was silent regarding the allegation of cruel and unusual punishment.

Held: the decision of the service court was affirmed as to findings and set aside as to sentence. The case was remanded to the service court with the option of either granting relief at their level for the Article 55, UCMJ, violation (i.e., Eighth Amendment) or to remand back to the CA for remedial action.

3. *United States v. Ney*, 68 M.J. 613 (A. Ct. Crim. App. 2010). The appellant asserted that the command failed to follow AR 190-47 by not transferring him to a military confinement facility within seven working days after trial (it took thirty-four days). This Eighth Amendment and Article 55, UCMJ, claim was denied because: 1) administrative remedies, such as an Article 138 complaint, must be exhausted first; and, 2) regulatory violations alone are normally not enough for an Eighth Amendment or Article 55 violation.

G. Appellate counsel access to defense files. *United States v. Dorman*, 58 M.J. 295 (C.A.A.F. 2003). Error for military defense counsel and the CCA to deny civilian defense counsel access to the appellant's case file after civilian defense counsel obtained a signed release from the client. "[T]rial defense counsel must, upon request, supply appellate defense counsel with the case file, but only after receiving the client's written release." *Id*. at 298.

XI. RECOMMENDATION OF THE SJA OR LEGAL OFFICER AND DC SUBMISSION. ARTICLE 60, UCMJ; RCM 1106.

A. RCM 1106 requires a written SJA recommendation (SJAR) before the CA takes action on a GCM with any findings of guilty or a SPCM with an adjudged BCD or confinement for a year.

B. Disqualification of persons who have previously participated in the case.

1. Who is disqualified? The accuser, investigating officer, court members, MJ, any TC, DC, or anyone who "has otherwise acted on behalf of the prosecution or defense." Article 46, UCMJ.

a) *United States v. Taylor*, 60 M.J. 190 (C.A.A.F. 2004). SJA of TC who authored article in base newspaper stating that the interests of justice were not met in a recent court-martial because of administrative errors resulting in the inadmissibility of counseling documents was disqualified from participating in the post-trial process. The SJA could have disclaimed the article, but instead said that the article could be imputed to him. His failure to disqualify himself was error.

b) *United States v. Gutierrez*, 57 M.J. 148 (C.A.A.F. 2002). Chief of Justice who testified on the merits in opposition to a defense motion to dismiss for lack of speedy trial and who later became the SJA, is disqualified from participating in the post-trial process. Therefore, it was error for that officer to prepare the SJAR and the subsequent addendum. The court noted, "Having actively participated in the preparation of the case against appellant, [that officer] was not in a position objectively to evaluate the fruits of her efforts." *Id*. at 149.

c) *United States v. Johnson-Saunders*, 48 M.J. 74 (C.A.A.F. 1998). The Assistant TC, as the Acting Chief of Military Justice, prepared the SJAR. The SJA added only one line, indicating he had reviewed and concurred with the SJAR. The DC did not object when served with the SJAR. The court held that the ATC was disqualified to prepare the SJAR. The court went on to hold that there was no waiver and there was plain error. The court returned the case for a new SJAR and action. The court created the test for non-statutory disqualification: whether the trial participation of the person preparing the SJAR "would cause a disinterested observer to doubt the fairness of the post-trial proceedings."

d) *United States v. Sorrell*, 47 M.J. 432 (C.A.A.F. 1998). CoJ wrote the SJAR. Dispute developed between the accused and the CoJ over whether the CoJ

promised the accused he would recommend clemency if the accused testified against other soldiers (which he did). The court avoided the issue; if there was error, it was harmless because the PTR recommended six months clemency, which the CA approved.

e) United States v. Stefan, No. 20081097 (A. Ct. Crim. App. Jan. 29, 2010) (unpublished), *review granted*, 69 M.J. 171 (C.A.A.F. 2010). This case was submitted on its merits. The majority affirmed the findings and the sentence without comment. The dissent found that a disqualified officer advised the convening authority. The officer at issue first appeared in the record of trial as "Chief, Military Justice," by signing the referral of both the charges and additional charges. Next, she appeared as trial counsel and served the referred charges and additional charges on appellant. Third, she acted again as "Chief, Military Justice" by granting the defense request for extension of time to submit post-trial matters. Next, she signed the promulgating order and the chronology sheet as "Acting Staff Judge Advocate." Then, on the same day, she signed the court-martial data sheet as three separate persons: "Trial Counsel," "Convening Authority or His/Her Representative," and "Staff Judge Advocate of General Court-Martial Convening Authority or Reviewing Staff Judge Advocate." Finally, on that same day, she signed the addendum to the SJAR as "Acting SJA." The dissent spent time discussing the roles of the chief of military justice and the fact that the "modern chief of military justice in the Army is in no way, shape, or form—not in concept or execution—'neutral,' and has no business advising the convening authority in the post-trial process." As a result, the dissent would have found prejudice by the numerous roles played by the chief of military justice in this case, and granted relief.

f) United States v. Stefan, 69 M.J. 256 (C.A.A.F. 2010). The CAAF agreed with the dissent from the court below and found that the Chief of Justice was statutorily disqualified under Article 6(c), UCMJ, primarily because she served the referred charges and the additional charges on the accused, a "task traditionally reserved for detailed trial counsel, see R.C.M. 602." However, the CAAF held that the appellant was not prejudiced and granted no relief. Of particular note to the CAAF was the fact that anyone who acts as a trial counsel is disqualified under the plain reading of Article 6(c), UCMJ, and not just those who are specifically detailed as trial counsel under Article 27, UCMJ.

g) United States v. Ramos, No. 20090099, 2010 WL 3946329 (A. Ct. Crim. App. July 19, 2010) (unpublished), *review granted*, 69 M.J. __ (C.A.A.F. Nov. 23, 2010). This case was submitted on its merits. The majority affirmed the findings and the sentence without comment. The dissent found that a disqualified officer advised the convening authority. The facts here are very similar to the *Stefan* case above, because the same office of the staff judge advocate and the same officer were involved. The dissent held that this case is very similar to the *Stefan* case above, except for the fact that the main document at issue in this case was the SJAR. In *Stefan*, the main document at issue was the addendum. As a result, the defense counsel had an opportunity to object to the disqualified officer acting in this case, whereas in *Stefan*, the defense counsel had no opportunity to object to the disqualified officer acting on the addendum. As a result, the dissent would have remanded the case for at least "a new review and action."

2. Also disqualified is the SJA who must review his own prior work (*United States v. Engle*, 1 M.J. 387 (C.M.A. 1976)); or his own testimony in some cases (*United States v. Rice*, 33 M.J. 451 (C.M.A. 1991)); *United States v. Choice*, 49 C.M.R. 663 (C.M.A.

1975). *United States v. McCormick*, 34 M.J. 752 (N.M.C.M.R. 1992) (holding that PTR insufficient if prepared by a disqualified person, even if filtered through and adopted by the SJA). *See* RCM 1106(b) discussion.

3. "Material factual dispute" or "legitimate factual controversy" required. *United States v. Lynch*, 39 M.J. 223, 228 (C.M.A. 1994). *See United States v. Bygrave*, 40 M.J. 839 (N.M.C.M.R. 1994) (holding that PTR must come from one free from *any* connection with a controversy); *United States v. Edwards*, 45 M.J. 114 (C.A.A.F. 1996). Legal officer (non-judge advocate) disqualified from preparing PTR because he preferred the charges, interrogated the accused, and acted as evidence custodian in case. Mere prior participation does not disqualify, but involvement "far beyond that of a nominal accuser" did so here.

4. Who is not disqualified?

a) The SJA who has participated in obtaining immunity or clemency for a witness in the case. *United States v. Decker*, 15 M.J. 416 (C.M.A. 1983).

b) Preparation of pretrial advice challenged at trial not automatically disqualifying; factual determination. *United States v. Caritativo*, 37 M.J. 175 (C.M.A. 1993).

c) *United States v. McDowell*, 59 M.J. 662 (A.F. Ct. Crim. App. 2003). SJA whose initial SJAR was deemed defective on appeal is not *per se* disqualified when the error is a result of a change in the law as opposed to bad or erroneous advice. Changes in the law affecting the validity of an SJAR do not create a "personal interest" in the case; however, erroneous or bad advice in an SJAR, returned to the same SJA for a second review and action may disqualify that SJA if it is shown he or she has an other than official interest in the case.

5. How do you test for disqualification outside the scope of the rules? Do the officer's actions before or during trial create, or appear to create, a risk that the officer will be unable to evaluate the evidence objectively and impartially? *United States v. Newman*, 14 M.J. 474 (C.M.A. 1983). *See United States v. Kamyal*, 19 M.J. 802 (A.C.M.R. 1984) ("a substantial risk of prejudgment"). *United States v. Johnson-Saunders*, 48 M.J. 74 (C.A.A.F. 1998) (whether the involvement by a disqualified person in the PTR preparation "would cause a disinterested observer to doubt the fairness of the post-trial proceedings")

6. RCM 1106(c). When the CA has no SJA or SJA is disqualified (unable to evaluate objectively and impartially), CA must request assignment of another SJA, or forward record to another GCMCA. Make sure documentation is included in the record.

a) Informal agreement between SJAs is not sufficient. *United States v. Gavitt*, 37 M.J. 761 (A.C.M.R. 1993).

b) *United States v. Hall*, 39 M.J. 593 (A.C.M.R. 1994). SJA used incorrect procedure to obtain another SJA to perform post-trial functions. Court holds that failure to follow procedures can be waived.

c) Deputies cannot sign SJARs. *United States v. Crenshaw*, No. 9501222 (A. Ct. Crim. App. 1996) (unpublished). Fact that Deputy Staff Judge Advocate (DSJA) improperly signed PTR as "Deputy SJA" rather than "Acting SJA" did not require corrective action where PTR "contained nothing controversial" and where SJA signed addendum that adhered to DSJA's recommendation.

d) Who should author the SJAR? The SJA. *United States v. Finster*, 51 M.J. 185 (C.A.A.F. 1999), where a non-qualified individual signed the SJAR, the court concluded there was manifest prejudice. *United States v. Gatlin*, 60 M.J. 804 (N-M. Ct. Crim. App. 2004) (refusing to apply a presumption of regularity to a PTR

signed by a LT Stampher (not the SJA) when there was no explanation in the record as to why he prepared and signed the PTR; holding, however, that appellant did not make a showing of any prejudice).

C. Form and content: "The staff judge advocate or legal advisor shall provide the [CA] with a copy of the report of results of trial, setting forth the findings, sentence, and confinement credit to be applied, a copy or summary of the pretrial agreement, if any, any recommendation for clemency by the sentencing authority, made in conjunction with the announced sentence, and the staff judge advocate's recommendation." RCM 1106(d)(3). EFFECTIVE: 23 AUGUST 2008.

1. Findings and sentence. *United States v. Russett*, 40 M.J. 184 (C.M.A. 1994). Requirement for the SJA to comment on multiplicity question arises when DC first raises the issue as part of the defense submission to the CA.

a) Accuracy most critical on charges and specs. *United States v. Diaz*, 40 M.J. 335 (C.M.A. 1994) (the CMA disapproved findings on two specs omitted from PTR). *See also United States v. Sanchez*, 54 M.J. 874 (A. Ct. Crim. App. 2001) (error in PTR alleging a finding of guilty to larceny as opposed to wrongful appropriation, however, no prejudice – finding of guilty to larceny set aside and replaced with a finding of guilty to wrongful appropriation and sentence affirmed after reassessment). *United States v. Lindsey*, 56 M.J. 850 (A. Ct. Crim. App. 2002). Finding of not guilty to specification reported in PTR as guilty. DC failed to comment on the error. Applying a waiver and plain error analysis, court held plain error; therefore, waiver did not apply. Unsure on the issue of prejudice, the court reduced the sentence by two months. "We are unsure of the impact of the error on appellant's request for clemency. To moot any possible claim of prejudice . . . and for the sake of judicial economy, we will take appropriate remedial action." *Id*. at 851. *But see United States v. Ross*, 44 M.J. 534, 536 (A.F. Ct. Crim. App. 1996) (improper dates for offense in PTR – July vs. Sept. – not fatal when CA action reflected original, correct date of charge sheet; "we are reluctant to elevate 'typos' in dates to 'plain error'" *especially* when waived).

b) Some errors indulged, especially when defense does not notice or point them out. *See, e.g., United States v. Royster*, No. 9400201 (A. Ct. Crim. App. 1995) (unpublished); *United States v. Bernier*, 42 M.J. 521 (C.G. Ct. Crim. App. 1995); *United States v. Zaptin*, 41 M.J. 877 (N-M. Ct. Crim. App. 1995). *United States v. Gunkle*, 55 M.J. 26 (C.A.A.F. 2001). The PTR failed to reflect that the judge granted motions for a finding of not guilty and/or modification of charges. Defense failed to mention these errors in their RCM 1105/6 submissions, but did mention the judge's favorable rulings. The court found no error.

c) Maximum punishment. Not a required element; if done, ensure accuracy. *See United States v. Hammond*, 60 M.J. 512 (A. Ct. Crim. App. 2004) (reducing confinement by thirty days when the PTR misstated the maximum punishment (life w/o possibility for parole when maximum was only six years)).

2. Any clemency recommendations by the MJ or panel. RCM 1106(d)(3) [2008 change].

a) *United States v. Paz-Medina*, 56 M.J. 501 (A. Ct. Crim. App. 2001). Plain error for the SJA to *omit* member's clemency recommendation regarding waiver of forfeitures from the PTR. CA action set aside; returned for new PTR and action. Court also commented on the slow post-trial processing stating, "[b]ecause we are already returning the case for a new SJAR and action, the new SJA and convening authority will also be provided a discretionary opportunity to fashion an appropriate remedy for the untimely processing." *Id*. at 505.

b) *United States v. Williams*, 57 M.J. 1 (C.A.A.F. 2002). Error found where government failed to serve DC with PTR prior to action when PTR omitted clemency recommendation from sentencing authority.

3. Summary of accused's service record. Required by the old, pre-23 August 2008, R.C.M. 1106(d)(3)(C), <u>but not</u> the new R.C.M. 1106. Under the new R.C.M. 1106(d)(1), the SJA "*<u>shall</u>* use the record of trial in preparation of the recommendation, and *<u>may</u>* also use the personnel records of the accused or other matters in advising the [CA] whether clemency is warranted." (emphasis added).

a) *United States v. DeMerse*, 37 M.J. 488 (C.M.A. 1993). Failure to note Vietnam awards and decorations was plain error, requiring that action be set aside.

b) *United States v. Czekala*, 38 M.J. 566 (A.C.M.R. 1993). Error in omitting JSCM waived by failure to comment.

c) *United States v. McKinnon*, 38 M.J. 667 (A.C.M.R. 1993). Failure to comment on omission of several awards and decorations equals waiver.

d) *United States v. Thomas*, 39 M.J. 1078 (C.G.C.M.R. 1994). SJA not required to go beyond ROT and accused's service record in listing medals and awards in PTR.

e) *United States v. Perkins*, 40 M.J. 575 (N.M.C.M.R. 1994). SJA may rely on accused's official record in preparing PTR. No need to conduct inquiry into accuracy of record, particularly where accused does not question.

f) *United States v. Brewick*, 47 M.J. 730 (N-M. Ct. Crim. App. 1997). SJA PTR failed to list SW Asia service awards. Held – waived by DC, and no plain error. Distinguishes *DeMerse*, because those were combat awards, and old, which set DeMerse apart from other soldiers (so few remaining on active duty).

g) *United States v. Osuna*, 56 M.J. 620 (C.G. Ct. Crim. App. 2001). SJA PTR summarized accused's service record by reference to enclosures. For example, accused's awards are at enclosure 2, performance summary at enclosure 3, and nonjudicial punishment at enclosure 4. Held: summary was sufficient. Note: PTR erroneously stated that accused was sentenced, in a judge alone trial, by members. Court found error but not plain error, no prejudice and waiver by failing to timely object to the error. *See also United States v. Kittle*, 56 M.J. 835 (A.F. Ct. Crim. App. 2002) (no error in SJAR by inclusion of complete nonjudicial punishment actions in lieu of summarizing them).

h) *United States v. Mack*, 56 M.J. 786 (A. Ct. Crim. App. 2002). SJAR need not include awards and decorations which are not supported by accused's service record admitted at trial (e.g., ORB) or established by stipulation of the parties. Failure to mention accused's Purple Heart was not error, "plain or otherwise." *Id*. at 790. Additionally, SJA's characterization of accused's service as "satisfactory" was not error. Finally, SJA need not comment on accused's clemency submission absent allegation of legal error. "The appellant suggests that we equate the SJA's decision not to comment on the appellant's extensive clemency matters as tantamount to disagreeing with or disputing matters in the appellant's RCM 1105 submission. We are aware of no authority to support the appellant's position, and we decline to establish such authority." *Id*.

i) *United States v. Wellington*, 58 M.J. 420 (C.A.A.F. 2003). Prejudicial error for the SJAR in an indecent assault, attempted rape, and attempted forcible sodomy to misstate the appellant's prior disciplinary actions. The SJAR indicated the appellant received two prior Field Grade Article 15s when in fact he had never

received NJP. Additionally, the SJAR indicated no pretrial restraint when in fact the appellant was restricted prior to trial. Applying a plain error analysis (RCM 1106(f)(6)) because the defense counsel failed to comment on the erroneous SJAR, the court found that the errors were both "'clear' and 'obvious'." Next the court found prejudice from the error which, despite a service record lacking in any disciplinary action, "portrayed [the appellant] as a mediocre soldier who had twice received punishment from a field grade officer . . . . Appellant's 'best hope for sentence relief' was dashed by the inaccurate portrayal of his service record." Held: the erroneous SJAR amounted to plain error and the court would not speculate on what the CA would do if accurately advised by the SJA; the case was remanded for a new SJAR and action.

4. Nature and duration of any pretrial restraint.

a) "The accused was under no restraint;" or

b) "The accused served 67 days of pretrial confinement, which should be credited against his sentence to 8 years confinement."

5. *United States v. Scalo*, 60 M.J. 435 (C.A.A.F. 2005). SJAR erroneously advised the CA that there had been no pretrial restraint in appellant's case. In fact, the appellant had been restricted to the limits of Fort Stewart, Georgia for forty-four days until his court-martial. The court determined that the SJA's failure to advise the CA regarding appellant's pretrial restraint was not inherently prejudicial and that appellant failed to make a colorable showing of possible prejudice. The appellant failed to make a reference, direct or indirect, in his clemency petition. Further, the length alone of the restraint, was not of an unusual length to attract the convening authority's attention for clemency purposes.

a) *United States v. Weber*, 56 M.J. 736 (C.G. Ct. Crim. App. 2002). Error for SJA to omit from PTR that accused was subject to over three months of pretrial restriction; however, applying *United States v. Wheelus*, 49 M.J. 283 (C.A.A.F. 1998), accused failed to "make some colorable showing of possible prejudice" that would warrant relief.

b) *United States v. Miller*, 56 M.J. 764 (A.F. Ct. Crim. App. 2002). SJAR failed to mention three days of pretrial confinement. Held: attachments to SJAR (e.g., Report of Result of Trial and Personal Data Sheet) both stated three days of PTC; therefore, no error. Even if error, applying *United States v. Wheelus*, 49 M.J. 283 (C.A.A.F. 1998), accused failed to make a "colorable showing of prejudice" that would warrant relief. Finally, court noted that accused waived the issue by failing to raise a timely objection in the absence of plain error.

6. CA's obligation under any pretrial agreement. *See United States v. Green*, 58 M.J. 855 (A. Ct. Crim. App. 2003); *United States v. Sheffield*, 60 M.J. 591 (A.F. Ct. Crim. App. 2004) (failure of the SJAR to notify the CA of his obligations regarding waiving automatic forfeitures was error). The 2008 amendment to RCM 1106(d)(3) requires a "copy or summary of the pretrial agreement."

7. The SJAR. RCM 1106(d)(3). The pre-2008 RCM 1106 only required a "specific recommendation as to the action to be taken by the [CA] on the sentence." Pre-23 August 2008 RCM 1106(D)(3)(F).

8. Nothing else should be included!

9. Legal sufficiency need not be reviewed. Exceptions:

a) If the SJA deems it appropriate to take corrective action on findings or sentence; or

b) If the accused alleges a legal error in the RCM 1105 submission.

c) *United States v. Drayton*, 40 M.J. 447 (C.M.A. 1994). Weighing of evidence supporting findings of guilt limited to evidence introduced at trial.

d) *United States v. Haire*, 40 M.J. 530 (C.G.C.M.R. 1994). Legal issues raised in RCM 1105 submission not discussed in SJA recommendation; addressed for first time in addendum. No proof that addendum was served on DC. Action set aside.

10. Additional appropriate matters may be included in the recommendation even if taken from outside the record. RCM 1106(d)(5). *See United States v. Due*, 21 M.J. 431 (C.M.A. 1986). *See also United States v. Drayton*, 40 M.J. 447 (C.M.A. 1994). Key – service on accused and counsel and opportunity to comment!

D. Two additional tips.

1. Use a certificate of service when providing the defense with the SJAR. *United States v. McClelland*, 25 M.J. 903 (A.C.M.R. 1988). This logic should be extended to service of the accused's copy of the SJAR. *See* RCM 1106(f).

2. List each enclosure (petitions for clemency, etc.) that goes to the CA on the SJAR/addendum and/or have the convening authority initial and date all documents. *United States v. Hallums*, 26 M.J. 838 (A.C.M.R. 1988); *United States v. Craig*, 28 M.J. 321 (C.M.A. 1989).

a) Query: What if the CA forgets to initial one written submission, but initials all the others? Have you just given the DC evidence to argue that the CA "failed to consider" a written defense submission?

b) *United States v. Blanch*, 29 M.J. 672 (A.F.C.M.R. 1989) (government entitled to enhance "paper trail" and establish that accused's RCM 1105 matters were forwarded to and considered by the CA); *United States v. Joseph*, 36 M.J. 846 (A.C.M.R. 1993) (SJA's affidavit established that matters submitted were considered by CA before action).

c) *United States v. Briscoe*, 56 M.J. 903 (A.F. Ct. Crim. App. 2002). Failure of SJA to prepare addendum to PTR advising CA to consider all matters (i.e., written maters) submitted by accused cured through post-trial affidavit from CA and SJA swearing that all clemency matters were considered by CA prior to action.

d) *United States v. Stephens*, 56 M.J. 391 (C.A.A.F. 2002). CA's action stated that he "'specifically considered the results of trial, the record of trial, and the recommendation of the [SJA]'." *Id*. at 392. The CA's action did not list the accused's clemency matters. Held: no error since the evidence revealed the CA considered the addendum which included the accused's clemency materials. "We decline to hold that a document embodying the [CA's] final action is defective simply because it refers to the SJA's recommendation without also referring to the attachments, such as an addendum or clemency materials." *Id*.

e) *United States v. Gaddy*, 54 M.J. 769 (A.F. Ct. Crim. App. 2001). The appellant submitted a single letter from his pastor in his RCM 1105 matters. The SJA did not do an addendum accounting for the letter nor did the PTR advise the CA he had to consider all written submissions made by the appellant. According to the court, it can assume the CA considered all defense submissions when the SJA prepares an addendum which includes mention of the defense submissions,

advises the CA that he must consider the matters submitted, and the addendum actually lists the matters submitted. If no addendum is prepared, the record must reflect that the CA was advised of his obligation to consider all written submissions from defense and there must be some evidence that the defense matters were actually considered. The AFCCA found prejudice and reduced the appellant's sentence by two months.

f) *United States v. Baker*, 54 M.J. 774 (A.F. Ct. Crim. App. 2001). There was no evidence in the record that the CA had considered the defense RCM 1105 matters. SJA did not do an addendum to his PTR despite lengthy letter from accused requesting clemency. Affidavits obtained to establish that the CA considered the appellant's letter. Although the court found no prejudicial error, they decry the waste of appellate assets caused by the SJA failing to follow standard Air Force post-trial process. The court stated that they will be sending information to their TJAG about SJAs who commit egregious post-trial errors.

E. Errors in the recommendation.

1. Corrected on appeal without return to CA for action.

2. Returned for new recommendation and new action. *See United States v. Craig*, 28 M.J. 321 (C.M.A. 1989). "Since it is very difficult to determine how a convening authority would have exercised his broad discretion if the staff judge advocate had complied with RCM 1106, a remand will usually be in order." *Id*. at 325 (quoting *United States v. Hill*, 27 M.J. 293, 296 (C.M.A. 1988)). *See also United States v. Reed*, 33 M.J. 98 (C.M.A. 1991); *United States v. Hamilton*, 47 M.J. 32 (C.A.A.F. 1997). "This court has often observed that the convening authority is an accused's last best hope for clemency [citation omitted]. Clemency is the heart of the convening authority's responsibility at that stage of a case. If an SJA gives faulty advice in this regard, the impact is particularly serious because no subsequent authority can adequately fix that mistake." *Id*. at 35. *See also United States v. Ord*, 63 M.J. 279 (C.A.A.F. 2006). When the CA did not act expressly on the findings and the SJAR omitted a finding of guilty adjudged by the court-martial, the ACCA could not presume that the CA approved the omitted findings, but could return the record for a new SJAR and action.

a) *United States v. Pate*, 54 M.J. 501 (A. Ct. Crim. App. 2000). Accused was convicted at trial of several charges which were the basis of a prior Article 15. The SJA advised the CA of the Article 15 in his PTR and erroneously stated the Article 15 was set aside. Defense noted the error in the RCM 1105/6 submissions and the SJA agreed with the defense in an addendum, which advised the CA he could not consider the Article 15 for any purpose other than granting *Pierce* credit to the appellant. Defense claimed that under *Pierce*, an Article 15 of this nature cannot be used for any purpose, administrative or otherwise, and thus it was error for the SJA to mention it in the PTR. The court disagreed, stating that *Pierce* does not require withholding this information from the CA. The court went on to state that even if it did, the defense had failed to make a colorable showing of possible prejudice.

b) *United States v. Williams*, 54 M.J. 626 (A.F. Ct. Crim. App. 2000). SJA signed the PTR three days before the military judge authenticated the ROT. Defense claimed PTR was invalid because it was based on an unauthenticated record of trial (ROT) thus invalidating the CA's action. The court disagreed – ROT had only received minor, non-substantive errata from the military judge and defense failed to raise any objection in the RCM 1105/6 submissions. Court found no prejudice to the accused and noted that the issue was waived. *See also*

United States v. Smith, 54 M.J. 783 (A.F. Ct. Crim. App. 2001) (cautioning that when PTR dated nine days before authentication of the ROT, "this sort of inattention to detail far too often creates unnecessary issues on appeal."). *Id*. at 788.

c) *United States v. Farence*, 57 M.J. 674 (C.G. Ct. Crim. App. 2002). Despite erroneous SJAR that advised the CA that the appellant was convicted of two offenses dismissed for sentencing purposes by the MJ, no corrective action was required when the appellant failed to make "some colorable showing of possible prejudice."

3. Waived absent plain error. RCM 1106(f)(6) provides that "[f]ailure of counsel for the accused to comment on any matter in the recommendation or matters attached to the recommendation in a timely manner shall waive later claim of error with regard to such matter in the absence of plain error."

a) In cases where neither the appellant nor his counsel raises any error in the SJAR either as an RCM 1106(f)(4) matter or on appeal, the reviewing court will apply a *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998), plain error analysis: (1) was there an error; (2) was the error plain and obvious; and, (3) did the error materially prejudice a substantial right. *United States v. Scalo*, 59 M.J. 646 (A. Ct. Crim. App. 2003) (en banc), *aff'd*, 60 M.J. 435 (C.A.A.F. 2005). The reviewing court will not apply the lesser *Wheelus* standard of "some colorable showing of possible prejudice" to establish plain error in cases where the issues is not raised by the appellant either at or before action or on appeal. *Id*. at 650.

b) In cases where neither the appellant nor his counsel raises an allegation of error in the SJAR as an RCM 1106(f)(4) matter, but raises the error on appeal, the reviewing court will apply a *Powell-Wheelus* analysis (appellant need only show a "colorable showing of possible prejudice"). *United States v. Hartfield*, 53 M.J. 719, 720 (A. Ct. Crim. App. 2000).

F. No recommendation is needed for total acquittals or other final terminations without findings. This now includes findings of not guilty only by reason of lack of mental responsibility. *See* RCM 1106(e).

G. Service of SJAR on DC and the accused. RCM 1106(f)(1).

1. Before forwarding the recommendation and the ROT to the CA for action, the SJA or legal officer shall cause a copy of the SJAR to be served on counsel for the accused. A separate copy will be served on the accused.

a) *United States v. Hickok*, 45 M.J. 142 (C.A.A.F. 1996). Failure to serve PTR on counsel is prejudicial error, even though counsel submitted matters before authentication of record and service of PTR. Original counsel PCS'd, new counsel never appointed, and OSJA never tried to serve PTR. The CAAF found accused "was unrepresented in law and in fact" during this stage. Fact that RCM 1105 clemency package was submitted at an early stage (and, all conceded, considered by CA at action) cannot compensate for the separate post-trial right to *respond* to the PTR under RCM 1106. *United States v. Williams*, 57 M.J. 1 (C.A.A.F. 2002) (finding error for failing to serve DC with PTR prior to action when PTR omitted clemency recommendation from sentencing authority).

b) *United States v. Siler*, 60 M.J. 772 (N-M. Ct. Crim. App. 2004). When the SJA served the PTR on appellant, the substitute DC put the SJA on notice that the DC did not have an attorney-client relationship with the appellant. The CA took action without any comment by appellant or his substitute DC. Once on notice of

a potential problem concerning post-trial representation, the government has the responsibility to ensure adequate representation.

c) *United States v. Cornelious*, 41 M.J. 397 (C.A.A.F. 1995). The SJA should have realized that service of the PTR was inadequate because it was not served "on counsel for the accused" as required by RCM 1106(f)(1). In this case the court held that service was tantamount to no service at all and ordered a new PTR and CA action. The court took pains to explain that because the SJA affirmatively inquired into the existence of the attorney-client relationship, he could not ignore the results of his inquiry.

d) *United States v. Klein*, 55 M.J. 752 (N-M. Ct. Crim. App. 2001). Failure to serve PTR on DC until five days after CA's action constituted error, but accused failed to make "some colorable showing of possible prejudice." However, relief was granted on another basis.

e) *United States v. Williams*, 57 M.J. 1 (C.A.A.F. 2002). Action set aside because PTR which omitted required clemency recommendation from the MJ at sentencing served on DC day after action in the case.

f) *United States v. Smith*, 59 M.J. 604 (N-M. Ct. Crim. App. 2003). Failure to produce evidence of service of the SJAR on the appellant prior to action does not preclude approval of a punitive discharge despite language to the contrary in RCM 1107(d)(4) and 1103(c)(1). The court, after noting that RCM 1107(d)(4) was "inartfully drafted," applied a "'whole statute' principle of statutory interpretation . . . considering the drafter's intent . . . and [considering] case law," rejected a literal reading of RCM 1107(d)(4) and 1103(c)(1) that would require disapproval of a punitive discharge. Finally, the court noted that the appellant failed to make a colorable showing of possible prejudice from the alleged error.

2. Although normally submitted simultaneously, RCM 1105 and RCM 1106 submissions serve different purposes. RCM 1105 submissions are the accused's submissions where RCM 1106 focuses on submission by the accused's counsel.

3. RCM 1106(f)(1). "If it is impracticable to serve the recommendation on the accused for reasons including but not limited to the transfer of the accused to a distant place, the unauthorized absence of the accused, or military exigency, or if the accused so requests on the record at court or in writing, the accused's copy shall be forwarded to the accused's defense counsel. A statement shall be attached to the record explaining why the accused was not served personally."

a) *United States v. Ayala*, 38 M.J. 633 (A.C.M.R. 1993). Substitute service of ROT and PTR on DC authorized where accused is confined some distance away.

b) *United States v. Smith*, 37 M.J. 583 (N.M.C.M.R. 1993). Mailing of recommendation is not impracticable where all parties are located in CONUS and the accused has provided a current mailing address.

c) *United States v. Lowery*, 37 M.J. 1038 (A.C.M.R. 1993). Real issue in this area is whether accused and defense counsel have had an opportunity to submit post-trial matters.

d) *United States v. Ray*, 37 M.J. 1052 (N.M.C.M.R. 1993). Mere failure to serve does not warrant relief; accused did not offer evidence to rebut presumption that SJA had properly executed duties, did not submit matters that would have been submitted to CA, and did not assert any inaccuracies in the recommendation.

e) *United States v. Ybarra*, 57 M.J. 807 (N-M. Ct. Crim. App. 2002). Failure to serve ROT and SJAR on appellant as specifically requested by appellant does not warrant relief (i.e., no prejudice) when the appellant submitted a waiver of clemency and he failed, under *United States v. Wheelus*, 49 M.J. 283 (C.A.A.F. 1998), to cite to any errors or omissions in the SJAR that he would have brought to the CA's attention had he been given the opportunity to do so.

4. RCM 1106(f)(2). The accused may designate at trial which counsel shall be served with the SJAR or may designate such counsel in writing to the SJA before the SJAR is served. Absent such a designation, the priority for service is: civilian counsel, individual military counsel, and then detailed counsel. *But see United States v. Johnson*, 26 M.J. 509 (A.C.M.R. 1988) (holding that service on detailed defense counsel, even when accused was represented by civilian counsel, was sufficient. Accused "must have acquiesced" in the response filed by detailed defense counsel because his letter to the CA was included in the detailed defense counsel's response to the SJAR).

5. RCM 1106(f)(2). If no civilian counsel exists and all military counsel have been relieved or are not reasonably available, substitute counsel shall be detailed by an appropriate authority. AR 27-10, para. 6-9, says the Chief, USATDS, or his delegee will detail defense counsel.

a) Substitution of counsel problems. RCM 1106(f)(2).

(1) *United States v. Iverson*, 5 M.J. 440 (C.M.A. 1978). Substituted counsel must form attorney-client relationship with the accused; absent extraordinary circumstances, only the accused may terminate an existing relationship. *See also United States v. Miller*, 45 M.J. 149 (C.A.A.F. 1996). Substitute defense counsel's failure to formally establish attorney-client relationship with accused found harmless, despite substitute counsel's failure to consult accused or submit clemency package. Detailed counsel (who later ETS'd) had submitted clemency materials before service of PTR, and government was not on any reasonable notice that substitute counsel and accused failed to enter attorney-client relationship. In such circumstances, the test is for prejudice.

(2) *United States v. Howard*, 47 M.J. 104 (C.A.A.F. 1997). Rejecting an invitation to overrule *Miller*, the CAAF restated that failure of the substitute DC to contact the client post-trial will be tested for prejudice. "Prejudice" does not require the accused to show that such contact and the resulting submission would have resulted in clemency; it only requires a showing that the accused would have been able to submit something to counter the SJA's PTR.

(3) *United States v. Antonio*, 20 M.J. 828 (A.C.M.R. 1985). Accused may waive the right to his former counsel by his acceptance of substitute counsel and his assent to representation.

(4) *United States v. Hood*, 47 M.J. 95 (C.A.A.F. 1997). Even if the substitute counsel does form the required attorney-client relationship, failure to discuss the accused's clemency packet with him prior to submission is deficient performance under the first prong of the *Strickland* analysis.

(5) *United States v. Johnston*, 51 M.J. 227 (C.A.A.F. 1999). The convening authority must ensure that the accused is represented during post-trial. Submission of RCM 1105 and 1106 matters is considered to be a critical point in the criminal proceedings against an accused.

b) If the accused alleges ineffective assistance of counsel (IAC) after trial, that counsel cannot be the one who is served with the SJAR.

(1) *United States v. Cornelious*, 41 M.J. 397 (C.A.A.F. 1995). Government on notice of likely IAC. Court remanded to determine whether accused substantially prejudiced.

(2) *United States v. Carter*, 40 M.J. 102 (C.M.A. 1994). No conflict exists where DC is unaware of allegations.

(3) *United States v. Alomarestrada*, 39 M.J. 1068 (A.C.M.R. 1994). Dissatisfaction with outcome of trial does not always equal attack on competence of counsel requiring appointment of substitute counsel.

(4) *United States v. Sombolay*, 37 M.J. 647 (A.C.M.R. 1993). Substitute counsel not required where allegations of ineffective assistance are made after submission of response to PTR.

6. RCM 1106(f)(3). Upon request, a copy of the ROT shall be provided for use by DC. DC should include this boilerplate language in the Post-Trial and Appellate Rights Forms.

H. Defense Counsel Submissions. RCM 1106(f)(4). "Counsel for the accused may submit, in writing, corrections or rebuttal to any matter in the recommendation believed to be erroneous, inadequate, or misleading, and may comment on any other matter."

1. *United States v. Goode*, 1 M.J. 3 (C.M.A. 1975). Service of PTR on the DC is required before the CA can take action. DC's failure to object to errors in PTR response normally waives such errors. *See also United States v. Narine*, 14 M.J. 55 (C.M.A. 1982).

2. Response due within 10 days of service of SJAR on both DC and accused and service of authenticated ROT on accused, whichever is later.

3. SJA may approve delay for RCM 1105 (not RCM 1106) matters for up to 20 days; only CA may disapprove. Note the distinction between the timelines and approval and/or disapproval authority when dealing with RCM 1105 vs. RCM 1106 matters. *See* RCM 1105(c)(1) and RCM 1106(f)(3). Key: serve accused and counsel the authenticated ROT and SJAR at the same time.

I. Staff Judge Advocate's Addendum. RCM 1106(f)(7). "The staff judge advocate or legal officer may supplement the recommendation after the accused and counsel for the accused have been served with the recommendation and given an opportunity to respond."

1. Must address allegations of legal error. Rationale not required; "I have considered the defense allegation of legal error regarding _____. I disagree that this was legal error. In my opinion, no corrective action is necessary." *See also United States v. McKinley*, 48 M.J. 280, 281 (C.A.A.F. 1998) (Judge Cox's interpretation of RCM 1106(d)(4) and how to respond to an allegation of legal error).

a) *See United States v. Keck*, 22 M.J. 755 (N.M.C.M.R. 1986). *See also United States v. Broussard*, 35 M.J. 665 (A.C.M.R. 1992) (addendum stating "I have carefully considered the enclosed matters and, in my opinion, corrective action with respect to the findings and sentence is not warranted" was an adequate statement of disagreement with the assertions of accused). Need not give rationale or analysis – mere disagreement and comment on the need for corrective action sufficient.

b) *United States v. Welker*, 44 M.J. 85 (C.A.A.F. 1996). Although error for SJA not to respond to defense assertions of legal errors made in post-trial submissions, the CAAF looked to record and determined there was no merit to the allegation of

error raised by the defense in the RCM 1105/6 submissions. Consequently, the court held that there was no prejudice to the accused by the SJA's failure to comment on the allegation of error raised by the defense. The court also reaffirmed the principle that a statement of agreement or disagreement, without statement of rationale, is OK. Court will test for prejudice. When (as here) the court finds no trial error, it will find no prejudice. *See also United States v. Jones*, 44 M.J. 242 (C.A.A.F. 1996) (comments on preparation of ROT were "trivial"); *United States v. Hutchison*, 56 M.J. 756 (A. Ct. Crim. App. 2002).

c) *United States v. Sojfer*, 44 M.J. 603 (N-M. Ct. Crim. App. 1996). Seven page addendum recited alleged errors and said, "'*My recommendation remains unchanged: I recommend that you take action to approve the sentence as adjudged*' . . . He [SJA] made no other comment regarding the merit of the assigned errors." *Id*. at 611. Government argued that "only inference . . . is that the [SJA] disagreed with all of the errors that were raised. We agree." *Id*.

d) *United States v. Zimmer*, 56 M.J. 869 (A. Ct. Crim. App. 2002). It was error for SJA not to respond to allegation of error regarding improper deferment denial.

2. Ambiguous, unclear defense submission. If the submission arguably alleges a legal error in the trial, the SJA must respond under RCM 1106 and state whether corrective action is needed.

a) *United States v. Williams-Oatman*, 38 M.J. 602 (A.C.M.R. 1993). "Consideration of inadmissible evidence" is sufficient allegation of legal error.

b) *United States v. Hutchison*, 56 M.J. 756 (A. Ct. Crim. App. 2002). Unsupported claim of onerous and illegal pretrial punishment which was not raised at trial after specific Article 13 inquiry by MJ and raised for the first time in clemency submission does NOT allege legal error requiring comment by the SJA. Likewise, alleged undue, non-prejudicial post-trial delay does not raise an allegation of legal error requiring comment by the SJA.

3. RCM 1106(f)(7). Addenda containing "new matter" must be served on the defense.

a) *United States v. Leal*, 44 M.J. 235 (C.A.A.F. 1996). If the additional information is not part of the record, *i.e.*, transcript, consider it to be new matter. Not enough that the information is contained "between the blue covers," because that would permit government to highlight and smuggle to CA evidence offered but not admitted. Here, the addendum referred to a letter of reprimand; the failure to serve the addendum required a new PTR and action by a new CA. *But see United States v. Brown*, 54 M.J. 289 (C.A.A.F. 2000). New action not required where defense, on appeal, fails to proffer a possible response to the un-served addendum that "could have produced a different result." *Id*. at 293.

b) *United States v. Cook*, 43 M.J. 829 (A.F. Ct. Crim. App. 1996), *aff'd*, 46 M.J. 37 (C.A.A.F. 1997). In two post-trial memos, the SJA advised the CA about the MJ's qualifications and experience, the likelihood of the accused waiving an administrative separation board, and minimizing effects of BCD. The AFCCA disapproved the BCD because all of this was obviously outside the record and should have been served on accused with opportunity to comment.

c) *United States v. Harris*, 43 M.J. 652 (A. Ct. Crim. App. 1995). Addendum mentioned for the first time that the accused had received three prior Article 15s; new review and action required.

d) *United States v. Sliney*, No. 9400011 (A. Ct. Crim. App. 1995) (unpublished). The inclusion of letters from victim and victim-witness liaison required re-service;

new action required. *Accord United States v. Haire*, 40 M.J. 530 (C.G.C.M.R. 1994).

e) *United States v. McCrimmons*, 39 M.J. 867 (N.M.C.M.R. 1994). Reference in addendum to three thefts that formed basis for court-martial ("demonstrated by his past behavior that he is not trustworthy"), not "new matter."

f) *United States v. Heirs*, 29 M.J. 68 (C.M.A. 1989). The SJA erred by erroneously advising the CA in the addendum that Heirs' admissions during the rejected providence inquiry could be used to support the findings of guilty once the accused challenged the sufficiency of the evidence post-trial.

g) *United States v. Jones*, 44 M.J. 242 (C.A.A.F. 1996). Addendum explained post-trial delays and an Air Force Regulation on the Return to Duty Program (RDP). The CAAF held this information to be new matter under R.C.M. 1106(f)(7). However, error was harmless since many of the reasons for the delay were in the Record of Trial, and the contents of the regulation were clearly known to the defense since the defense asked for entry into the RDP.

h) *United States v. Catalani*, 46 M.J. 325 (C.A.A.F. 1997). The addendum stated, "All of the matters submitted for your consideration in extenuation and mitigation were offered by the defense at trial; and the seniormost military judge in the Pacific imposed a sentence that, in my opinion, was both fair and proportionate to the offense committed." This was held to be new matter under R.C.M. 1106(f)(7). The case was returned for submission to a different convening authority for action.

i) *United States v. Trosper*, 47 M.J. 728 (N-M. Ct. Crim. App. 1997). The Division Sergeant Major attached a memorandum to the addendum that stated that "taking responsibility means he accepts the punishment awarded. . . . He has earned his brig time and his BCD." The court found this to be unremarkable because commanders "seek the counsel of his or her trusted advisors in such a weighty matter." Even if this was new matter, the appellant did not state how he would respond to the memorandum, so there was no prejudice.

j) *United States v. Cornwell*, 49 M.J. 491 (C.A.A.F. 1998). CG asked the SJA whether the command supports the accused's request for clemency. The SJA called the accused's commanders, then verbally relayed their recommendations against clemency for the accused to the CG. The SJA then signed an MFR to that effect, and attached it to the ROT. The CAAF held the SJA's advice to the CG is not new matter in the addendum under R.C.M 1106(f)(7), but may be new matter under RCM 1107(b)(3)(B)(iii) of which the accused's is not charged with the knowledge thereof. However, even if such, the CAAF says the defense did not indicate what they would have done in response, so no relief.

k) *United States v. Anderson*, 53 M.J. 374 (C.A.A.F. 2000). A paper-clipped, small (3 x 3 ½), hand-written note attached to the last page of the SJAR from the chief of staff to the convening authority that stated, "Lucky he didn't kill the SSgt. He's a thug, Sir." was new matter requiring service on the accused and an opportunity to respond.

l) *United States v. Gilbreath*, 57 M.J. 57 (C.A.A.F. 2002). Error for SJA, after a Judge Alone trial, not to serve addendum on defense which stated in part, "After hearing all matters, the jury determined a bad conduct discharge was appropriate and as such, I recommend you approve the sentence as adjudged." *Id*. at 59. Defense could have pointed out that: (1) the trial was judge alone, and (2) the sentencing authority did NOT consider the clemency submissions. Note – the

court also questioned whether the statement by the SJA was improper. "She [DC] also could have made a persuasive argument that the SJA's recommendation that the CA defer to the judgment of the members was also legally improper." *Id*. at 62.

m) *United States v. Gilbreath*, 58 M.J. 661 (A.F. Ct. Crim. App. 2003), *aff'd*, 59 M.J. 400 (C.A.A.F. 2004) (summary disposition). After remand from the case above, the insertion in the SJA's addendum of a statement of inability to locate appellant to serve her with post-trial documents constituted "new matter" requiring service on the appellant's defense counsel and an opportunity to respond. The government could have avoided this issue by complying with the substitute service provisions of RCM 1106(f)(1), which simply require a statement in the record of trial explaining "why the accused was not served personally." Applying the standard for relief enunciated in *United States v. Chatman*, 46 M.J. 321 (C.A.A.F. 1997) (appellant must "demonstrate prejudice by stating what, if anything, would have been submitted to 'deny, counter, or explain' the new matter."), the AFCCA noted that the inability to locate appellant could be perceived by the CA as evidence of appellant's disobedience of orders because she failed to provide a valid leave address while on appellate leave. Additionally, the CA could view the comment as an indication of how little she cared about her case because she failed to provide a proper mailing address for issues associated with her case. In light of the potential adverse impact of the SJA's comments, the AFCCA found prejudice and determined that its charter to "do justice" mandated a new SJAR and action in the case. *Id*. at 665.

n) *United States v. Scott*, 66 M.J. 1 (C.A.A.F. 2008). SJA's lengthy rebuttal to defense assertions that the accused's sentence was overly harsh was not a new matter. Unlike *Catalani* and *Gilbreath*, the SJA's comments did not misinform the CA as to the matters contained in the accused's clemency submissions or misstate the sentencing authority in the accused's case.

o) *United States v. Frederickson*, 63 M.J. 55 (C.A.A.F. 2006). The DSJA prepared the addendum, which was endorsed by the SJA. It was not served on the defense, despite all of the DSJA's observations about the defense submissions. The CAAF held that the addendum constituted new matter, and should have been served on the defense. However, in this case, they held that the defense counsel could not demonstrate prejudice since the proferred defense response was the same.

p) *United States v. Tuscan*, 67 M.J. 592 (C.G. Ct. Crim. App. 2008). Addendum contained the following: "I also disagree with the defense counsel's statement that the accused is 'remorseful for the events that transpired.' . . . As you may recall, the pretrial offers, taken as a whole were unreasonable and on their face did not reflect a willingness on the part of the accused to fully accept responsibility." The CGCCA finds that this comment, while not a complete picture of the pretrial negotiations, was not error. The CGCCA warns against doing this in the future, since the SJAR Addendum is not intended to be a "document of advocacy for the government. An SJA should not only be objective, as noted above, but also should maintain the appearance of objectivity."

4. Addendum should remind CA of the requirement to review the accused's post-trial submissions. *United States v. Pelletier*, 31 M.J. 501 (A.F.C.M.R. 1990); *United States v. Ericson*, 37 M.J. 1011 (A.C.M.R. 1993).

a) *United States v. Foy*, 30 M.J. 664 (A.F.C.M.R. 1990). Appellate courts will presume post-trial regularity if the SJA prepares an addendum that:

(1) Informs the CA that the accused submitted matters and that they are attached;

(2) Informs the CA that he *must consider* the accused's submissions; and,

(3) Lists the attachments.

b) *United States v. Taylor*, 67 M.J. 578 (A.F. Ct. Crim. App. 2008). In her clemency submissions to the convening authority, the appellant asked to enter the Return-To-Duty Program (RTDP). The addendum made no mention of this request, nor did it advise the convening authority of his options regarding the RTDP. The addendum did specifically list the appellant's submissions and advised the convening authority that he had to consider them prior to taking action. No error.

5. Who should sign the addendum? The SJA.

a) *United States v. Hudgins*, 69 M.J. 630 (A. Ct. Crim. App. 2010). If the Deputy Staff Judge Advocate signs the addendum, then he or she should sign it as the Acting SJA. Signing it as the Deputy Staff Judge Advocate or "for" the SJA is improper under Article 60(d), UCMJ, and RCM 1106(a). No prejudice in this case because "the Deputy Staff Judge Advocate was an officer and experienced judge advocate who was statutorily qualified to sign the addendum as the Acting SJA in the SJA's absence."

J. What if the accused submitted matters but there is no addendum?

1. *United States v. Godreau*, 31 M.J. 809 (A.F.C.M.R. 1990). Two conditions for a presumption of post-trial regularity:

a) There must be a statement in the SJAR informing the CA that he must consider the accused's submissions.

b) There must be some means of determining that the CA in fact considered all post-trial materials submitted by the accused. Ideal: (1) list all attachments; (2) have the CA initials and dates all submissions in a "clearly indicated location."

2. If *United States v. Foy*, 30 M.J. 664 (A.F.C.M.R. 1990), requirements are not met, or if no addendum and the two *Godreau* conditions are not met, the government must submit an affidavit from the CA. *See United States v. Joseph*, 36 M.J. 846 (A.C.M.R. 1993).

3. "The best way to avoid a *Craig* [28 M.J. 321 (C.M.A. 1989)] problem is to prepare an addendum using the guidance in *Foy* and *Pelletier* to ensure compliance with *Craig* and UCMJ, Article 60(c). If this method is used, there will be no need to have the convening authority initial submissions or prepare an affidavit." *Godreau*, 31 M.J. at 812.

4. *United States v. Buller*, 46 M.J. 467 (C.A.A.F. 1997). "[L]itigation can be avoided through the relatively simple process of serving the addendum on the accused in all cases, regardless whether it contains 'new matter'." *Id*. at 469 n.4.

5. *United States v. Briscoe*, 56 M.J. 903 (A.F. Ct. Crim. App. 2002). Failure of SJA to prepare addendum to PTR advising CA to consider all matters (i.e., written matters) submitted by accused cured through post-trial affidavit from CA and SJA swearing that all clemency matters were considered by CA prior to action.

K. Common SJAR and addendum errors:

1. Inaccurately reflect charges and specifications (especially dismissals, consolidations).

2. Inaccurately reflect the maximum punishment.

3. Omit, misapply pretrial confinement (*Allen*, RCM 305(k) credit).

4. Omit, misapply Article 15 (*Pierce*) credit.

5. Recommend approval of greater than 2/3 forfeitures for periods of no confinement.

6. Recommend approval (in special courts-martial) forfeitures and fines (cumulatively) in excess of the court-martial's jurisdictional limit.

7. Add extraneous (and often erroneous) information.

XII. ACTION BY CONVENING AUTHORITY. ARTICLE 60, UCMJ; RCM 1107.

A. Who may act: the CA. *See United States v. Delp*, 31 M.J. 645 (A.F.C.M.R. 1990) (the person who convened the court).

1. *United States v. Solnick*, 39 M.J. 930 (N.M.C.M.R. 1994). Rule requiring CA to take action unless impractical requires that there be practical reason for transferring case from control of officer who convened court to superior after trial, and precludes superior from plucking case out of hand of CA for improper reason.

2. *United States v. Rivera-Cintron*, 29 M.J. 757 (A.C.M.R. 1989). Acting Commander not disqualified from taking action in case even though he had been initially detailed to sit on accused's panel.

3. *United States v. Cortes*, 29 M.J. 946 (A.C.M.R. 1990). After considering the Assistant Division Commander's affidavit, the court determined that the acting CA, who approved accused's sentence as adjudged, was not affected by the editorial written by the CA about the "slime that lives among us."

4. *United States v. Vith*, 34 M.J. 277 (C.M.A. 1992). Commander did not lose impartiality by being exposed to three pages of accused's immunized testimony in companion case; commander had no personal interest in the case and there was no appearance of vindictiveness.

5. *United States v. Mack*, 56 M.J. 786 (A. Ct. Crim. App. 2002). Installation Chaplain and staff officer to the CA stole over $73,000 from the Consolidated Chaplains' Fund (CCF). Although CA had a personal and professional relationship with accused, he was not disqualified from acting as CA absent evidence that he had a "personal interest in the outcome of the [accused's] case." *Id*. at 794. The ACCA found that the CA was not an "accuser" as alleged by the accused and there was no error, plain or otherwise, by the CA taking action. Additionally, the ACCA found accused waived the issue of CA as accuser absent plain (clear and obvious) error.

6. *United States v. Walker*, 56 M.J. 617 (A.F. Ct. Crim. App. 2001). CA's comments during visit to confinement facility established an "arbitrary and inflexible refusal to consider clemency," thus disqualifying him from acting in accused's case. According to accused, CA, during a confinement visit, stated the following: "I have no sympathy for you guys, you made your own decisions and you put yourself in this situation. I'm not sympathetic, and I show no mercy for you. I hope you guys learn from this, but half of you will go on and try to cheat civilian laws and end up in a worst [sic] place than this." *Id*. at 618. Allegation by appellant went uncontested by the CA. Relief – action of CA set aside and returned to another SJA and CA for a new PTR and action. Court noted that its opinion did not mean that the CA in question was forever disqualified from taking action in other cases. *See also United States v. Jeter*, 35 M.J. 442 (C.M.A. 1992); *United States v. Voorhees*, 50 M.J. 494 (C.A.A.F. 1999).

7. *United States v. Barry*, 57 M.J. 799 (A. Ct. Crim. App. 2002). Absent a proper transfer of authority from one GCMCA to another, a transfer based on impracticability, a commander who did not convene the court lacks authority to act on the case. The appellant, assigned to the 10th Mountain Division (Light Infantry) at all times relevant, was convicted at a GCM convened by the Commander, 10th Mountain Division (Light Infantry); however, action in his case was taken by the Commander, 10th Mountain Division (Light Infantry) (Rear), who signed as Commander, 10th Mountain Division (Light Infantry). Because of the action by an improper convening authority, as well as concerns whether the SJA in the case was disqualified from providing legal advice, the case was returned for a new SJAR and action. *See also United States v. Newlove*, 59 M.J. 540 (A. Ct. Crim. App. 2003).

8. *United States v. Gudmundson*, 57 M.J. 493 (C.A.A.F. 2002). CA who testified on a controverted matter in a case was NOT *per se* disqualified from acting on the case. BG Fletcher, the CA, authorized "Operation Nighthawk," the "inspection" that resulted in appellant's positive urinalysis result, and testified on the motion to suppress. Testimony by a CA indicating a "personal connection with the case" may result in disqualification whereas testimony of "an official or disinterested *nature* only" is not disqualifying. Where an appellant is aware of potential grounds for disqualification and fails to raise them, the issue is waived on appeal. *Id* at 495. In the case at bar, the appellant's clemency submissions, while reminding the CA of the fact that he previously testified in the appellant's court-martial, did not ask the CA to disqualify himself.

9. *United States v. Davis*, 58 M.J. 100 (C.A.A.F. 2003). CA disqualification falls into two categories: (1) involves cases where the CA is an accuser, has a personal interest in the outcome of the case, or has a personal bias toward the accused; and (2) involves instances where the CA exhibits or displays an inelastic attitude toward the performance of his or her post-trial duties or responsibilities. Comments by the CA in the appellant's drug case that "people caught using illegal drugs would be prosecuted to the fullest extent, and if they were convicted, they should not come crying to him about their situations or their families['], or words to that effect" fall into category 2. Although CAs "need not appear indifferent to crime," they must maintain a "flexible mind" and a "balanced approach" when dealing with it. *Id*. at 103. The CA's comments reflected an inelastic or "inflexible" attitude toward his post-trial duties when dealing with drug cases and as such, he was disqualified from acting on the appellant's case. The decision of the lower court was reversed, the action set aside and the case remanded for a new review and action by a different CA. *United States v. Taylor*, 60 M.J. 190 (C.A.A.F. 2004) involved an allegation in category 1. The DC requested the CA's disqualification because an article authored by a TC and imputed to SJA amounted to a prejudgment as to clemency. The CA signed an affidavit stating that he was not aware of the article until the DC pointed it out and that he had no role in the article's preparation or publication. He also stated that the article did not influence his decision to not grant clemency. The CAAF held that the record established that the article could not be imputed to the CA, so disqualification was not appropriate.

10. *United States v. Brown*, 57 M.J. 623 (N-M. Ct. Crim. App. 2002). Error for one SPCMCA to act on a case convened by another SPCMCA. Held – although Article 60, UCMJ, and RCM 1107(a) allow for a different CA than that who convened a case to act on a case, this is the exception rather than the rule, and is allowed in situations where it is impracticable for the convening authority to act. Furthermore, in situations of impracticability, the transfer of the case should be to an officer exercising general court-martial jurisdiction (OEGCMJ), not to another special court-martial convening authority. In the case at bar, there was no showing of impracticability, the record of trial failed to contain any statement of impracticability as required by RCM 1107, and the transfer of the

B. CA not automatically disqualified simply because prior action set aside. *United States v. Ralbovsky*, 32 M.J. 921 (A.F.C.M.R. 1991). Test: Does CA have other than an official interest or was he a member of the court-martial?

C. When to Act?

1. Cannot act before RCM 1105(c) time periods have expired or submissions have been waived.

2. *United States v. Lowe*, 58 M.J. 261 (C.A.A.F. 2003). Prejudicial error for the CA to act on the case prior to service of the SJAR on the appellant's defense counsel as required by RCM 1106(f)(1). The plain language of RCM 1106(f)(1) as well as Article 60, UCMJ establish, as a matter of right, the requirement for service of the SJAR prior to action. The court noted:

> The opportunity to be heard before or after the convening authority considers his action on the case is simply not qualitatively the same as being heard at the time a convening authority takes action, anymore than the right to seek reconsideration of an appellate opinion is qualitatively the same as being heard on the initial appeal. "The essence of post-trial practice is basic fair play – notice and an opportunity to respond." *United States v. Leal*, 44 M.J. 235, 237 (C.A.A.F. 1996).

Id. at 263. The appellant established some "colorable showing of possible prejudice" by showing that he was denied the opportunity to advise the CA of his gunshot wound and his future prognosis. Finally, the court provided some common sense guidance to military practitioners:

> Where there is a failure to comply with RCM 1106(f), a more expeditious course would be to recall and modify the action rather than resort to three years of appellate litigation. The former would appear to be more in keeping with principles of judicial economy and military economy of force.

Id. at 264.

D. General considerations.

1. Not required to review for legal correctness or factual sufficiency. Action is within sole discretion of CA as a command prerogative.

2. RCM 1107(b)(3)(A). *Must consider*:

a) Result of trial;

b) SJA recommendation; and,

c) Accused's written submissions.

d) *United States v. Davis*, 33 M.J. 13 (C.M.A. 1991). How "detailed" must the consideration be? "Congress intended to rely on the good faith of the convening authority in deciding how detailed his 'consideration' must be."

e) *United States v. Dvonch*, 44 M.J. 531 (A.F. Ct. Crim. App. 1996). Failure to consider two letters submitted by DC requires new review and action.

f) *United States v. Osuna*, 56 M.J. 620 (C.G. Ct. Crim. App. 2001). Record of trial returned to CA where there was no evidence that the CA considered clemency letter by DC.

g) *United States v. Mooney*, No. 9500238 (A. Ct. Crim. App. June 10, 1996) (unpublished). Court determined that fax received "in sufficient time to forward it . . . through the Staff Judge Advocate to the convening authority." "[A]ppellant's articulate and well-reasoned RCM 1105 clemency letter *through no fault of his own* was not submitted to the convening authority on time. We do not have sufficient information to determine [whose fault it was] . . . as our function is . . . not to allocate blame. The quality of the clemency letter . . . gives rise to the reasonable possibility that a [CA] would grant clemency based upon it. Thus . . . the appellant has been prejudiced . . ." (emphasis in original). Action set aside and returned to CA for new PTR and action.

Practice Pointer: Even if the government is not at fault, accused may get new SJAR and action. Send back to CA if record not yet forwarded for appeal.

h) *United States v. Roemhildt*, 37 M.J. 608 (A.C.M.R. 1993). CA and SJA not required to affirmatively state they considered recommendation of Family Advocacy Case Management Team (FACMT). *Accord United States v. Corcoran*, 40 M.J. 478 (C.M.A. 1994).

i) *United States v. Ericson*, 37 M.J. 1011 (A.C.M.R. 1993). There must be some tangible proof that CA saw and considered clemency materials before taking action. *United States v. Briscoe*, 56 M.J. 903 (A.F. Ct. Crim. App. 2002) (post-trial affidavits from SJA and CA suffice, although not the preferred method – use an addendum).

3. RCM 1107(b)(3)(B). *May consider*:

a) Record of trial, personnel records of accused, and anything deemed appropriate, but if adverse to accused and from outside the record, then accused must be given an opportunity to rebut. *See United States v. Mann*, 22 M.J. 279 (C.M.A. 1986); *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984).

b) *United States v. Harris*, 56 M.J. 480 (C.A.A.F. 2002). CA properly considered accused's pre-enlistment criminal history, some of which occurred while the accused was a juvenile, history documented in the accused's enlistment waiver document contained within his Service Record Book (SRB), a personnel record of the accused which he had access to and could review during the clemency process. No requirement to provide the accused with prior notice that the CA would consider the document since the SRB was part of the accused's personnel records and not "other matters."

4. CA need not meet with accused – or anyone else. *United States v. Haire*, 44 M.J. 520 (C.G. Ct. Crim. App. 1996). CA not required to give a personal appearance appointment to the accused. Even truer now, as this case relied on *Davis*, in which court had held that CA must consider videotape (no longer good law in light of 1998 statutory change). Requirement to "consider" only pertains to "'inanimate' matter that can be appended to a clemency request. We specifically reject the contention that a petitioner for clemency has a non-discretionary right to personally appear before the convening authority." *Id*. at 526.

5. RCM 1107(b)(4). No action on not guilty findings.

6. RCM 1107(b)(5). No action approving a sentence of an accused that lacks the capacity to understand or cooperate in post-trial proceedings.

E. Action on findings not required but permissible. *See* MCM, Appendix 16. Absent specific action on findings, the CA implicitly approves the findings reported in the SJAR.

1. *United States v. Diaz*, 40 M.J. 335 (C.M.A. 1994). "In the absence of contrary evidence, a convening authority who does not expressly address findings in the action impliedly acts in reliance on the statutorily required recommendation of the SJA, *see* Article 60(d) (1983), and thus effectively purports to approve implicitly the findings as reported to the convening authority by the SJA." *Id*. at 337. *See also United States v. Henderson*, 56 M.J. 911 (A. Ct. Crim. App. 2002) (when faced with ambiguous or erroneous findings not expressly addressed by CA in his action, the court can either return the case to the CA for clarification (i.e., new PTR and action) or affirm only those findings of guilty that are correct and unambiguous in the PTR).

2. *United States v. Lindsey*, 56 M.J. 850 (A. Ct. Crim. App. 2002). SJAR erroneously stated findings and CA implicitly approved the findings as reported by the SJA. SJAR reported a guilty finding to Specification 4 of the Charge when in fact the accused was found not guilty of this offense. The court only affirmed the proper findings and reduced the accused's period of confinement from twelve months to ten months. The court commented on the lack of attention to detail in the post-trial processing:

> This case presents the court with yet another incident in which an SJA has failed to provide complete and accurate information to the convening authority, as required by RCM 1106. The regularity of these post-trial processing errors is alarming and occurs in many jurisdictions. Most SJAR errors are the direct result of sloppiness and a lack of attention to detail exhibited by the SJA, Deputy SJA, and the Chief of Criminal Law. Likewise, diligent trial defense counsel should identify and correct such errors whenever possible. See RCM 1106(f)(4), (f)(6). These errors reflect poorly on our military justice system and on those individuals who implement that system. They should not occur!

Id. at 851. In a footnote in the above-quoted language, the court referred to thirty-five cases out of nineteen jurisdictions, covering a 15-month period, with erroneous SJARs.

3. *United States v. Saunders*, 56 M.J. 930 (A. Ct. Crim. App. 2002). The SJAR erroneously advised the CA that the appellant was convicted of six specifications of violating a no-contact order, as opposed to five, and adultery (i.e., Specification 1 of Charge I and Specification 2 of Additional Charge I respectively). Applying *United States v. Wheelus*, 49 M.J. 283 (C.A.A.F. 1998), the court found that despite the erroneous SJAR, the appellant failed to make a "colorable showing of possible prejudice to his substantial rights concerning the approved sentence." *Id*. at 936. The erroneous findings of guilty were set aside and the affected specifications dismissed; the sentence was affirmed.

4. *United States v. Ord*, 63 M.J. 279 (C.A.A.F. 2006). Appellant was convicted of seven different offenses. However, the SJAR omitted one of the seven. The CA approved the SJA's recommendation on the sentence. The ROT was then forwarded to ACCA for appellate review. Subsequently, the command issued a "corrected" promulgating order that included the missing findings. The ACCA set aside the CA's action and returned the record for a new SJAR and CA's action. The ACCA then affirmed the findings and sentence as approved in the new CA's action, including the forgery offense. The CAAF held that, when the CA did not act expressly on the findings, and the SJAR omitted a finding of guilty adjudged by the court-martial, the ACCA could not presume that the CA approved the omitted findings, but could return the record for a new SJAR and action.

5. *United States v. Alexander; United States v. Vanderschaaf*, 63 M.J. 269 (C.A.A.F. 2006) (joint case). The ACCA found that action taken by the CA in separate, unrelated

cases did not approve findings reached by a GCM, and in both cases it ordered that language which appeared in the CMO be deleted. The Judge Advocate General of the Army sought review. The CAAF found that the ACCA erred. Although the UCMJ and the MCM require the CA to take express action when he disapproved a finding, neither the UCMJ nor the MCM required a CA to take express action to approve findings. The record in both cases was consistent with the presumption that the CA approved the findings adjudged at trial.

F. Action on sentence must:

1. Explicitly state approval or disapproval.

a) *United States v. Wilson*, 65 M.J. 140 (C.A.A.F. 2007). The Court will not look for ambiguity where there is none. Action said:

> "In the case of . . . that part of the sentence extending to confinement in excess of 3 years and 3 months is disapproved. The remainder of the sentence, with the exception of the Dishonorable Discharge, is approved and will be executed."

SJAR and addendum recommended approval of the adjudged DD and that is what the CA intended to do, but CAAF found the language of the action unambiguous in its disapproval of the DD. The court refused to look at surrounding documents to find an ambiguity where the action appeared clear on its face.

b) *United States v. Schiaffo*, 43 M.J. 835 (A. Ct. Crim. App. 1996). Action did not expressly approve the BCD, though it referred to it in "except for" executing language. Sent back to CA for new action. Action said:

> "In the case of . . . only so much of the sentence as provides for reduction to Private E1, forfeiture of $569.00 pay per month for six months, and confinement for four months is approved and, except for the part of the sentencing extending to bad-conduct discharge, will be executed."

See also United States v. Reilly, No. 9701756 (A. Ct. Crim. App. June 12, 1998) (unpublished); *United States v. Scott*, No. 9601465 (A. Ct. Crim. App. June 12, 1998) (unpublished); *United States v. Politte*, 63 M.J. 24 (C.A.A.F. 2006); and, *United States v. Gosser*, 64 M.J. 93 (C.A.A.F. 2006).

c) *United States v. Klein*, 55 M.J. 752 (N-M. Ct. Crim. App. 2001). Action by CA stated: "In the case of . . . the sentence is approved, but the execution of that part of the sentence extending to confinement in excess of 28 days was suspended for a period of 4 months from the date of trial . . . The part of the sentence extending to the bad conduct (sic) discharge will be suspended for a period of 12 months from the date of trial, at which time, unless the suspension is sooner vacated, it will be remitted without further action." After the appellate court acquired jurisdiction, CA attempted to withdraw the first action and replace a second wherein the punitive discharge was not suspended, stating he never intended to suspend the discharge. Held: "administrative oversight" as opposed to "clerical error" in CA's action does not warrant return to the CA for a corrected action. Additionally, any purported action by the CA after an appellate court acquires jurisdiction is a nullity. The NMCCA distinguishes this case from *United States v. Smith*, 44 M.J. 788 (N-M. Ct. Crim. App. 1996), stating "[u]nlike *Smith*, there is nothing 'illegal, erroneous, incomplete or ambiguous' in the original action." *Id*. at 756.

d) *United States v. Mendoza*, 67 M.J. 53 (C.A.A.F. 2008). Lower court (NMCCA) had sent the case back for a new Action because the language was

ambiguous and not susceptible to interpretation. First Action stated: "only such part of the sentence as provides for a reduction to the grade of pay E-1, confinement for 90 days, is approved and except for the part of the sentence extending to a bad conduct [sic] will be executed." CA who signed original action had moved on. His successor in command took a new action that approved the BCD. No new SJAR was prepared, and there was no evidence the CA consulted with the original CA before action. The CAAF holds that a "new, as opposed to a corrected" action requires a new SJAR and the opportunity for the accused to submit additional matters under RCM 1105.

2. Cannot increase adjudged sentence.

a) *United States v. Jennings*, 44 M.J. 658 (C.G. Ct. Crim. App. 1996). MJ announced five month sentence, but did not expressly include pretrial confinement (PTC) credit. After issue raised, MJ said on record that he had "considered" the eight days PTC before announcing the sentence, and the SJA recommended that the CA approve the sentence as adjudged (he did).

> "Further clarification by the judge was needed to dispel the ambiguity . . . created by his remarks." SJA "should have returned the record to the judge for clarification pursuant to RCM 1009(d), rather than attempt to dispel the ambiguity of intent himself." "In any event, there is no authority whatsoever for a staff judge advocate to make an upward interpretation of the sentence, as was done in this case."

Id. at 662.

b) *United States v. Kolbjornsen*, 56 M.J. 805 (C.G. Ct. Crim. App. 2002). Appellant was sentenced to a DD, twelve months confinement, and reduction to E-1. The pretrial agreement required the CA to suspend any confinement in excess of ten months. At action, the CA approved "only so much of the sentence as provides for a BCD, confinement for 3 months, and reduction to E-1." On appeal, the court noted the ambiguity of the action and stated it had two options: (1) return the case to the CA for a new SJAR and action to clarify the ambiguity, or (2) to construe the ambiguity itself and resolve any inconsistencies in favor of the appellant. The court chose the latter and affirmed only so much of the sentence as provided for a BCD, confinement for three months, and reduction to E-1.

c) *United States v. Shoemaker*, 58 M.J. 789 (A.F. Ct. Crim. App. 2003). At action the first time, the CA approved only thirty days confinement of a three month sentence. On appeal, the action was set aside and the case returned for a new SJAR and action. In the subsequent action, the CA approved a sentence of one month. Unfortunately, seven months out of the year contain thirty-one days resulting in a potential sentence greater than that originally approved, in violation of RCM 810(d). Rather than return the case for a third SJAR and action, the court only approved thirty days confinement.

d) *United States v. Mitchell*, 58 M.J. 446 (C.A.A.F. 2003). Appellant was sentenced to a BCD, ten years confinement, total forfeitures, and reduction to E-1. On appeal, the ACCA ordered a rehearing on sentence. On rehearing, the appellant was sentenced to a DD, six years confinement, and reduction to E-1. The ACCA affirmed the rehearing sentence finding that under an objective standard, a reasonable person would not view the rehearing sentence as "in excess of or more severe than" the original sentence; therefore, Article 63, UCMJ, and RCM 810(d)(1) were not violated. The CAAF reversed as to sentence, finding

that a DD is more severe than a BCD and no objective equivalence is available when comparing a punitive discharge with confinement. The CAAF reduced the sentence to a bad-conduct discharge, six years confinement, and reduction to E-1.

e) *United States v. Burch*, 67 M.J. 32 (C.A.A.F. 2008). Appellant was sentenced to confinement for one year, reduction to E-1, and a bad-conduct discharge. The CA suspended all confinement in excess of 45 days. Subsequent to his release, but before the suspension period was over, or the CA took action, appellant committed additional misconduct. His suspension was properly vacated and he was returned to confinement. The CA took action, which stated: "execution of that part of the sentence adjudging confinement in excess of 45 days is suspended for a period of 12 months." Appellant served approximately 223 days of confinement before being released. The CAAF held that this was illegal confinement. "If the CA's action is to be given effect, as required by R.C.M. 1107, attendant circumstances preceding the action may not be utilized to undermine it." The vacation of the suspension should have been noted in the action.

3. RCM 1107(d)(1). May disapprove all or any part of a sentence for any or no reason.

a) *United States v. Bono*, 26 M.J. 240 (C.M.A. 1988). Reduction in sentence saved the case when DC found to be ineffective during sentencing.

b) *United States v. Smith*, 47 M.J. 630 (A. Ct. Crim. App. 1997). At a GCM, the accused was sentenced to total forfeitures (TF), but no confinement. Neither the DC nor the accused submitted a request for waiver or deferment, nor complained about the sentence. Accused did not go on voluntary excess leave. Fourteen days after sentence, TF went into effect. At action, the CA tried to suspend all forfeitures beyond 2/3 until the accused was placed on involuntary excess leave. Held: CA's attempt to suspend was invalid, because the TF was executed (at 14 days) prior to the attempted suspension. The ACCA found the time the accused spent in the unit (5 Jul to 19 Aug) without pay was cruel and unusual punishment and directed the accused be restored 1/3 of her pay. *See also United States v. Warner*, 25 M.J. 64 (C.M.A. 1987).

4. RCM 1107(d)(2). May reduce a mandatory sentence adjudged.

5. May change a punishment to one of a different nature if less severe. *United States v. Carter*, 45 M.J. 168 (C.A.A.F. 1996). CA lawfully converted panel's BCD and twelve month sentence to twenty-four *additional* months' confinement and no BCD, acting in response to request that accused be permitted to retire. Commutation must be clemency, "not 'merely a substitution'" of sentences, but clearly was proper here; BCD was disapproved and accused got his wish to retire, and where, importantly, he neither set any conditions on the commutation (*e.g.*, setting a cap on confinement he was willing to endure), nor protested the commutation in his submission to the CA. But consider the discussion to RCM 1107(d)(1) that a BCD could be converted to confinement for up to one year at a special court-martial.

6. May suspend a punishment. *United States v. Barraza*, 44 M.J. 622 (N-M. Ct. Crim. App. 1996). Court approved CA's reduction of confinement time from PTA-required forty-six months (suspended for twelve months) to fourteen months, six days (suspended for thirty-six months). Sentence was for ten years. Court emphasized the "sole discretionary power" of CA to approve or change punishments "as long as the severity of the punishment is not increased" (*citing* RCM 1107(d)(1)). Also significant that approved confinement was twenty-two months less than accused sought in his clemency petition.

7. *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002). Error for SJAR to advise CA that in order to waive automatic forfeitures at action he would have to disapprove the adjudged forfeitures. CA could have modified the monetary amount of adjudged forfeitures and/or suspended the forfeitures for the period of waiver. Case returned to the CA for a new SJAR and action.

8. May reassess sentence. If a CA reassesses sentence after, for example, dismissing guilty findings, the CA must do so in conformity with the requirements of *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986). *United States v. Harris*, 53 M.J. 86 (C.A.A.F. 2000). The CA may purge any prejudicial effect if it can determine that the sentence would have been of a certain magnitude. Further, the SJAR must provide guidance to the CA as the standard to apply in reassessing the sentence. *United States v. Reed*, 33 M.J. 98 (C.M.A. 1991).

a) *United States v. Bonner*, 64 M.J. 638 (A. Ct. Crim. App. 2007). The SJAR recommended that the CA disapprove one specification without giving a reason. The CA did so and approved the adjudged sentence. Appellate defense alleged error and pointed to the lack of any *Sales* guidance on sentence reassessment in the SJAR or addendum. The ACCA found no reason to believe the specification was disapproved because of legal error (no such allegation in RCM 1105/1106 submissions) and concluded that the disapproval was an act of clemency not requiring sentence reassessment. *See United States v. Kerwin*, 46 M.J. 588 (A.F. Ct. Crim. App. 1996) (holding that a pure act of clemency does not require sentence reassessment). In a footnote, the ACCA conceded that there may be "middle ground" between pure sentence clemency and clemency recommended as a form of relief from "possible legal error" and recommended that SJAs advise CAs of the standard for sentence reassessment.

b) *United States v. Taylor*, 47 M.J. 322 (C.A.A.F. 1997), *aff'd after remand*, 51 M.J. 390 (C.A.A.F. 1999). Discusses how to reassess a sentence if some charges are dismissed by the CA. Disregarding the findings is not enough; must disregard the evidence too. Remanded to the AFCCA to correctly reassess or order a re-hearing.

c) *United States v. Griffaw*, 46 M.J. 791 (A.F. Ct. Crim. App. 1997). SJA incorrectly stated that the sentence reduction based on the terms of the pre-trial agreement was equal to a form of clemency.

d) *United States v. Bridges*, 58 M.J. 540 (C.G. Ct. Crim. App. 2003). Appellant was sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for twenty-two years, and a DD. At action, the CA disapproved two specifications and approved only so much of the sentence as provided for reduction to E-1, forfeiture of all pay and allowances, confinement for twenty years, and a DD. The CGCCA held that the CA erred in attempting to reassess the sentence after dismissing two very serious specifications (indecent acts and forcible sodomy). Although the maximum punishment for the offenses both before and after action remained the same (i.e., reduction to E-1, forfeiture of all pay and allowances, confinement for life, and a DD), the issue was whether the CA or the court could "accurately determine the sentence which the members would have adjudged for only those charges and specifications approved by the convening authority." *Id*. at 545. The court determined that neither the CA nor the court could properly reassess the sentence in light of the modified findings, set aside the sentence and authorized a rehearing.

e) *United States v. Meek*, 58 M.J. 579 (C.G. Ct. Crim. App. 2003). Appellant was sentenced to reduction to E-1, seventy-five days confinement, and a BCD. At action, the SJA recommended disapproval of one charge based upon the PTA. The SJA further recommended "I do not recommend that you adjust the accused's sentence as a result of setting aside the military judge's findings as to Charge I and its specification. The two remaining charges to which the accused pled guilty adequately support the sentence awarded." *Id*. at 580. The CGCCA held that the SJA erred by giving the above guidance and by failing to advise the CA that he must reassess the sentence, approving only so much of the sentence as would have been adjudged without the dismissed specification. The CGCCA approved only so much of the sentence as provided for reduction to E-1, sixty days confinement, and a BCD.

f) *United States v. Perez*, 66 M.J. 164 (C.A.A.F. 2008). Shortly after trial, rape victim recants. During post-trial Article 39(a) session, military judge finds that he would not have found appellant guilty of rape, nor would he have sentenced him to anything more than six months confinement, reduction and forfeitures. CA modified findings and sentence by approving the BCD, reduction to E-1, and confinement for 206 days. The CAAF held that CA did not properly reassess sentence. Under no circumstances can the CA approve a sentence greater than the sentencing authority would have adjudged absent the error.

9. *United States v. Rollins*, 61 M.J. 338 (C.A.A.F. 2005). Appellant was sentenced to a BCD, confinement for eight years, and reduction to E-5. The convening authority revised the findings to address issues involving the application of the statute of limitations under Article 43, UCMJ. The SJA recommended that the convening authority approve the adjudged sentence, subject to reducing the period of confinement from eight to five years to the cure the prejudice from the erroneous findings. The convening authority revised the findings but only reduced the sentence to seven years. The AFCCA affirmed the findings and sentence as modified by the convening authority. The CAAF held that "[t]he convening authority's action in this case did not cure the prejudice from the military judge's failure to focus the attention of the members on the appropriate period of time under the circumstances of this case. *See Kotteakos v. United States*, 328 U.S. 750, 765 (1946). Accordingly, we shall set aside the affected findings and authorize a rehearing."

G. Sentence Credits.

1. *United States v. Minyen*, 57 M.J. 804 (C.G. Ct. Crim. App. 2002). Although the court recommends stating all sentence credits in the CA's action, it is not required. *See also United States v. Gunderson*, 54 M.J. 593, 594 (C.G. Ct. Crim. App. 2000) (recommending that a CA expressly state all applicable credits in the action).

2. AR 27-10, para. 5-32*a*, states that "the convening authority will show in his or her initial action all credits against a sentence to confinement, either as adjudged or approved, regardless of the source of the credit (automatic credit for pretrial confinement under U.S. v. Allen, 17 M.J. 126 (CMA 1984), or judge-ordered additional administrative credit under U.S. v. Suzuki, 14 M.J. 491 (CMA 1983)), R.C.M. 304, R.C.M. 305, or for any other reason specified by the judge."

H. Original signed and dated action must be included in the record. *See* RCM 1107(f)(1) and 1103(b)(2)(D)(iv).

I. RCM 1107(f)(1). Contents of action. *See also* Appendix 16, MCM, Forms for Actions.

J. If confinement is ordered executed, "the convening authority shall designate the place . . . in the action, unless otherwise prescribed by the Secretary concerned." RCM 1107(f)(4)(C).

1. AR 27-10, para. 5-32*a* states that the CA does not designate a place of confinement. AR 190-47 controls.

2. AFI 51-201, para. 9.4. "HQ AFSFC/SFC, not the convening authority, selects the corrections facility for post-trial confinement and rehabilitation for inmates gained by HQ AFSFC/SFC [inmates not ordered to serve sentences in local correctional facilities]."

K. What if an error is discovered after action is taken? RCM 1107(f)(2) provides that:

1. Before publication or official notice to the accused, CA may recall and modify any aspect of action (including modification less favorable to the accused, such as adding the discharge approval language, as was required in *United States v. Schiaffo*, 43 M.J. 835 (A. Ct. Crim. App. 1996)).

2. If either publication or official notice has occurred, CA may only make changes that do not result in action less favorable to the accused.

3. CA must personally sign the modified action.

4. Action after appellate court has the case is a nullity unless subsequent action is directed or case is returned to the CA for further action. *United States v. Klein*, 55 M.J. 752 (N-M. Ct. Crim. App. 2001).

L. Action potpourri.

1. *McCray v. Grande*, 38 M.J. 657 (A.C.M.R. 1993). Sentence, for purposes of commutation, begins to run on date announced.

2. *United States v. Foster*, 40 M.J. 552 (A.C.M.R. 1994). Court does not have to treat ambiguous action ($214 per month) as forfeiture for one month; may return to CA for clarification of intent.

3. *United States v. Muirhead*, 48 M.J. 527 (N-M. Ct. Crim. App. 1998). Accused sentenced to "forfeit all pay and allowances, which is $854.40 for 2 years," and CA approved the same. Held: ambiguous sentence. CA under RCM 1107(d)(1) can return case to court for clarification of ambiguous sentence; if he does not, he can only approve a sentence no more severe than the unambiguous portion. Rather than return to CA, the NMCCA simply affirmed the unambiguous dollar amount.

M. Post-trial deals. *United States v. Olean*, 59 M.J. 561 (C.G. Ct. Crim. App. 2002). CA authorized to enter into post-trial deals where a rehearing is impracticable. In the case at bar, the CA agreed to approve a sentence of no punishment, dismiss the specifications which were set aside and returned for a rehearing, process the appellant for administrative discharge, and recommend a general discharge. In exchange, the appellant agreed to waive personal appearance before the separation board, remain on appellate leave, and waive any right to accrued pay, allowances, or travel entitlements.

XIII. POST-TRIAL PROCESSING TIME.

A. Service courts have two distinct responsibilities when reviewing allegations of post-trial and appellate delay. First, service courts may grant relief to appellants for excessive post-trial delay under their broad authority to determine sentence appropriateness under Article 66(c), UCMJ. Second, as a matter of law, both the service courts and the CAAF may review claims of untimely review and appeal under the Due Process Clause of the Constitution using the principals announced in the case of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006).

B. From sentence to action. An accused has a right to timely review during the post-trial process. *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003).

1. The old, old rule: *Dunlap v. Convening Authority*, 48 C.M.R. 751 (C.M.A. 1974) (when an accused is continuously under restraint after trial, the convening authority must take action within ninety days of the end of trial or a presumption of prejudice arises).

2. The old rule: if prejudice, relief mandated. *United States v. Banks*, 7 M.J. 92 (C.M.A. 1976).

3. Back to the future: the evolution to *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006).

a) *United States v. Tardif*, 55 M.J. 666 (C.G. Ct. Crim. App. 2001), *rev'd and remanded*, 57 M.J. 219 (C.A.A.F. 2002), *on remand*, 58 M.J. 714 (C.G. Ct. Crim. App. 2003), *aff'd*, 59 M.J. 394 (C.A.A.F. 2004) (summary disposition). The appellant was sentenced to forfeiture of all pay and allowances, reduction to E1, three years confinement and a DD (the CA only approved two years of confinement). It took the government one year to process the record from sentencing to action and forwarding to the appellate court. Despite the delay, the CGCCA could find no prejudice that flowed to the accused from the post-trial delay and therefore did not grant any relief. Although the CGCCA did discuss the Army's *Collazo* opinion, it concluded it was bound by the CAAF's precedent regarding undue post-trial delay. On appeal, the CAAF noted that relief under Article 66(c), UCMJ, unlike Article 59(a), UCMJ, does not require a predicate showing of "error materially [prejudicial to] the substantial rights of the accused" and remanded the case to the CGCCA because of the lower court's mistaken belief that it was "constrained" by Article 59(a), UCMJ. Applying principles of sentence appropriateness, CCAs can grant relief under Article 66(c) for unreasonable and unexplained post-trial delay that does not result in prejudice. On remand, the CGCCA agreed with appellant that "neither *United States v. Collazo*, [citation omitted], nor our higher court's decision in this case requires a showing of uniquely personal harm in order to justify a sentence reduction, rather that the delay is to be considered along with the rest of the record in determining what sentence should be approved." The CGCCA reduced appellant's confinement for post-trial delay.

b) *United States v. Jones*, 61 M.J. 80 (C.A.A.F. 2005). Following his release from custody, appellant had applied for a position as a driver. He submitted to the court his own declaration and declarations from three officials of a potential employer that stated that he would have been considered for employment or actually hired if he had possessed a DD-214, even if his discharge was less than honorable. The employer was aware of appellant's court martial for two specifications of unauthorized absence and two specifications of missing movement by design, in violation of Articles 86 and 87. The CAAF held that those un-rebutted declarations were sufficient to demonstrate ongoing prejudice beyond what would have been a reasonable time for post-trial proceedings. Whether appellant would have had a job for certain was not relevant. The court concluded that setting aside the bad-conduct discharge is a remedy more proportionate to the prejudice that the unreasonable post-trial delay had caused. Appellant was prejudiced by the facially unreasonable post-trial delay, which violated his right to due process. The appropriate remedy was disapproval of the bad-conduct discharge.

4. The current rule. On 11 May 2006, the CAAF released *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). The *Moreno* decision demonstrated that while the CAAF was not willing to return to an inflexible *Dunlap*-style 90-day rule, it was willing to apply heightened scrutiny and find due process violations in cases where post-trial processing crossed certain defined boundaries. In *Moreno*, the CAAF announced that it would apply a presumption of unreasonable delay to any case completed after 11 June 2006 that: (1) did not have initial action taken within 120 days of the completion of the trial; (2) was not

docketed within 30 days of the convening authority's action; or, (3) did not have appellate review completed by the Court of Criminal Appeals within 18 months of docketing.

a) Once the post-trial delay in a case is determined to be unreasonable, the court must balance: (1) the length of the delay against; (2) the reason for the delay; (3) the appellant's assertion of the right to timely review and appeal; and, (4) prejudice. This test represented an adaptation of the *Barker v. Wingo*, 407 U.S. 514 (1972), test that had previously only been used to review speedy trial issues in a Sixth Amendment context. While failure to meet the *Moreno* timelines triggers the *Barker v. Wingo* analysis, the government can still rebut the presumption of prejudice by showing that the delay was not unreasonable.

b) When balancing the length of the delay against the other factors, no single factor is required to find that the post-trial delay constitutes a due process violation.

c) An appellate court must evaluate prejudice to the appellant in light of three interests: (1) preventing oppressive incarceration pending appeal; (2) minimizing anxiety and concern over those convicted awaiting the outcome of their appeals; (3) limiting the possibility that a convicted person's ground for appeal, and his or her defenses in case of reversal or retrial, might be impaired.

d) In *United States v. Toohey*, 63 M.J. 353 (C.A.A.F. 2006), the CAAF further refined the prejudice factor by announcing that when an appellant had not shown actual prejudice under the fourth factor of the *Barker v. Wingo* analysis, the appellate courts could still find a due process violation when, in balancing the other three factors, the delay is "so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *Id.* at 362.

e) In *Moreno*, the CAAF suggested a non-exclusive list of relief that could include, but was not limited to: (1) day-for-day reduction in confinement or confinement credit; (2) reduction of forfeitures; (3) set aside portions of the approved sentence including a punitive discharge; (4) set aside of the entire sentence, leaving a sentence of no punishment; (5) limitation upon the sentence that may be approved by the convening authority following a rehearing; and, (6) dismissal of the charges and specifications with or without prejudice.

f) In *United States v. Harrow*, 65 M.J. 190 (C.A.A.F. 2007), the CAAF determined that even when the post-trial delay is facially unreasonable, if an appellate court is convinced that any error was harmless beyond a reasonable doubt, there is no need to do a separate analysis of each of the *Barker v. Wingo* factors.

g) Cases.

(1) *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), *on remand*, No. 200100715, 2009 WL 1808459 (N-M. Ct. Crim. App. June 23, 2009) (unpublished), *aff'd*, 69 M.J. 36 (C.A.A.F. 2010) (summary disposition). Appellant was tried and convicted by members of rape in violation of Article 120, UCMJ. He was sentenced to reduction to E-1, TF, six years confinement, and DD. On appeal, appellant asserted that he was denied due process as a result of unreasonable post-trial delay. He was sentenced on 29 September 1999. The 746-page Record of Trial (ROT) was authenticated 288 days later. On 31 January 2001 (490 days after the court-martial), the CA took action. The case was docketed at NMCCA 76 days later. The NMCCA granted 18 defense motions for enlargement for time to file an appellate brief. From the end of his court-martial until the NMCCA rendered a decision, it took 1,688 days. In conducting an analysis of the case, the CAAF adopted the four factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), which are: (1) length of the delay; (2) reasons for the delay; (3) assertion by Appellant of the right to a timely review and appeal;

and (4) prejudice suffered by Appellant. During the post-trial process, each of these factors will be analyzed based on the circumstances. More importantly for practitioners, the CAAF established new post-trial processing guidelines as follows: (1) from sentence to action, the government has 120 days; (2) from action to docketing at the Court of Criminal Appeals, the government has 30 days; and, (3) from docketing at the Court of Criminal Appeals to appellate decision, the Court has 18 months to render a decision. Failure to meet these processing timelines serves to trigger the four-part *Barker* analysis. However, the government can rebut the presumption by showing that the delay was not unreasonable.

(2) *United States v. Toohey*, 63 M.J. 353 (C.A.A.F. 2006). Appellant, contrary to his pleas, was convicted of rape and assault consummated by battery. On August 13, 1998, he was sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for twelve years and a dishonorable discharge. The transcript was 943 pages and the ROT was composed of eleven volumes. It took 2,240 days from the end of trial until the issuance of the NMCCA's decision, a period of over six years.

The NMCCA decision was set aside. The CAAF held that the appellant was denied his due process right to speedy post-trial and appellate review. They set forth the analytical framework using the four *Barker v. Wingo* factors of: (1) length of delay; (2) reasons for the delay; (3) assertion of the right to timely review and appeal; and (4) prejudice. The court determined that the first three factors weighed heavily in favor of the appellant. Moreover, CAAF ruled that where there is no finding of *Barker* prejudice, they will find a due process violation only when, in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of fairness and integrity of the military justice system. *See also United States v. Harvey*, 64 M.J. 13 (C.A.A.F. 2006).

(3) *United States v. Dearing*, 63 M.J. 478 (C.A.A.F. 2006). A 1,794 day delay from sentence to first-level appellate review violated the appellant's right to speedy post-trial relief because he suffered two forms of actual prejudice. First, he was denied timely review of a meritorious claim of legal error (an instructional error made at trial). Second, the lack of "institutional vigilance" by the government resulted in the loss of his right to free and timely professional assistance of detailed military appellate defense counsel. The CAAF granted relief in the form of cap on sentence at a rehearing ordered as a result of the instructional error.

(4) *United States v. Harvey*, 64 M.J. 13 (C.A.A.F. 2006). Despite not showing prejudice under the fourth prong of the *Barker* analysis, the court found that a 2,031-day delay from trial to first-level appellate review was "so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." The CAAF granted relief in the form of a cap on sentence upon rehearing (the case had already been returned for rehearing on another basis).

(5) *United States v. Simon*, 64 M.J. 205 (C.A.A.F. 2006). The government's gross negligence in not mailing a 36-page ROT to the first-level appellate court for 572 days was a violation of the appellant's right to speedy post-trial review. The CAAF returned the case to the NMCCA with direction that it may grant relief under its broad sentence appropriateness authority under Article 66(c) or, as a matter of law, under the Due Process Clause.

(6) *United States v. Canchola*, 64 M.J. 245 (C.A.A.F. 2007). The CAAF specifically rejects the NMCCA's attempt to create a generalized "excludable delay" concept similar to that used under RCM 707(c) to examine pretrial speedy trial issues.

(7) *United States v. Young*, 64 M.J. 404 (C.A.A.F. 2007). The CAAF considered the circumstances and the entire record, and found that 1,637 days from trial through completion of ACCA review was harmless beyond a reasonable doubt.

(8) *United States v. Roberson*, 65 M.J. 43 (C.A.A.F. 2007). The CAAF found that under the facts of this case, 1,524 days from trial to NMCCA review was harmless beyond a reasonable doubt.

(9) *United States v. Pflueger*, 65 M.J. 127 (C.A.A.F. 2007). The NMCCA, in assessing the "unreasonable and unconscionable" post-trial delay in this case, did not approve the BCD. Sentence at trial was a BCD, confinement for four months, and reduction to E-1. CA's action suspended BCD and all confinement in excess of 90 days. The CAAF found that this was not meaningful sentence relief because the BCD had already been remitted at the end of the suspension period.

(10) *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006). The CAAF found that under the facts of this case, 1,867 days from trial to NMCCA review was harmless beyond a reasonable doubt.

(11) *United States v. Rodriguez-Rivera*, 63 M.J. 372 (C.A.A.F. 2006). The CAAF found that despite the six-year delay in appellate review in this case, any relief that would be actual and meaningful would be "disproportionate to the possible harm generated from the delay." No relief was warranted or granted.

(12) *United States v. Yammine*, 67 M.J. 717 (N-M. Ct. Crim. App. 2009). The NMCCA was able to assume, without deciding, that the appellant was denied speedy post-trial processing (214 days from sentencing to CA Action). The NMCCA then found that there was no prejudice and conclude that the error was harmless beyond a reasonable doubt.

(13) *United States v. Purdy*, 67 M.J. 780 (N-M. Ct. Crim. App. 2009). The NMCCA found held that a 1,007-day delay between sentencing and docketing with the court was unreasonable, but appellant conceded no material prejudice from the delay. As a result, no relief was granted. The NMCCA also placed emphasis on the fact that even with the most "energetic and proactive post-trial processing" the appellant's 150 days of confinement would have been completed before any review was possible.

(14) *United States v. Bush*, 68 M.J. 96 (C.A.A.F. 2009). Appellant's case file was "apparently lost in the mail for over six years." It took over seven years to review a 143-page guilty plea. The CAAF finds this to be facially unreasonable. On the fourth *Barker v. Wingo* prong, the CAAF held that the appellant's unsupported affidavit that he was denied employment at a store in Alabama was insufficient to establish prejudice. The CAAF holds that *Allende* does not shift the burden to him to establish that the due process violation was not harmless beyond a reasonable doubt. The burden remains upon the government. However, in an unsubstantiated affidavit case, the government's burden of proving any due process violation was harmless beyond a reasonable doubt will be "more easily attained."

(15) *United States v. Schweitzer*, 68 M.J. 133 (C.A.A.F. 2009). Appellant asserted that the eight-year delay from the announcement of sentence until the NMCCA rendered its original opinion violated his due process rights. He

submitted an unsupported affidavit claiming that he averaged less than $35,000 a year in annual income since he began his appellate leave, even though persons trained as he was normally earned between $79,000 and $95,000. Citing *Bush*, the CAAF held that there was no prejudice under the fourth *Barker v. Wingo* prong, and that the unsupported affidavit of the appellant allowed the government to more easily demonstrate that any violation of his due process right was harmless beyond a reasonable doubt.

(16) *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009). More than eight-year delay from the announcement of sentence until the NMCCA rendered its original opinion violated the appellant's due process rights. However, unsupported (and belated) affidavit claiming that his inability to travel due to his appellate leave status do not establish actionable harm arising from any delay. The CAAF held that under the totality of the circumstances, the post-trial delay was harmless beyond a reasonable doubt. Due to the lack of convincing evidence of prejudice in the record, the court will not presume prejudice from the length of the delay alone.

(17) *United States v. Mullins*, 69 M.J. 113 (C.A.A.F. 2010). Convening authority did not take action for 363 days. After docketing, 448 days passed until the first contact between appellate defense counsel and the appellant. Over the course of the appeals, appellant had four separate appointed attorneys. Appellant also filed writs and motions pro se, including complaints about the delay in the appellate process. Appellant was eventually released from confinement. Two months later, he was allegedly denied unemployment insurance because he was on appellate leave and did not have a DD-214. The CAAF skipped over most of the analysis and went right to the lack of prejudice. The appellant had three assertions of prejudice: 1) no unemployment benefits due to the lack of a DD-214; 2) anxiety because he had to register as a sex offender; and, 3) a timely appeal would have allowed him to seek legal custody of his children. The CAAF dismissed the latter two arguments since the appellant did not prevail on the merits of his appeal. Turning to the unemployment benefits, the CAAF held that while this may be prejudicial, it was not necessarily so in this case. The appellant provided no affidavits or direct proof that a person in appellant's situation would have been eligible for unemployment benefits. Unlike *United States v. Jones*, 61 M.J. 80 (C.A.A.F. 2004), where the appellant provided affidavits from potential employers, this case was lacking of such proof of prejudice. Absent prejudice, the post-trial delay was harmless beyond a reasonable doubt. The CAAF denied relief.

4. The ACCA and the exercise of its Article 66, sentence appropriateness authority – prejudice not required for relief from post-trial delay.

a) *United States v. Collazo*, 53 M.J. 721 (A. Ct. Crim. App. 2000). The ACCA came up with a new method for dealing with post-trial processing delay. In *Collazo*, the court granted the appellant four months off of his confinement because the government did not exercise due diligence in processing the record of trial. The court expressly found no prejudice.

b) *United States v. Bauerbach*, 55 M.J. 501 (A. Ct. Crim. App. 2001). The only allegation of error was undue delay in the post-trial process. Defense sought relief in accordance with *Collazo*. Applying *Collazo*, the ACCA found that the government did not proceed with due diligence in the post-trial process when it took 288 days to process a 384-page record of trial. Although no prejudice was established, the court granted relief under its Article 66, sentence appropriateness authority reducing confinement by one month. The court did provide valuable guidance to SJAs and Chiefs of Justice regarding what might justify lengthy post-

trial delay (remembering that the court will test whether the government has proceeded with due diligence in the post-trial process based on the totality of the circumstances). "Acceptable explanations may include excessive defense delays in the submission of RCM 1105 matters, post-trial absence or mental illness of the accused, exceptionally heavy military justice post-trial workload, or unavoidable delays as a result of operational deployments. Generally, routine court reporter problems are not an acceptable explanation." *Bauerbach*, 55 M.J. at 507.

c) *United States v. Delvalle*, 55 M.J. 648 (A. Ct. Crim. App. 2001). Ten months to prepare 459-page ROT was too long; sentence reduced by two months.

d) *United States v. Maxwell*, 56 M.J. 928 (A. Ct. Crim. App. 2002). Appellant was convicted at a GCM of desertion terminated by apprehension and wrongful appropriation of a motor vehicle. The adjudged and approved sentence was confinement for five months and a BCD. On appeal, appellant alleged undue delay in the post-trial processing of her case. Held: fourteen months from trial to action in a case where the ROT is only 384 pages is an excessive delay that warrants relief under *Collazo* and *Bauerbach*. Note: appellant failed to cite any prejudice resulting from the delay, however, the ACCA, in exercise of its Article 66, UCMJ, sentence appropriateness authority affirmed the findings and reduced the period of confinement from five to four months. *See also United States v. Paz-Medina*, 56 M.J. 501 (A. Ct. Crim. App. 2001) (one year delay in post-trial processing of 718-page ROT unreasonable and indicates a lack of due diligence). *United States v. Hutchison*, 56 M.J. 756 (A. Ct. Crim. App. 2002) (419 day delay from trial to action in an 81-page ROT case is unreasonable – 3-month confinement reduction despite the lack of prejudice to the accused).

e) *United States v. Stachowski*, 58 M.J. 816 (A. Ct. Crim. App. 2003). Delay of 268 days between sentence and action was not excessive and did not warrant relief for dilatory post-trial processing. Applying a totality of circumstances approach, the court considered the following: that the CA reduced the appellant's confinement by thirty days because of the post-trial delay; while processing the appellant's case, the installation only had one court reporter; the lone reporter doubled as the military justice division NCOIC; the backlog of cases awaiting transcription was significant; and the cases were transcribed on a "first in, first out" basis. *Id*. at 818.

f) *United States v. Bodkins*, 60 M.J. 322 (C.A.A.F. 2004). The CAAF rejected the ACCA's conclusion that the accused is required to ask for timely post-trial processing, and that failure to do so waived any right to relief. The accused failed to object to dilatory post-trial processing in guilty plea case with a 74-page record of trial (ROT) (i.e., 252 days from sentence to action; 412 days from sentence to receipt of ROT by the ACCA). The CAAF noted that the responsibility to complete post-trial processing in a timely fashion lies with the CA and is not dependent on an accused's request. The CAAF did, however, observe that the absence of a request from the defense is one factor a reviewing court may consider in assessing the impact of any delay in a particular case.

g) *United States v. Garman*, 59 M.J. 677 (A. Ct. Crim. App. 2003). Allegations of dilatory post-trial processing will be examined on a case-by-case basis applying a totality of the circumstances approach. Court refuses to adopt a bright line rule regarding post-trial delay. Held: appellant was not entitled to relief despite a post-trial delay of 248 days from sentence to action (i.e., 329 days less 81 days attributable to the defense; the military judge's time to authenticate the record was government time). The factors the court considered were as follows: defense

counsel's objection to the post-trial delay was "dilatory," occurring at day 324; after the defense objected, the government acted on the case expeditiously (i.e., in five days); although unexplained, the delay did not exceed 248 days; slow post-trial processing was the only post-trial error; and, the appellant failed to allege any prejudice or harm from the delay. Most significant in the court's decision was the defense counsel's lack of timely objection to the post-trial processing.

XIV. SUSPENSION OF SENTENCE; REMISSION. ARTICLE 71, UCMJ; RCM 1108.

A. The rule requires the conditions of any suspension to be specified in writing, served on the accused, and receipted for by the probationer. *United States v. Myrick*, 24 M.J. 792 (A.C.M.R. 1987) (there must be substantial compliance with RCM 1108). *See*:

1. AR 27-10, para. 5-35;

2. JAGMAN, section 0158; and,

3. AFI 51-201, para. 9.23.

B. Power of the CA to create conditions.

1. *United States v. Cowan*, 34 M.J. 258 (C.M.A. 1992). The accused asked the CA for a method by which she could serve her confinement and still support her 6-year-old child. CA approved the sentence, but suspended for one year confinement in excess of six months and forfeitures in excess of $724.20, suspension of forfeitures conditioned upon:

a) The initiation of an allotment payable to the daughter's guardian of $278.40, for the benefit of the girl; and

b) The maintenance of the allotment during the time the accused is entitled to receive pay and allowances.

Held: Permissible. Note: court recognizes inherent problems; recommends careful use of such actions.

2. *United States v. Schneider*, 34 M.J. 639 (A.C.M.R. 1992), *aff'd*, 38 M.J. 387 (C.M.A. 1993). The accused asked for assistance in supporting his dependents. The ACMR upheld CA's suspension of forfeitures in excess of $400.00 on conditions that the accused:

a) Continue to claim on W-4, as long as he can legitimately do so, single with 2 dependents; and

b) Initiate and maintain allotment to be paid directly to spouse in amount of $2,500.

C. Period of suspension must be reasonable; conditions must not be "open-ended" or "unachievable."

1. Limited by AR 27-10, para. 5-35, on a sliding scale from three months in a SCM to two years or the period of unexecuted portion of confinement, whichever is longer, in a GCM.

2. *United States v. Spriggs*, 40 M.J. 158 (C.M.A. 1994). Uncertain and open-ended period of time required to fulfill one of the conditions (self-financed sex offender program) made the period of suspension of the discharge and reduction in grade "unreasonably long." The CMA, especially Judge Cox, signals approval for parties' "creative" and "compassionate" efforts.

3. *United States v. Ratliff*, 42 M.J. 797 (N-M. Ct. Crim. App. 1995). Eleven years probation not unreasonably long under the circumstances (though this extended suspension period may be barred in the Army by AR 27-10).

4. *United States v. Koppen*, 39 M.J. 897 (A.C.M.R. 1994). Suspension of period of confinement in conjunction with an approved discharge should coincide with serving the unsuspended portion of confinement.

5. *United States v. Wendlandt*, 39 M.J. 810 (A.C.M.R. 1994). Directing that suspension period begin on date later than action is not per se improper.

XV. VACATION OF SUSPENSION OF SENTENCE. ARTICLE 72, UCMJ; RCM 1109.

A. The rule sets forth the procedural and substantive requirements for vacating a suspended sentence. It authorizes immediate confinement pending the vacation proceedings, if under a suspended sentence to confinement. *See* Appendix 18, MCM.

B. *United States v. Connell*, 42 M.J. 462 (C.A.A.F. 1995). Appellant challenged the vacation of his suspended bad-conduct discharge because the hearing officer, his special court-martial convening authority (as required by RCM 1109(d)), had imposed nonjudicial punishment on him for the same offense that caused the vacation of his suspended bad-conduct discharge. The CAAF held that this did not make the special court-martial convening authority too personally interested to be a neutral and detached hearing officer as required by RCM 1109.

C. *United States v. Miley*, 59 M.J. 300 (C.A.A.F. 2004). Error for the hearing officer (i.e., SPCMCA) in a vacation of suspended punishment situation to refrain from making findings of fact on whether a basis for vacation existed. The hearing officer's decision, pursuant to RCM 1109, must include an evaluation of the contested facts and a determination of whether the facts warrant vacation. A decision based solely on equitable grounds is improper. Error for the GCMCA to vacate the suspended punishment when the hearing officer failed to comply with RCM 1109. Held: vacation action set aside and returned to the GCMCA for yet another (a third vacation hearing) or reinstatement of the terms of the original pretrial agreement. Note: 3-2 decision with J. Baker and C.J. Crawford dissenting.

XVI. WAIVER OR WITHDRAWAL OF APPELLATE REVIEW. ARTICLE 61, UCMJ; RCM 1110.

A. RCM 1110(a). After any GCM, except one in which the approved sentence includes death, and after a special court-martial in which the approved sentence includes a BCD the accused may elect to waive appellate review.

B. Waiver. The accused may sign a waiver of appellate review any time after the sentence is announced. The waiver may be filed only within 10 days after the accused or defense counsel is served with a copy of the action under RCM 1107(h). On written application of the accused, the CA may extend this period for good cause, for not more than 30 days. *See* RCM 1110(f)(1).

C. The accused has the right to consult with counsel before submitting a waiver or withdrawal. RCM 1110(b).

1. Waiver.
   a) Counsel who represented the accused at the court-martial.
   b) Associate counsel.
   c) Substitute counsel.
2. Withdrawal.
   a) Appellate defense counsel.
   b) Associate defense counsel.
   c) Detailed counsel if no appellate defense counsel has been assigned.
   d) Civilian counsel.

D. Procedure.

1. RCM 1110(d). Must be in writing, attached to ROT, and filed with the CA. Written statement must include: statement that accused and counsel have discussed accused's appellate rights and the effect of waiver or withdrawal on those rights; that accused understands these matters; that the waiver or withdrawal is submitted voluntarily; and signature of accused and counsel. *See* Appendix 19 and 20, MCM.

2. TDS SOP requires a seventy-two hour "cooling off" period; re-contact after initial request to waive/withdraw.

3. The accused may only file a waiver within ten days after he or DC is served with a copy of the action (or within period of extension not to exceed thirty days).

4. *United States v. Smith*, 44 M.J. 387 (C.A.A.F. 1996). May not validly waive appellate review, under Article 61, UCMJ, before CA takes initial action in a case, *citing, inter alia*, *United States v. Hernandez*, 33 M.J. 145 (C.M.A. 1991) (Article 61(a) permits such waiver "within 10 days after the action . . . is served on the accused or on defense counsel." RCM 1110(f) must be read in this context. Clearly the RCM cannot supersede a statute, but careful reading of the RCM reveals that it may be signed "at any time after the sentence is announced" but "must be *filed* within 10 days after" service of the action (emphasis added)). *Smith*, 44 M.J. at 391-392.

5. RCM 1110(f)(2). The accused may file a withdrawal at any time before appellate review is completed.

6. RCM 1110(g). Once filed in substantial compliance with the rules, the waiver or withdrawal may not be revoked.

a) *United States v. Walker*, 34 M.J. 317 (C.M.A. 1992). Documents purporting to withdraw accused's appeal request were invalid attempt to waive appellate review prior to CA's action.

b) *United States v. Smith*, 34 M.J. 247 (C.M.A. 1992). Waiver of appellate representation 58 days before action by CA was tantamount to waiver of appellate review; therefore, was premature and without effect.

c) *Clay v. Woodmansee*, 29 M.J. 663 (A.C.M.R. 1989). Accused's waiver of appellate review was null and void as it was the result of the government's promise of clemency.

XVII. DISPOSITION OF RECORD OF TRIAL AFTER ACTION. RCM 1111.

A. General Courts-Martial. ROT and CA's action will be sent to the Office of The Judge Advocate General (OTJAG).

B. Special Courts-Martial with an approved BCD will be sent to OTJAG.

C. Special Courts-Martial with an approved BCD and waiver of appeal. Record and action will be forwarded to a Judge Advocate for review (RCM 1112).

D. Other special courts-martial and summary courts-martial will be reviewed by a Judge Advocate under RCM 1112.

XVIII. REVIEW BY A JUDGE ADVOCATE. ARTICLE 64, UCMJ; RCM 1112.

A. A Judge Advocate (JA) shall review:

1. Each general court-martial in which the accused has waived or withdrawn appellate review under RCM 1110.

2. Each special court-martial in which the accused has waived or withdrawn appellate review under RCM 1110 or in which the approved sentence does not include a BCD or confinement for one year.

3. Each summary court-martial.

B. A JA shall review, under service regulations, each case not reviewed under Article 66. AR 27-10, para. 5-45*b*, says this review may be done either by a JA in the Office of the SJA of the convening command or by a JA otherwise under the technical supervision of the SJA.

C. No review required for: total acquittal, a finding of not guilty only by reason of a lack of mental responsibility, or where the CA disapproved all findings of guilty.

D. Disqualification of reviewer for prior participation in case.

E. The review shall be in writing. It shall contain conclusions as to whether the court-martial has jurisdiction over the accused and the offenses, each specification states an offense, and the sentence is legal. The review must respond to each allegation of error made by the accused under RCM 1105, 1106(f), or filed with the reviewing officer directly. If action on the ROT is required by the CA, a recommendation as to the appropriate action and an opinion as to whether corrective action is required must be included.

F. The ROT shall be sent to the GCMCA over the accused at the time the court-martial was held (or to that officer's successor) for supplementary action if: (1) the reviewer recommends corrective action; (2) the sentence approved by the CA includes dismissal, a DD or BCD or confinement in excess of six months; or, (3) service regulations require it.

G. If the reviewing JA recommends corrective action but the GCMCA acts to the contrary, the ROT is forwarded to the Judge Advocate General concerned for review under RCM 1201(b)(2). RCM 1112(g)(1).

H. If the approved sentence includes dismissal, the service Secretary concerned must review the case.

XIX. EXECUTION OF SENTENCE. UCMJ, ARTICLE 71, UCMJ; RCM 1113.

A. A sentence must be approved before it is executed (but confinement, forfeitures, and reduction may be carried out before ordered executed).

B. Confinement, unless deferred is immediate. Forfeitures, both automatic and adjudged, and reduction, unless deferred, take effect fourteen days after sentence is announced or upon action, whichever is earlier.

C. The CA's initial action may order executed all punishments except a DD, BCD, dismissal or death.

D. A Dishonorable Discharge (DD) or Bad-Conduct Discharge (BCD) may be ordered executed only after a final judgment within the meaning of RCM 1209 has been rendered in the case. If on the date of final judgment, a servicemember is not on appellate leave and more than six months have elapsed since approval of the sentence by the CA, before a DD or BCD may be executed, the officer exercising GCM jurisdiction over the servicemember shall consider the advice of that officer's SJA as to whether retention would be in the best interest of the service. Such advice shall include the findings and sentence as finally approved, the nature and character of duty since approval of the sentence by the CA, and a recommendation whether the discharge should be executed.

1. *United States v. Estrada*, 68 M.J. 548 (A. Ct. Crim. App. 2009), *aff'd*, 69 M.J. 45 (C.A.A.F. 2010). Purported honorable discharge given before bad-conduct discharge could be executed was void. AR 27-10, para. 5-16 automatically voided any purported discharge because the honorable discharge occurred prior to initial action.

2. *United States v. McPherson*, 68 M.J. 526 (A. Ct. Crim. App. 2009), *aff'd*, 68 M.J. 408 (C.A.A.F. 2009) (summary disposition). Purported honorable discharge given before bad-conduct discharge could be executed was not void and remits any approved bad-conduct discharge. The honorable discharge in this case occurred after initial action (after a prior honorable discharge issued before initial action was revoked as void).

3. *United States v. Watson*, 69 M.J. 623 (A. Ct. Crim. App. 2010), *review granted*, 69 M.J. __ (C.A.A.F. 2010). Prior to CA Action, the appellant, a reserve officer, was released from active duty (REFRAD). After CA Action that approved her dismissal, she received an honorable discharge. Because the proper authority (Commander, HRC, St. Louis) voided the erroneous honorable discharge, the dismissal was not remitted.

4. *United States v. Brasington*, No. 20060033, 2010 WL 3582596 (A. Ct. Crim. App. Sept. 13, 2010) (unpublished). Purported honorable discharge given by reserve component of Human Resources Command (Soldier was an active duty Soldier, not reserve) was issued in error and withdrawn by the same command after a request from the Personnel Control Facility. The ACCA held that the reserve component of HRC did not have the authority to discharge the appellant, and his discharged was voidable.

E. Dismissal of a commissioned officer, cadet or midshipman may be approved and ordered executed only by the Secretary concerned or such Under Secretary or Assistant Secretary as the Secretary concerned may designate.

F. Death. A punishment of death may be ordered executed only by the President.

XX. PROMULGATING ORDERS. ARTICLE 76, UCMJ; RCM 1114.

A. A summary of the charges and specifications is authorized. *See* MCM, Appendix 17. *See also* United States Army Court of Criminal Appeals, Office of the Clerk of Court, Post Trial Handbook (2009).

B. The specifications and findings in the promulgating order need to sufficiently apprise a third party of the specific offenses that the accused was tried on. Stating "AWOL" without more is defective because it lacks sufficient specificity to prevent against subsequent prosecution for the same offense.

1. *United States v. Glover*, 57 M.J. 696 (N-M. Ct. Crim. App. 2002). RCM 1114(c) requires that the charges and specifications either be stated verbatim or summarized. The promulgating order in this case did neither, providing "no useful information about the offenses" the appellant was convicted of except for the number of the UCMJ Article that was violated. *Id*. at 697. Held: the promulgating order failed to comply with RCM 1114(c) and absent a verbatim summary of the specification, a "meaningful summary" must be provided. *Id*. at 698. The court provided relief in its decretal paragraph, affirming the findings and sentence and ordering that a supplemental promulgating order be issued in compliance with its decision.

2. *United States v. Suksdorf*, 59 M.J. 544 (C.G. Ct. Crim. App. 2003). Promulgating order that omits suspension of confinement in excess of 150 days and incorrectly reflects the pleas and findings at trial is erroneous. Similarly, an action which fails to reflect a required suspension of confinement is erroneous. Despite these errors, the appellant failed to allege any prejudice since he was released from confinement at the appropriate time and did not serve any confinement in excess of the required 150 days. Although Article 66, UCMJ, "does not provide general authority for a court of criminal appeals to suspend a sentence, [the CAAF has recognized a service court's] authority to do so when a convening authority failed to comply with the terms of a pretrial agreement requiring suspension of some part of a sentence." *Id*. at 547. As for the lack of attention to detail in the post-trial processing of the case, the CGCCA noted that post-trial processing is "not

rocket science, and careful proof-reading of materials presented to the convening authority, rather than inattention to detail, would save time and effort for all concerned." In affirming the findings and sentence, the CGCCA suspended confinement in excess of 150 days and directed the CA to issue a new promulgating order.

XXI. ACTION BY THE JUDGE ADVOCATE GENERAL. ARTICLES 66 AND 69, UCMJ; RCM 1201.

A. Cases automatically reviewed by a Court of Criminal Appeals (Article 66).

1. Cases in which the approved sentence includes death.

2. Cases in which the approved sentence includes a punitive discharge or confinement for a year or more.

B. Scope of CCA review: both law and fact.

1. *United States v. Clifton*, 35 M.J. 79 (C.M.A. 1992). Courts of Military Review need not address in writing all assignments of error, so long as the written opinion notes that judges considered any assignments of error and found them to be without merit.

2. *United States v. Quigley*, 35 M.J. 345 (C.M.A. 1992). Choice of whether to call appellate court's attention to issue rests with counsel, although choice is subject to scrutiny for effective assistance of counsel in each case.

3. *United States v. Gunter*, 34 M.J. 181 (C.M.A. 1992). Error for CMR to deny accused's motion to submit handwritten matter for consideration by that court (detailed summary by appellate defense counsel not sufficient).

C. Power of Courts of Criminal Appeals (CCAs). UCMJ, Article 66(c):

1. "It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses."

2. *United States v. Cole*, 31 M.J. 270 (C.M.A. 1990). "Article 66(c)['s] . . . awesome, plenary, *de novo* power of review" grants CCAs the authority to substitute their judgment for that of the MJ. It also allows a "substitution of judgment" for that of the court members.

3. *United States v. Claxton*, 32 M.J. 159 (C.M.A. 1991). A "*carte blanche*" to do justice. J. Sullivan in dissent notes CCAs are still bound by the law.

4. *United States v. Keith*, 36 M.J. 518 (A.C.M.R. 1992). In appropriate case, the ACMR may fashion equitable and meaningful remedy regarding sentence.

5. *United States v. Smith*, 39 M.J. 448 (C.M.A. 1994). Plenary, *de novo* power of CCA does not include finding facts regarding allegations of which fact finder has found accused not guilty.

6. *United States v. Lewis*, 38 M.J. 501 (A.C.M.R. 1993), *aff'd*, 42 M.J. 1 (C.A.A.F. 2005). Appellate court has authority to investigate allegations of IAC, including authority to order submission of affidavits and a hearing before a MJ.

7. *United States v. Joyner*, 39 M.J. 965 (A.F.C.M.R. 1994). In reviewing severity of sentence, appellate court's duty is to determine whether accused's approved sentence is correct in law and fact based on individualized consideration of nature and seriousness of offense and character of accused. *United States v. Smith*, 56 M.J. 653 (A. Ct. Crim. App. 2001) (holding that nine-year sentence for escape from Disciplinary Barracks and related offenses not inappropriately severe even though co-accused and individual who initiated

the scheme to escape only received three years). *See also United States v. Hundley*, 56 M.J. 858 (N-M. Ct. Crim. App. 2002); *United States v. Ransom*, 56 M.J. 861 (A. Ct. Crim. App. 2002).

8. *United States v. Ragard*, 56 M.J. 852 (A. Ct. Crim. App. 2002). Clemency power is not within the powers granted to appellate courts by Article 66, UCMJ. Appellant argued that his medical condition (having AIDS) made his dismissal an inappropriately severe sentence because his dismissal would limit his access to medical care. The Army court disagreed, noting that sentence appropriateness involves a judicial function of ensuring that the accused gets the punishment deserved while clemency involves "bestowing mercy."

9. *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986). Appellate court may reassess a sentence if it is convinced that the sentence would have been of at least a certain magnitude, even if there is no error. If there is an error, such a reassessment must purge the prejudicial impact of the error. If the error was of constitutional magnitude, the court must be persuaded beyond a reasonable doubt that its reassessment has rendered any error harmless. If the appellate court cannot be certain that the prejudicial impact can be eliminated by reassessment and that the sentence would have been of a certain magnitude, it must order a rehearing on sentence. *See also United States v. Harris*, 53 M.J. 86 (C.A.A.F. 2000) (noting that appellate courts must also make the same determination if a sentence has been reassessed by a convening authority).

a) *United States v. Doss*, 57 M.J. 182 (C.A.A.F. 2002). Appellant convicted of assault consummated by a battery, assault with a dangerous weapon, and soliciting another to murder his wife. At trial, the DC presented no evidence on appellant's mental condition other than his unsworn statement. On appeal, the NMCCA found appellant's defense counsel ineffective during the sentencing portion of the trial by failing to present evidence of appellant's mental condition. The court reassessed the appellant's sentence and reduced the period of confinement from eight to seven years. On appeal, the CAAF found that the DC's omissions could not be cured (i.e., rendered harmless beyond a reasonable doubt) by reassessing the sentence because it was impossible to determine what evidence a competent defense counsel would have presented. The court, therefore, held that the lower court abused its discretion in reassessing the sentence instead of ordering a rehearing.

b) *United States v. Mitchell*, 58 M.J. 446 (C.A.A.F. 2003). Appellant convicted of, among other offenses, five drug distribution specifications and sentenced to a BCD, ten years confinement, total forfeitures, and reduction to E-1. On appeal, the ACCA set aside two distribution specifications and ordered a rehearing on sentence. On rehearing, the appellant was sentenced to a DD, six years confinement, and reduction to E-1. The ACCA affirmed the sentence finding that under an objective standard, a reasonable person would not view the rehearing sentence as "in excess of or more severe than" the original sentence; therefore, Article 63, UCMJ, and RCM 810(d)(1) were not violated. The CAAF reversed as to sentence, finding that a DD is more severe than a BCD and no objective equivalence is available when comparing a punitive discharge with confinement. The CAAF affirmed only so much of the sentence as provided for a BCD, six years confinement, and reduction to E-1.

10. *United States v. Commander*, 39 M.J. 972 (A.F.C.M.R. 1994). Appellate courts may examine disparate sentences when there is direct correlation between each accused and their respective offenses, sentences are highly disparate, and there are no good and cogent

reasons for differences in punishment. *See also United States v. Kelly*, 40 M.J. 558 (N.M.C.M.R. 1994).

11. *United States v. Pingree*, 39 M.J. 884 (A.C.M.R. 1994) (inappropriately severe sentence reassessed, dismissal disapproved). *See also United States v. Hudson*, 39 M.J. 958 (N.M.C.M.R. 1994) (court disapproved BCD); *United States v. Triplett*, 56 M.J. 875 (A. Ct. Crim. App. 2002) (court reduced accused period of confinement from fifteen years to ten years based on the five- and six-year sentences two co-accused received).

12. *United States v. Dykes*, 38 M.J. 270 (C.M.A. 1993). Standard for ordering post-trial hearing on issue presented to appellate court:

a) Not required where no reasonable person could view opposing affidavits, in light of record of trial, and find the facts alleged by accused to support claim.

b) Required where substantial unresolved questions concerning accused's claim.

13. *United States v. Fagan*, 58 M.J. 534 (A. Ct. Crim. App. 2003), *rev'd*, 59 M.J. 238 (C.A.A.F. 2004). The lower court was correct in holding that *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997)[1] provides the proper analytical framework for dealing with a post-trial affidavit raising a claim of cruel and unusual punishment. The lower court, however, erred in holding that it could grant relief at its level "in lieu of ordering a *DuBay* hearing (*United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967)), to resolve the disputed factual issues raised by the appellant's affidavit. "The linchpin of the *Ginn* framework is the recognition that a Court of Criminal Appeals' fact-finding authority under Article 66(c) does not extend to deciding disputed questions of fact pertaining to a post-trial claim, solely or in part on the basis of conflicting affidavits submitted by the parties." 59 M.J. 238, 242 (C.A.A.F. 2004). Finally, the lower court erred in finding a conflict, "where none exists" between *Ginn* and *United States v. Wheelus*, 49 M.J. 283 (C.A.A.F. 1998). 59 M.J. at 243. "The exercise of the 'broad power' referred to in *Wheelus* flowed from the existence of an acknowledged legal error or deficiency in the post-trial review

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[1] In *United States v. Ginn*, the CAAF established six principles for dealing with allegations of error raised for the first time on appeal in a post-trial affidavit:

> First, if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in the appellant's favor, the claim may be rejected on that basis.
>
> Second, if the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis.
>
> Third, if the affidavit is factually adequate on its face to state a claim of legal error and the Government either does not contest the relevant facts or offers and affidavit that expressly agrees with those facts, the Court can proceed to decide the legal issues on the basis of those uncontroverted facts.
>
> Fourth, if the affidavit is factually adequate on its face but the appellate filings and the record as a whole "compellingly demonstrate" the improbability of those facts, the Court may discount those factual assertions and decide the legal issue.
>
> Fifth, when an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and appellant's expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal.
>
> Sixth, the Court of Criminal Appeals *is required to order a factfinding hearing only when the above-stated circumstances are not met. In such circumstances the court must remand the case to the trial level for a DuBay proceeding.*

Fagan, 58 M.J. at 537 (emphasis in original).

process. It is not a 'broad power to moot claims of prejudice' in the absence of acknowledged legal error or deficiency, nor is it a mechanism to 'moot claims' as an alternative to ascertaining whether a legal error or deficiency exists in the first place." 59 M.J. at 244.

14. *United States v. Campbell*, 57 M.J. 134 (C.A.A.F. 2002). Standard for handling post-trial discovery issues:

> a) Has appellant met his threshold burden of demonstrating that some measure of appellate inquiry is warranted? If no – stop. If yes, then –
>
> b) What method of review should be used (e.g., affidavits, interrogatories, fact-finding hearing, etc.)?

15. *United States v. Hutchison*, 57 M.J. 231 (C.A.A.F. 2002). Sentence review limited to determining appropriateness of sentence. Consideration of whether civilian criminal prosecution was "appropriate" is an improper consideration for the CCA.

16. *United States v. Perron*, 58 M.J. 78 (C.A.A.F. 2003). Appellate courts (i.e., CCAs) cannot impose alternative relief on an unwilling appellant to rectify a mutual misunderstanding of a material term of a PTA. Appellant must consent to the proposed relief or be afforded the opportunity to withdraw from the prior plea. *But see United States v. Lundy*, 63 M.J. 299 (C.A.A.F. 2006).

17. *United States v. Holt*, 58 M.J. 227 (C.A.A.F. 2003). The lower court (AFCCA) erred, depriving the appellant of a proper Article 66(c) review limited to the record of trial, when it considered numerous exhibits for the truth of the matters asserted, "alter[ing] the evidentiary quality of the [exhibits]" when the military judge ruled otherwise and instructed the members that they were not to consider the cited evidence for the truth of the matters asserted. *Id*. at 233. "Article 66(c) limits the Courts of Criminal Appeals to a review of the facts, testimony, and evidence presented at trial, and precludes a Court of Criminal Appeals from considering 'extra-record' matters when making determinations of guilt, innocence, and sentence appropriateness (citation omitted). Similarly, the Courts of Criminal Appeals are precluded from considering evidence excluded at trial in performing their appellate review function under Article 66(c)." *Id*. at 232.

18. *United States v. Osuna*, 58 M.J. 879 (C.G. Ct. Crim. App. 2003). Appellate courts are limited, absent clearly erroneous findings or legal error, to the factual determinations made by prior panels of that court. In appellant's first appeal, the court affirmed the findings but remanded for a new review and action because there was no evidence that the CA considered the appellant's clemency submissions or that he was ever advised to consider the defense's written submissions. C.J. Baum, in the first appeal, dissented re: findings on several offenses citing to a lack of factual sufficiency. On appeal the second time, the appellant renewed his challenge to the findings. The court, in an opinion authored by C.J. Baum, held "it would be inappropriate for us to readdress our previous factual determination, absent a legal error necessitating such action." *Id*. at 880.

19. *United States v. Castillo*, 59 M.J. 600 (N-M. Ct. Crim. App. 2003). The appellant was convicted of unauthorized absence terminated by apprehension and sentenced to reduction to E-1, fifty-one days confinement, and a BCD. On appeal [*Castillo I*], the appellant alleged that her sentence was inappropriately severe, an allegation that the court agreed with, setting aside the CA's action and remanding with the following direction:

> The record will be returned to The Judge Advocate General for remand to the [CA], who may upon further consideration approve an adjudged sentence no greater than one including a discharge *suspended* under proper conditions.

Id. at 601 (*quoting United States v. Castillo*, No. 200101326, 2002 WL 1791911 (N-M. Ct. Crim. App. Jul. 31, 2002) (unpublished)). Upon remand, the SJAR erroneously advised the CA that the appellate court "recommended" that the punitive discharge be set aside. The defense counsel disagreed with the SJAR noting that the guidance from the NMCCA was not a recommendation. The CA, following the SJA's advice, again approved a punitive discharge. Held: the CA's decision to disregard the court's guidance was "a clear and obvious error," a decision based on advice that was similarly "clearly erroneous" and "misguided." *Id*. Finally, the court advised that "[p]arties practicing before trial and appellate courts have only three options when faced with [their] rulings [: comply with the decision, request reconsideration, or appeal to the next higher authority to include certification of an issue by the Judge Advocate General]." *Id*. In exercising its sentence appropriateness authority under Article 66(c), UCMJ, the court approved only so much of the sentence as provided for reduction to E-1 and 51 days confinement, and disapproved the BCD.

20. Extraordinary Writs and Government Appeals.

D. Cases reviewed by TJAG (Article 69(a)).

1. Those GCMs when the approved sentence does not include a dismissal, DD, or BCD, or confinement for a year or more (Article 69(a)).

2. Those cases where a JA finds, under RCM 1112, that as a matter of law corrective action should be taken and the GCMCA does not take action that is at least as favorable to the accused as that recommended by the JA (RCM 1112(g)(l)).

3. Cases which have been finally reviewed, but not reviewed by a CCA or TJAG (per RCM 1201(b)(1)), may *sua sponte* or upon application of the accused under Article 69(b) be reviewed on the grounds of:

a) Newly discovered evidence.

b) Fraud on the court.

c) Lack of jurisdiction.

d) Error prejudicial to the substantial rights of the accused.

e) Appropriateness of the sentence.

4. TJAG may consider if the sentence is appropriate and modify or set aside the findings or sentence.

5. TJAG has the power to authorize a rehearing.

E. United States Army Legal Services Agency (USALSA).

1. Army Court of Criminal Appeals (Article 66, UCMJ).

2. Defense Appellate Division (Article 70, UCMJ).

3. Government Appellate Division (Article 70, UCMJ).

4. Examination and New Trials Division (Article 69, UCMJ).

XXII. REVIEW BY THE COURT OF APPEALS FOR THE ARMED FORCES. ARTICLES 67 & 142, UCMJ; RCM 1204.

A. Authorized five judges since 1 October 1990.

B. Expanded role of Senior Judges.

C. Service of Article III Judges.

D. Cases reviewed.

1. All cases in which the sentence as approved by a Court of Criminal Appeals extends to death.

2. All cases reviewed by a Court of Criminal Appeals which TJAG orders sent to the CAAF for review.

3. All cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the CAAF has granted a review.

4. Extraordinary writ authority.

E. *United States v. Schoof*, 37 M.J. 96 (C.M.A. 1993). Equal protection and due process challenge to TJAG's authority to certify issues under Article 67.

F. *United States v. Jones*, 39 M.J. 315 (C.M.A. 1994). Power of the CAAF usually does not include making sentence-appropriateness determinations; that is the province of the Courts of Criminal Appeals.

G. *United States v. Rodriguez*, 67 M.J. 110 (C.A.A.F. 2009). Article 67(b), UCMJ, provides that the appellant has sixty days from the date of notification of a Court of Criminal Appeals decision to petition the Court of Appeals for the Armed Forces for review. The appellant in this case filed his petition for review approximately 73 days after notification of the NMCCA decision. The United States Supreme Court decided *Bowles v. Russell*, 551 U.S. 205 (2007), shortly before the NMCCA decision in this case. *Bowles* concluded that statutory periods within which an accused may file a petition for review are jurisdictional. The CAAF holds that Article 67(b) is jurisdictional. Appeal was outside the authority of the CAAF to grant.

H. Abatement *Ab Initio*. *United States v. Rorie*, 58 M.J. 399 (C.A.A.F. 2003). Appeal to the CAAF under Article 67(a)(3), UCMJ, is a matter of discretion and NOT a matter of right. As such, the CAAF will no longer grant abatement *ab initio* upon death of an appellant pending Article 67(a)(3) appellate review, reversing a policy followed by the court since 1953. Abatement *ab initio* is a "matter of policy in Federal courts," not mandated by the Constitution or statute, and is not part of the Rules of Practice and Procedures for the CAAF. By reversing its prior 50-year policy, the court is now in line with the rule established by the Supreme Court in *Dove v. United States*, 423 U.S. 325 (1976). To the extent that *United States v. Kuskie*, 11 M.J. 253 (C.M.A. 1981) and *Berry v. The Judges of the United States Army Court of Military Review*, 37 M.J. 158 (C.M.A. 1983) are inconsistent with this decision, they were overruled. *See also United States v. Ribaudo*, 62 M.J. 286 (C.A.A.F. 2006).

XXIII. REVIEW BY THE SUPREME COURT. ARTICLE 67a, UCMJ; RCM 1205.

A. Decisions of the Court of Appeals for Armed Forces may be reviewed by the Supreme Court by writ of certiorari.

B. The Supreme Court may not review by writ of certiorari any action of CAAF in refusing to grant a petition for review.

XXIV. POWERS AND RESPONSIBILITIES OF THE SECRETARY. RCM 1206.

Sentences that extend to dismissal of a commissioned officer, cadet, or midshipman may not be executed until approved by the Secretary concerned or his designee.

XXV. SENTENCES REQUIRING APPROVAL BY THE PRESIDENT. RCM 1207.

That part of a court-martial sentence extending to death may not be executed until approved by the President.

XXVI. FINALITY OF COURTS-MARTIAL. RCM 1209.

A. When is a conviction final?

1. When review is completed by a Court of Criminal Appeals and —

a) The accused does not file a timely petition for review by CAAF and the case is not otherwise under review by that court; or

b) A petition for review is denied or otherwise rejected by CAAF; or

c) Review is completed in accordance with the judgment of CAAF and:

(1) A petition for a writ of certiorari is not filed within applicable time limits;

(2) A petition for a writ of certiorari is denied or otherwise rejected by the Supreme Court; or,

(3) Review is otherwise completed in accordance with the judgment of the Supreme Court.

2. In cases not reviewed by a Court of Criminal Appeals.

a) When the findings and sentence have been found legally sufficient by a JA, and when action by such officer is required, have been approved by the GCMCA, or

b) The findings and sentence have been affirmed by TJAG when review by TJAG is required under RCM 1112(g)(1) or 1201(b)(1).

B. *United States v. Jackson*, 38 M.J. 744 (A.C.M.R. 1993). Abatement after death of appellant, before appeal to Court of Military Appeals. *See also United States v. Huey*, 57 M.J. 504 (N-M. Ct. Crim. App. 2002) (findings and sentence set aside based on accused's death prior to final action – motions to vacate and attach granted). *But see United States v. Rorie*, 58 M.J. 399 (C.A.A.F. 2003) (the CAAF will no longer grant abatement *ab initio* upon death of an appellant pending Article 67(a)(3) appellate review, reversing a policy followed by the court since 1953).

C. Finality and execution of sentences.

1. A DD or BCD may be ordered executed only after a final judgment within the meaning of RCM 1209.

2. Dismissal may be approved and ordered executed only by the Secretary concerned.

3. Only President may order execution of death penalty.

XXVII. PETITION FOR A NEW TRIAL. ARTICLE 73, UCMJ; RCM 1210

A. Within 2 years of initial action by the CA.

B. Requirements:

1. Evidence discovered after trial or fraud on the court.

2. Evidence not such that it would have been discovered by petitioner at time of trial in exercise of due diligence.

3. Newly discovered evidence, if considered by a court-martial in light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

C. Approval authority: OTJAG, CCA, or CAAF.

D. Concern for avoiding *manifest injustice* is adequately addressed in three requirements in RCM 1210(f)(2). *United States v. Williams*, 37 M.J. 352 (C.M.A. 1993).

E. *United States v. Hanson*, 39 M.J 610 (A.C.M.R. 1994). Petition for new trial based on newly discovered evidence.

XXVIII. ASSERTIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

A. *United States v. Lewis*, 42 M.J. 1 (C.A.A.F. 1995). Counsel's refusal to submit handwritten letter as part of post-trial matters was error. Counsel may advise client on contents of post-trial matters but final decision is the client's. The CAAF rejects the ACCA's procedures for handling IAC allegations, originally set out in *United States v. Burdine*, 29 M.J. 834 (A.C.M.R. 1989). Trial defense counsel should not be ordered to explain their actions until a court reviews the record and finds sufficient evidence to overcome the presumption of competence.

B. *United States v. Burdine*, 29 M.J. 834 (A.C.M.R. 1989). Two key points:

1. When the accused specifies error in his request for appellate representation or in some other form, appellate defense counsel will, at a minimum, invite the attention of the CCA to those issues and it will, at a minimum, acknowledge that it has considered those issues and its disposition of them.

2. Guidelines for resolving IAC allegations:

a) Appellate counsel must ascertain with as much specificity as possible grounds for IAC claim.

b) Appellate defense counsel then will allow the appellant the opportunity to make his assertions in the form of an affidavit (explaining the affidavit is not a requirement, but also pointing out that it will "add credence" to his allegations).

c) Appellate defense counsel advises the accused that the allegations relieve the DC of the duty of confidentiality with respect to the allegations.

d) Appellate government counsel will contact the DC and secure affidavit in response to the IAC allegations.

C. *United States v. Dresen*, 40 M.J. 462 (C.M.A. 1994). Counsel's request, in clemency petition, for punitive discharge was contrary to wishes of accused and constituted inadequate post-trial representation. Returned for new PTR and action.

D. *United States v. Pierce*, 40 M.J. 149 (C.M.A. 1994). Factual dispute as to whether DC waived accused's right to submit matters to the CA. Held: where DC continues to represent accused post-trial, there must be some showing of prejudice before granting relief based on premature CA action. Any error by failing to secure accused's approval of waiver was not prejudicial in this case.

E. *United States v. Aflague*, 40 M.J. 501 (A.C.M.R. 1994). Where there is no logical reason for counsel's failure to submit matters on behalf of an accused and where the record glaringly calls for the submission of such matters, the presumption of counsel effectiveness has been overcome and appellate court should do something to cleanse the record of this apparent error.

F. *United States v. Robertson*, 39 M.J. 211 (C.M.A. 1994). Defense counsel submitted no post-trial clemency/response documents. Accused did not meet burden of showing that counsel did not exercise due diligence.

G. *United States v. Carmack*, 37 M.J. 765 (A.C.M.R. 1993). Defense counsel neglected to contact accused (confined at USDB) regarding post-trial submissions. Court admonished all defense counsel to live up to post-trial responsibilities; also, admonished SJAs and CAs to "clean up the battlefield" as much as possible.

H. *United States v. Sanders*, 37 M.J. 628 (A.C.M.R. 1993). Court unwilling to adopt *per se* rule that DCs must submit post-trial matters in all cases.

I. *United States v. Jackson*, 37 M.J. 1045 (N.M.C.M.R. 1993). Since clemency is sole prerogative of CA, where defense counsel is seriously deficient in post-trial representation, court reluctant to substitute its judgment for that of CA.

J. *United States v. Gilley*, 56 M.J. 113 (C.A.A.F. 2001). IAC in submitting three post-trial documents which were not approved or reviewed by appellant and which seriously undermined any hope of getting clemency; the CAAF also found IAC in counsel's trial performance.

K. *United States v. Key*, 57 M.J. 246 (C.A.A.F. 2002). Without holding, the CAAF hints that counsel may be ineffective if they fail to advise the client on his post-trial right to request waiver of forfeitures for the benefit of his dependents.

L. *United States v. Starling*, 58 M.J. 620 (N-M. Ct. Crim. App. 2003). The appellant was not denied post-trial effective assistance of counsel by his counsel's failure to submit clemency matters. The court went on to establish a prospective standard for handling IAC allegations resulting from a failure to submit evidence on sentencing or during post-trial:

> [A]bsent a clear indication of inaction by the defense counsel when action was compelled by the situation, future claims of inadequate representation for failure to exercise sentencing rights or post-trial rights will not be seriously entertained without the submission of an affidavit by the appellant stating how counsel's inaction contrasted with his wishes. If the claim involves the failure to submit matters for consideration, the content of the matters that would have been submitted must be detailed.

Id. at 623.

M. *Diaz v. The Judge Advocate General of the Navy*, 59 M.J. 34 (C.A.A.F. 2003). Article 66, UCMJ, and Due Process entitle appellants to timely post-trial and appellate review. In so holding, the court noted the following: "the standards for representation of servicemembers by military or civilian counsel in military appellate proceedings are identical" and the "duty of diligent representation owed by detailed military counsel to servicemembers is no less than the duty of public defenders to indigent civilians." *Id*. at 38-39. Finally, the differences between the military justice system as compared to the civilian system, to include the [military] appellate courts' unique fact finding authority, compel even "greater diligence and timeliness than is found in the civilian system." *Id*. at 39. *See also United States v. Brunson*, 59 M.J. 41 (C.A.A.F. 2003) (counsel have a duty to aggressively represent their clients before military trial and appellate courts, late filings and flagrant or repeated disregard for court rules subject the violator to sanctions). *Id*. at 43.

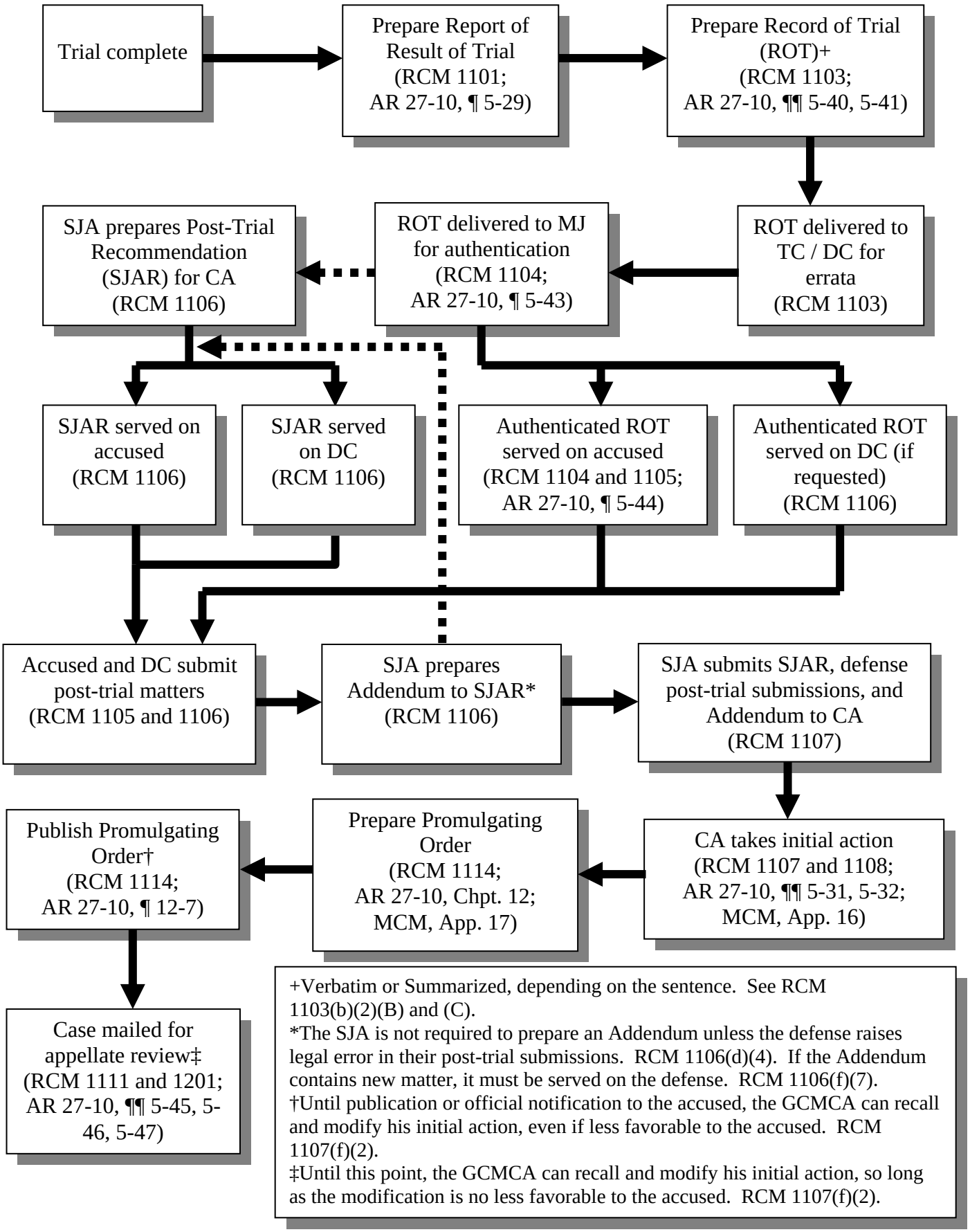
XXIX. RELEASE FOR CONFINEMENT *PENDENTE LITE*.

A. *Moore v. Akins*, 30 M.J. 249 (C.M.A. 1990). Moore successfully appealed his rape convictions before NMCMR and sought release from confinement pending the government's appeal to the C.M.A. Held:

> 1. Under the All Writs Act, 28 U.S.C. 1651, C.M.R. and C.M.A. have authority to order deferment of confinement pending completion of appellate review.
>
> 2. If the accused has won a "favorable decision from the Court of Military Review," and "the situation is one in which the Government could establish a basis for pretrial confinement (*see* RCM 305), then it should have the opportunity to show why the accused should be kept in confinement pending the completion of appellate review. This can best be handled by ordering a hearing before a military judge or special master [for a determination similar to that for pretrial confinement]."

XXX. CONCLUSION.

Typical General/Special Court-Martial Post-Trial Processing



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TAB Y

CORRECTIONS, CLEMENCY, & PAROLE

TAB Y

Table of Contents

I. INTRODUCTION 1

II. REFERENCES 1

III. CORRECTIONS 2

IV. CLEMENCY & PAROLE 5

V. OFFICER RESIGNATIONS FOR THE GOOD OF THE SERVICE (RFGOS) 7

VI. DISMISSAL/DROP FROM THE ROLLS/SEPARATION AFTER SIX MONTHS CONFINEMENT 8

VII. RESOURCES 8

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January 2011

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CORRECTIONS, CLEMENCY, & PAROLE

I. INTRODUCTION

A. The military, as well as society recognizes five principal reasons when determining an appropriate sentence once an individual has been convicted. Those reasons are rehabilitation, punishment, protection of society, preservation of good order and discipline, and deterrence. The types of sentences that a court-martial panel member or military judge may impose include no action, reduction in rank, forfeitures, fine, hard labor without confinement, confinement, punitive discharge or in the case of an officer a dismissal.

II. REFERENCES

A. Chapter 47 -- *Uniform Code of Military Justice*, 10 U.S.C. §§ 801 -- 946.

B. Chapter 48 -- *Military Correctional Facilities*, 10 U.S.C. §§ 951 -- 956.

C. Chapter 59 -- Commissioned officers: limitations on dismissal, 10 U.S.C. §1161.

D. Chapter 59 -- Members under confinement by sentence of court-martial: separation after six months confinement, 10 U.S.C. §1167.

E. Chapter 79 -- Correction of Military Records, 10 U.S.C. §1552 -- Correction of military records: claims incident thereto.

F. Chapter 79 -- Correction of Military Records, 10 U.S.C. §1553 -- Review of discharge or dismissal.

G. *28 CFR 2.1 -2.67*, Parole, Release, Supervision and Recommitment of Prisoners . . . .Judicial Administration, Department of Justice (U.S. Parole Commission Rules).

H. DoD Directive 1325.4, Confinement of Military Prisoners and Administration of Military Correctional Programs and Facilities, April 23, 2007.

I. DoD Instruction 1332.30, Separation of Regular and Reserve Commissioned Officers, December 11, 2008.

J. DoD Directive 1332.41, Boards for Correction of Military Records (BCMRs) and Discharge Review Boards (DRBs), March 8, 2004.

K. DoD Instruction 1325.7, Administration of Military Correctional Facilities and Clemency and Parole, July 17, 2001; C1, June 10, 2003.

L. DoD Instruction 1332.28, Discharge Review Boards (DRB) Procedures and Standards, April 4, 2004.

M. DoD 1325.7-M, DoD Sentence Computation Manual, July 27, 2004.

N. AR 15-80, Army Grade Determination Review Board and Grade Determinations, 12 July 2002.

O. AR 15-130, *Army Clemency and Parole Board*, 23 October 1998 (under revision).

P. AR 15-180, *Army Discharge Review Board*, 20 March 1998.

Q. AR 15-185, Army Board for Correction of Military Records, 31 March 2006.

R. AR 27-10, *Military Justice*, 16 November 2005.

S. AR 190-47, The Army Corrections System, 15 June 2006.

T. AR 600-8-24, Officer Transfers and Discharges, 12 April 2006.

U. AR 633-30, AFR 125-30, *Military Sentences to Confinement*, 28 February 1989.

V. AR 600-8-10, Leaves and Passes: Personal Absences, 15 February 2006.

W. SECNAVINST 1640.9C, Department of the Navy Corrections Manual, 3 January 2006.

X. SECNAVINST 1920.6C, *Administrative Separation of Officers*, 15 December 2005, with Chg 1, 19 September 2007.

Y. SECNAVINST 5420.193, *Board for Correction to Naval Records*, 19 November 1997.

Z. SECNAVINST 5815.3J, Department of the Navy Clemency and Parole Systems, 12 June 2003.

AA. AFI 31-205, The Air Force Corrections System, 7 April 2004.

BB. AFI 36-2603, Air Force Board for Correction of Military Records, 1 March 1996.

CC. AFI 36-3203, *Personnel – Service Retirements*, 8 September 2006, with Chg 2, 14 September 2009.

DD. Coast Guard Personnel Manual, COMTINST M1000.6A, thru Change 41, 18 June 2007.

III. CORRECTIONS

A. DoD policy states that the Military Services' correction programs should strive to achieve uniformity, effectiveness, and efficiency in the administration of corrections functions. Additionally, the Military Departments shall administer the clemency and parole programs to foster safe and appropriate release of military offenders under such terms and conditions that are consistent with the needs of society, the rights of victims, and the rehabilitation of the prisoner. DoD Instruction 1325.7, *Administration of Military Correctional Facilities and Clemency and Parole*, July 17, 2001; C1, June 10, 2003.

B. Military corrections have three objectives:

1. Provide a safe and secure environment for the incarceration of military offenders;

2. Protect the community from offenders;

3. Prepare military prisoners for their release whether return to duty or civilian status with the prospect of becoming productive Soldier/citizens for conforming to military or civilian environments.

C. DoD Correctional Facilities include confinement facilities, Regional Corrections Facilities (RCFs), and a centralized, long-term corrections facility, the United States Disciplinary Barracks (USDB).

1. Confinement facilities (Level 1) provide pretrial and short-term post-trial confinement support. Each service will determine the time limit for confinement at each of its level one facilities. The current norm for the Army is up to 90 days; when necessary the Level 1 facility may confine prisoners more than 90 days, but may not exceed 1 year. A Level 1 facility provides custody and control, administrative support, and limited counseling support for military prisoners. There are currently four Level 1 military facilities:

a) Mannheim, GE Correctional Facility,

b) Camp Humphries, Korea Correctional Facility,

c) Norfolk, VA, Naval Brig, and

d) Quantico, VA Marine Corps Brig .

2. Regional Corrections Facilities (RCF) (Level 2) house prisoners sentenced to confinement of five (5) years or less. For sentences over five years, each Service must evaluate its prisoners to determine whether they can be appropriately confined at a RCF (Level 2 facility). A Level 2 facility provides multifaceted correctional treatment programs, vocational and military training, administrative support, basic educational opportunity, employment, selected mental health programs, custodial control, and training to prepare military prisoners for return to duty, if deemed suitable, or to civilian society as a productive citizen. There are six Level 2 RCFs:

a) Fort Lewis, WA Regional Correctional Facility,

b) Fort Sill, OK Regional Correctional Facility,

c) Charleston, SC Naval Brig,

d) Miramar, CA Naval Brig (also used as Level 2 & 3 for all women),

e) Camp Lejeune, NC Marine Corps Brig, and

f) Camp Pendleton, CA Marine Corps Brig.

D. Federal Bureau of Prisons (FBOP) Facilities.

1. Prisoners with approved sentences to confinement may be transferred to a FBOP facility with the concurrence or by direction of the appropriate Secretary of Military Department or designee.

2. Authority to transfer the prisoners to the FBOP confers no right on prisoners to request transfer.

3. Factors considered when determining whether to transfer a prisoner to a FBOP include:

a) The prisoner's demonstrated potential for return to military service or rehabilitation.

b) The nature and circumstances of the prisoner's offenses.

c) The prisoner's incarceration record, including participation in rehabilitation programs.

d) The status of the prisoner's court-martial appeal and involvement in other legal proceedings.

e) The nature and circumstances of the prisoner's sentence, including length of sentence to confinement.

f) The prisoner's age.

g) Any other special circumstances relating to the prisoner, the needs of the Service, or the interests of national security.

4. Commitments based on lack of mental capacity to stand trial or acquittal because of lack of mental capacity at time of offense are transferred to the FBOP. See AR 190-47, para 3-4, R.C.M 706, R.C.M. 909, and 18 U.S.C. §§ 4241(d) & 4246.

E. The Department of the Army, Provost Marshal General determines the place of incarceration for prisoners who are sentenced to more than 30 days based on operational requirements and programs.

F. Prisoner Status.

1. Pretrial prisoner: a person subject to the UCMJ who is properly ordered to confinement pending preferral of charges, disposition of charges, or trial by court-martial, or a person properly ordered to confinement while awaiting trial by a foreign court is a pretrial prisoner.

2. Adjudged prisoner: a person whose sentence to confinement has been announced in open court by not yet approved by the convening authority.

3. Sentenced prisoner: occurs when the convening authority takes action to approve the confinement portion of the sentence.

4. Discharged prisoner: occurs upon completion of appellate review and execution of the punitive discharge.

G. Abatement of Confinement.

1. Good conduct time (GCT) is a deduction from a prisoner's release date for good conduct and faithful observance of all facility rules and regulations.

2. FOR SENTENCES ADJUDGED PRIOR TO 1 JANUARY 2005

	Sentence	Rate
a)	< 12 months	5 days per month
b)	1 < 3 years	6 days per month
c)	3 < 5 years	7 days per month
d)	5 < 10 years	8 days per month
e)	10 years or more	10 days per month
f)	Life or death	None

3. FOR SENTENCES ADJUDGED ON OR AFTER 1 JANUARY 2005

4. Five days for each month of confinement, and 1 day for each 6-day portion of a month, regardless of sentence or multiple sentence length.

5. Extra good conduct time (EGCT) or earned time (ET) is a deduction from a prisoner's release date earned for participation and graded effort in the areas of work, offense-related or other rehabilitation programs, education, self-improvement and personal growth, and support activities. This credit is awarded only when overall evaluations are average or higher.

6. **New rule: Maximum of 8 days earned time may be awarded per month.** Old rule: During first year of confinement, not to exceed 3 days per month; thereafter, not to exceed 5 days per month.

7. Special acts abatement (SAA) is a deduction from a prisoner's release date earned for a specific act of heroism, humanitarianism, or extraordinary institutional or community support deemed appropriate by the correctional facility commander. Prisoner without a release date (e.g. life without parole, death) may earn SAA, but it shall be held in abeyance and only awarded if the sentence is reduced to a determinate sentence length.

a) Maximum award of 2 days of SAA per month for a period not to exceed 12 months for a single act. Additional special acts may only extend period of abatement, not the monthly rate of earning.

8. Total of GCT, ET, and SAA awarded for any one month shall not exceed 15 days.

9. Minimum release date is calculated upon arrival at facility based on good conduct time that could be earned for entire period of sentence. Inmate is released at minimum release date absent parole or forfeiture of good conduct time or extra good conduct time, if any.

10. A reduction in confinement by clemency will adjust the minimum release date.

11. Inmates accepting parole waive all time abatements and remain on parole until maximum release date.

12. Prisoners who have an approved finding of guilty for an offense that occurred after 1 October 2004, the award of good conduct time, earned time, and special act abatement shall be conditioned on the prisoner submitting an acceptable release plan and fully cooperating in all other respects with the mandatory supervised release policy, if directed to do so.

13. Forfeiture and restoration of abatements. As a consequence of violations of institutional rules or the UCMJ, a facility commander may direct forfeiture of GCT, ET, and SAA. Discipline and Adjustment Boards are used to ensure due process. Forfeited time can be reinstated at the discretion of the facility commander.

H. Mandatory Supervised Release. Prisoners who are not granted parole prior to their MRD (minimum release date) can be ordered on a supervised release.

1. Policy of the DoD to use supervised release in all cases except where it is determined by the Service Clemency and Parole Boards to be in appropriate.

2. Terms and conditions are identified in the release plan. The prisoner acknowledges the receipt of the terms and conditions.

3. The Service Clemency and Parole Boards may modify or release any terms or conditions of supervision or may terminate supervision entirely.

4. A violation of the supervised release will be considered equivalent to a violation of the terms and conditions of parole and processed in the same manner.

5. *United States v. Pena*, 64 MJ 259 (2007) – The Air Force Clemency and Parole Board ordered Pena to participate in the Mandatory Supervised Release Program for seventy-two days –terminating on his maximum release date. The Board set forth twenty-five conditions to include participating in a community based sex offender treatment program and consent to periodic examinations of his computer. Prior to his release he submitted a declaration that noted a number of hardships his participation in the program created. The declaration did not describe his living circumstances, sources of support or overall financial condition. CAAF looked to see if his participation in the program constituted cruel or unusual punishment or otherwise violated an express prohibition in the UCMJ; unlawfully increased his punishment; or rendered his guilty plea improvident. CAAF held that the program did not constitute cruel or unusual punishment, that Pena did not demonstrate that the collateral consequences actually imposed increased his punishment; and that the plea agreement was provident. CAAF did leave open the possibility that in some cases the Mandatory Supervised Release program could be imposed in a manner that increases the punishment of the prisoner. The burden is on party challenging the conditions to demonstrate the increased punishment.

IV. CLEMENCY & PAROLE

A. Service Clemency & Parole Boards

1. Senior civilian employees and field grade officers.

2. Act for Service Secretaries, **except for** parole considerations for prisoners in FBOP facilities which are decided by U.S. Parole Commission.

B. Clemency Eligibility.

1. Inmate may not waive clemency review. Death sentence cases are not eligible for review by boards.

Initial Review	
Sentence is 12 months – 10 yrs	NLT 9 months after confined
Sentence is 10-20 years	NLT 24 months after confined
Sentence is 20-30 years	NLT 3 years after confined
Sentence greater than 30 years	NLT 10 years after confined (for offenses after 16 Jan 2000)
Life w/o parole	NET 20 years after confined (requires Service Secretary Approval)
After Initial Review	
12 months to 20 years	Annually
20-30 years	After 3 years
30 years to Life w/o parole	After 10 years
Life w/o parole	Every 3 years after 20 years of confinement (requires Service Secretary Approval)

C. Parole Eligibility.

1. Must have sentence of at least twelve (12) months confinement and a punitive discharge. Once considered, inmate will be considered annually by service board unless transferred to FBOP. Inmate may waive parole consideration.

2. Sentence Eligibility

3. 12 months - 30 years 1/3 of sentence, but NET < 6 mos.

4. 30 years to life 10 years

5. Life 20 years (if offense occurred at least 30 days after 16 Jan 2000)

6. Death or Life w/o parole Not eligible

D. Considerations.

1. Nature and circumstances of offenses.

2. Civilian and military history.

3. Confinement record.

4. Personal characteristics, such as age, education, marital and family status, and psychological profile.

5. Victim impact.

6. Protection and welfare of society.

7. Need for good order and discipline.

8. Other matters as appropriate.

E. Conditions for parole release.

1. Prisoner must submit a parole plan and agree to abide by the plan.

2. The plan must include:

a) A statement of where the prisoner plans to reside and with whom.

b) Guaranteed employment, an offer of effective assistance to obtain employment, or acceptance in a valid educational or vocational program.

c) A requirement that the prisoner shall comply with State and local registration requirements in the location the prisoner plans to reside.

d) Other requirements such as a restitution plan, completion of a substance abuse treatment, participation in counseling or therapy programs, etc.

3. The Board may establish and subsequently modify conditions or release as it considers reasonable or appropriate.

4. Prisoners who accept parole waive all GCT and EGCT and serve parole till the expiration of their full sentence.

F. Parole supervision: Individuals released on parole are under the direct supervision of Federal probation officers.

G. Parole revocation.

1. Standard—violation of condition that warrants revocation.

2. Suspension of parole.

3. Preliminary interview.

4. Parole revocation hearing.

5. Forfeiture of credit for service of sentence on parole.

H. Additional Opportunities for Clemency.

1. Discharge Review Boards can review discharges not given by general courts-martial.

2. Boards for Correction of Military Records may grant clemency after Clemency & Parole Boards lose review authority; however, may not overturn conviction.

3. Presidential Pardons.

V. OFFICER RESIGNATIONS FOR THE GOOD OF THE SERVICE (RFGOS)

A. AR 600-8-24, para. 3-13

B. Eligibility Criteria—Officer under suspended sentence of dismissal or who has charges preferred with a view to trial by general court-martial.

C. General Court-Martial Convening Authority (GCMCA) can proceed to trial or hold proceedings in abeyance pending decision on resignation.

D. GCMCA cannot take action on the findings and sentence until resignation has been approved or disapproved. However, note by definition an officer under a suspended sentence of dismissal can only submit a RFGOS after action is taken.

E. Approval of resignation before action requires GCMCA to disapprove both the findings and sentence based on approval authority's expressed intent. *U.S. v. Woods*, 26 MJ 372 (CMA 1988) and AR 27-10, paragraph 5-18.

F. Practice points: Send complete information about offenses – law enforcement investigations, victim/witness impact, Article 32 investigations, chain of command recommendations and rationale. Provide points of contact information for government and defense, preferably names, phone numbers, and email addresses.

VI. DISMISSAL/DROP FROM THE ROLLS/SEPARATION AFTER SIX MONTHS CONFINEMENT

A. Commissioned Officers: limitations on dismissal. 10 U.S.C. §1161(a). No commissioned officer may be dismissed from any armed force except—

1. By sentence of a general court-martial;

2. In commutation of a sentence of a general court-martial; or

3. In time of war, by order of the President.

B. Drop From the Rolls (DFR) of the service. 10 U.S.C. §1161(b). The President may drop from the rolls of any armed force any commissioned officer—

1. Who has been absent without authority for at least three months;

2. Who may be separated under 10 U.S.C. §1167 by reason of a sentence to confinement adjudged by a court-martial – must be sentenced to more than 6 months confinement, served at least six months, and sentence to confinement is final; or

3. Who is sentenced to confinement in a Federal or State penitentiary or correctional institution after having been found guilty of an offense by a court other than a court-martial or other military court, and whose sentence has become final.

C. Practice points: This is not a drop from the rolls of the unit. This is a drop from the rolls of the service – the administrative equivalent of the death penalty. It severs benefits except for non-regular retirement at age 60 for reservists. Process is relatively easy compared to a full blown elimination action.

VII. RESOURCES

A. Army Review Boards Agency (ARBA) Web page: http://arba.army.pentagon.mil. Includes application form (DD Form 149), procedures, frequently asked questions, DoD Directive, Army Regulation, links to other web sites, and case status checker.

B. ARBA Client Information & Quality Assurance Office, DSN 327- 1600, Commercial (703) 607-1600.

C. ARBA Legal Office.

1. Mr. Jan W. Serene, DSN 327-2031, Commercial (703) 607-2031, serenjw@hqda.army.mil.

2. Mr. John P. Taitt, DSN 327-1878, Commercial (703) 607-1878, John.Taitt@hqda.army.mil.

3. (Currently vacant), DSN 327-1625, Commercial (703) 607-1625,

4. Mr. W. Sherwin Fulton III, paralegal, DSN 327-1838, Commercial (703) 607-1838, fultows@hqda.army.mil.

5. FAX: Commercial (703) 607-0542.

D. Army, Air Force, Navy, Coast Guard Boards Reading Rooms: http://boards.law.af.mil. Contains some past decisional documents for correction and Discharge Review Boards. Microfiche copies of all past decisional documents for which records are available are maintained at the Armed Forces Reading Room located at ARBA in Crystal City, Arlington, VA.

E. Air Force Review Boards Office Web Page: http://ask.afpc.randolph.af.mil/default.asp. Click on Personnel Services tab, then Legal &Appeals, then Air Force Review Boards. Includes application form, procedures, frequently asked questions, and AF Instruction and Pamphlet for Discharge Review Board.

F. Navy Clemency and Parole Board Web Page: http://www.hq.navy.mil/ncpb/NCPB/Clemency_Parole.htm

G. Naval Council of Review Boards Web Page: http://www.hq.navy.mil/ncpb/. Includes information on Naval Clemency and Parole Board, Naval Discharge Review Board, and Physical Evaluation Board.

H. Web Page for DoD Directives & Instructions, Army regulations, SECNAV Instructions, and Air Force regulations: http://www.dtic.mil/whs/directives/. Service regulations are available under "Other Agency Links."

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TAB Z

GOVERNMENT APPEALS AND EXTRAORDINARY WRITS

Table of Contents

I. GOVERNMENT APPEALS. 1

A. INTRODUCTION. 1
B. QUALIFYING PROCEEDING. 1
C. QUALIFYING RULING. 1
D. FURTHER APPELLATE REVIEW 4
E. GOVERNMENT APPEAL PROCEDURE. 4
F. APPELLATE REVIEW 6

II. EXTRAORDINARY WRITS. 8

A. INTRODUCTION. 8
B. THE ALL WRITS ACT. 8
C. THEORIES OF JURISDICTION. 8
D. ACTUAL V. SUPERVISORY JURISDICTION; THE ALL WRITS ACT AND *GOLDSMITH* 9
E. EXTRAORDINARY CIRCUMSTANCES. 11
F. WRIT CLASSIFICATIONS. 12
G. FILING A WRIT. 13
H. PROCEDURE. 13

III. CONCLUSION. 14

MAJ Tyesha Lowery Smith
October 2010

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GOVERNMENT APPEALS AND EXTRAORDINARY WRITS

Outline of Instruction

I. GOVERNMENT APPEALS.

A. Introduction.

Article 62, UCMJ; R.C.M. 908(a). In a trial by a court-martial over which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal an order or ruling that terminates the proceedings with respect to a charge or specification, excludes evidence that is substantial proof of a fact material in the proceedings, or affects the disclosure or nondisclosure of classified information. However, the United States may not appeal an order or ruling that is, or amounts to, a finding of not guilty, with respect to the charge or specification.

B. Qualifying Proceeding.

1. Military judge presides; and

2. A punitive discharge may be adjudged. This includes a rehearing on sentence which did not result in a punitive discharge. *See United States v. Davis*, 63 M.J. 171 (2006) ("We conclude that the Government properly appealed the military judge's decision under Article 62, UCMJ, as the sentence rehearing was empowered to adjudge any sentence authorized for the underlying offenses regardless of the sentence approved after the original trial.")

C. Qualifying Ruling.

1. "***. . . order or ruling that terminates the proceedings with respect to a charge or specification***." R.C.M. 908(a).

a. *United States v. Dossey*, 66 M.J. 619 (N-M. Ct. Crim. App. 2008). Accused charged with various offenses related to using government computers to access child pornography. Military judge granted defense motion, in part, to exclude evidence obtained from a search of the government's computer. The government later introduced evidence to the panel that violated the military judge's ruling. The military judge declared a mistrial to the affected charge and specification. The government appealed the decision pursuant to Article 62. The Navy-Marine Court of Criminal Appeals initially denied the government's appeal stating that it did not have jurisdiction. The Navy-Marine Court of Criminal Appeals reconsidered its ruling and determined that "terminates the proceedings" means to "terminate the proceedings *before the particular court-martial* to which a charge has been referred" and that it had jurisdiction. The court then vacated the military judge's order declaring a mistrial and reinstated the original charge and specification.

MAJ Tyesha Lowery Smith
January 2011

b. *United States v. Weymouth*, 40 M.J. 798 (A.F.C.M.R. 1994), *aff'd* 43 M.J. 329 (1995). Accused charged with various offenses arising out of stabbing fellow airman (attempted murder, assault with intent to commit murder, assault by stabbing with a dangerous weapon, assault by IIGBH). MJ granted defense motion to dismiss all but attempted murder on multiplicity grounds, but advised parties he would instruct on any lesser-included offenses raised by the evidence during trial. Parties further agreed accused could only stand convicted of one offense. AFCMR held that MJ "terminate[d] the proceedings with respect to a charge or specification" when dismissed on multiplicity grounds; although he would instruct on lesser-included raised by the evidence, no recourse was likely for the government if the MJ concluded that the LIO was not raised by the evidence. Thus, jurisdiction was proper under Article 62, UCMJ.

c. *United States v. Woods*, 28 M.J. 318 (C.M.A. 1989). The court reversed the trial court's ruling to dismiss a charge alleging a violation of Article 134 (sexually transmitting a deadly virus).

2. ***". . . order or ruling . . . which excludes evidence that is substantial proof of a fact material...."*** R.C.M. 908(a).

a. *United States v. Baldwin*, 54 M.J. 551 (A.F. Ct. Crim. App. 2000). Appellate court found, on reconsideration request by government, that military judge erroneously suppressed the accused's confession.

b. *United States v. Stevenson*, 53 M.J. 257 (2000), *cert. denied*, No. 00-919, 2001 U.S. LEXIS 2192 (U.S. Mar. 19, 2001). Government appealed the NMCCA decision affirming the military judge's ruling to suppress DNA evidence obtained from the accused's blood. CAAF reversed the NMCCA and returned the case to the Navy for remand to the court-martial for trial on the merits.

c. *United States v. Moore*, 41 M.J. 812 (N-M. Ct. Crim. App. 1995). The appellate court reversed the MJ's grant of defense's motion to suppress the results of two urine tests. In case of urinalysis testing, MJ's findings regarding the "primary purpose" may be a "matter of fact," but "whether the examination is an inspection, is a matter of law."

d. *United States v. Phillips*, 30 M.J. 1 (C.M.A. 1990) (hearing a government appeal concerning the MJ's ruling that the accused was improperly "seized" within the meaning of the fourth amendment; trial court upheld).

e. *United States v. Konieczka*, 30 M.J. 752 (A.C.M.R. 1990) (considering whether a urinalysis test was properly suppressed; trial court reversed).

f. *United States v. Austin*, 21 M.J. 592 (A.C.M.R. 1985) (considering whether a urinalysis test was properly suppressed; trial court upheld).

g. *United States v. Bradford*, 68 M.J. 371 (C.A.A.F. 2010) (finding that a military judge's decision to not "preadmit" evidence **did not** constitute "[a]n order or ruling which excludes evidence that is substantial proof of fact material in the proceeding).

h. "It is sufficient that the petitioner believes that the evidence is significant." *United States v. Scholz*, 19 M.J. 530 (A.F.C.M.R. 1984). *See also United States v. Pacheco*, 36 M.J. 530 (A.F.C.M.R. 1992) ("it is not necessary that the evidence suppressed be the only evidence in the case"); *United States v. Hamilton*, 36 M.J. 927 (A.F.C.M.R. 1993).

3. Or, the **functional equivalent** of an R.C.M. 908 appealable order.

   a. *United States v. Sepulveda*, 40 M.J. 856 (A.F.C.M.R. 1994). The MJ granted defense's motion to dismiss three specifications of indecent acts as lesser-included offenses of three indecent assault specifications also charged, and further granted defense's motion to consolidate three specs of indecent assault into one specification. AFCMR found jurisdiction for appeal appropriate to determine whether dismissal should be with or without prejudice, because the MJ terminated proceedings with regard to indecent acts specifications. Jurisdiction was also proper with regard to the consolidated specs. since consolidation is a functional equivalent of dismissal.

   b. *United States v. True*, 28 M.J. 1 (C.M.A. 1989). The MJ's abatement order was the "functional equivalent" of a ruling that terminates the proceedings. The MJ ordered the Government to provide a defense expert and the CA would not pay. Use the "practical effects" test. *See also United States v. Metcalf*, 34 M.J. 1056 (A.F.C.M.R. 1992).

   c. *United States v. Harding*, 63 M.J. 65 (CAAF 2006). MJ's abatement order in this case was not a "termination of proceedings" and the Government appeal was not valid under Article 62, UCMJ. MJ simply abated proceedings pending enforcement of a warrant of attachment; in this case the Government acknowledged that the Marshal's Service had not enforced the writ of attachment the MJ issued to obtain certain records.

4. **BUT NOT** "an order or ruling that is, or amounts to, a finding of not guilty of a charge or specification".

   United States v. Adams, 52 M.J. 836 (A.F. Ct. Crim. App. 2000). Appellate court lacked jurisdiction to hear government appeal of military judge's granting of defense motion for a finding of not guilty pursuant to R.C.M. 917. *But see United States v. Brooks*, 41 M.J. 792 (Army Ct. Crim. App. 1995). A court-martial panel president announced guilty to specification "by absolute majority." Voir dire of the panel indicated several straw votes were taken on the specification - which resulted in insufficient votes to convict - MJ entered finding of not guilty to specification. Government filed appeal under R.C.M. 908. The appellate court had jurisdiction, notwithstanding a *finding of not guilty*, since MJ's characterization of the action was not controlling, and since the case was a members trial, only the panel could evaluate the evidence and render findings as to guilt or innocence (except for R.C.M. 917 finding). Therefore, the act of the MJ amounted to a dismissal with prejudice, and was a proper subject for government appeal.

5. **Classified Information**. The 1996 expansion of Art. 62, and 1998 changes to R.C.M. 908(a), permits appeal of a judge's order or ruling directing disclosure of classified information or imposing sanctions for nondisclosure of classified information. The government may also appeal a refusal of the judge to issue a protective order to prevent disclosure of classified information, or refusal to enforce such an order previously issued by competent authority.

D. **Further appellate review.** In *United States v. Lopez de Victoria*, 66 M.J. 67 (2008), the CAAF decided 3-2 that it had statutory authority to exercise jurisdiction over the courts of criminal appeals' decisions in Article 62 cases despite the absence of an express grant of authority in Article 67 (a). Relying on the express language in Article 67 (a) that the CAAF has jurisdiction over "all cases reviewed by a Court of Criminal Appeals . . . ," the majority reasoned that Congress intended uniformity in the application of the Code between the services. If "all cases" did not include government appeals, which are by their very nature interlocutory appeals, then the purpose of the statute would be defeated. The dissent reasoned that nothing in the plain language of Article 62, Article 67, or any other statute grants the CAAF the statutory authority to entertain an Article 62 appeal.

E. Government Appeal Procedure.

1. Trial counsel may request a delay of not more than 72 hours. R.C.M. 908(b)(1).

2. A court-martial may not proceed, except as to matters unaffected by the ruling or order.

3. However, if the order is nonappealable within the meaning of R.C.M. 908, the trial judge may properly proceed with the trial. *United States v. Browers*, 20 M.J. 356 (C.M.A. 1985).

4. The decision to file a notice of appeal with the judge must be authorized by the SJA or the GCMCA. For example, *see* DEP'T. OF ARMY, REG. 27-10, MILITARY JUSTICE, para. 13-3(a) (16 Nov 2005) (effective 16 Dec 2005).

5. Written notice of the appeal must be filed with the military judge not later than 72 hours after the ruling or order. R.C.M. 908(b)(3).

   a. *United States v. Neal*, 68 M.J. 289 (C.A.A.F 2010). The government has an *unqualified* seventy-two hour period to file a notice of appeal. The government need not request a delay in the proceedings in order to preserve the seventy-two hour period for filing a notice of appeal.

   b. *United States v. Flores-Galarza*, 40 M.J. 900 (N.M.C.M.R. 1994). The appellate court found R.C.M. 908 provision to file appeal within 72 hours mandatory, and a MJ has no authority to extend the time for filing appeal notice. To avoid procedural issues in the future, the court recommended the following: 1) MJ should enter essential findings contemporaneously with ruling on motion; 2) MJ should state on record that his action is ruling of the court; 3) if MJ rules adverse to the government on a significant matter, the MJ should then ascertain on the record whether the government is contemplating an appeal; and, 4) if the government is contemplating an appeal, the MJ should state on record the time of the ruling, i.e., the time the 72-hour period will run, and how and where the government may provide the MJ with written notice of appeal.

6. Written notice to the military judge shall (R.C.M. 908(b)(3)):

7. Specify the order appealed and the charges and specifications affected.

8. Certify that the appeal is not for the purpose of delay.

9. Certify that the evidence excluded is substantial proof of a material fact.

10. **Automatic Stay.** Notice of appeal "automatically stays" trial proceedings except as to unaffected charges or specifications. R.C.M. 908(b)(4).

    a. Motions may be litigated in the judge's discretion.

b. If trial on merits has not begun:

(1) Severance at the request of all parties.

(2) Severance requested by the accused to prevent manifest injustice.

11. If trial on merits has begun: a party may put on additional evidence within the judge's discretion.

12. Requesting reconsideration.

a. Should be undertaken upon request. *United States v. Tucker*, 20 M.J. 602 (N.M.C.M.R. 1985). *But see United States v. Vangelisti*, 30 M.J. 234 (C.M.A. 1990) (military judge did not abuse his discretion in denying the prosecution's request to reopen after granting the defense motion to suppress the accused's confession).

b. Scope of reconsideration. *Harrison v.United States*, 20 M.J. 55 (C.M.A. 1985). A trial judge has inherent authority, not only to reconsider a previous ruling on matters properly before him, but also to take additional evidence in connection therewith.

c. Effect of reconsideration and time limits. *United States v. Santiago*, 56 M.J. 610 (N-M. Ct. Crim. App. 2001). The denial of a reconsideration ruling can be appealed, and the time limit within which to appeal does not start until the trial court rules on the petition for reconsideration. While the MCM does not address timeliness of request for reconsideration, the time limits from Article 62 and R.C.M. 908 are appropriately applied to such requests in assessing the timeliness for purpose of appeal.

13. Speedy trial rules are generally not a problem as long as the appeal is not frivolous. *See* R.C.M. 707 (b)(3)(c) and R.C.M. 707(c). *See also United States v. Ramsey*, 28 M.J. 370 (C.M.A. 1989) ("[a] frivolous appeal is one where the law is so clear and well-established that continued litigation is evidence of bad faith.") The government gets a NEW 120 DAY CLOCK. R.C.M. 707(b)(3)(C).

14. Pretrial confinement of accused pending government appeal. R.C.M. 908(b)(9):

If an accused is in pretrial confinement at the time the United States files notice of its intent to appeal, the commander, in determining whether the accused should be confined pending the outcome of an appeal by the United States, should consider the same factors which would authorize the imposition of pretrial confinement under R.C.M. 305(h)(2)(B).

15. Record of trial. R.C.M. 908(b)(5).

16. Prepared and authenticated to the extent necessary to resolve the issue appealed.

17. Essential findings.

a. When ruling on motions to suppress evidence, military judges are required to state their essential findings of fact on the record (R.C.M. 905(d)).

b. Findings should be logical and complete enough so that there is no need to resort to other parts of the record for meaning.

c. Military judge should state the legal basis for the decision—the legal standards applied and the analysis of the application of these standards to the facts previously stated.

d. Military judge should state any conclusions made and the decision.

e. Help frame issues at the trial level; seek clarity and precision in judge's ruling.

18. Military judge or Court of Criminal Appeals may require additional portions of the record.

19. "Forwarding" of the appeal to government representative. R.C.M. 908(b)(6).

20. Statement of the issues appealed.

21. The original record or summary of the evidence.

22. Within 20 days from the date written notice of appeal is filed with the trial court.

a. *United States v. Combs*, 38 M.J. 741 (A.F.C.M.R. 1993). Government appeal properly dismissed for failure to promptly forward.

b. *United States v. Snyder*, 30 M.J. 662 (A.F.C.M.R. 1990). The government failed to forward the authenticated ROT within 20 days; the accused had remained in pretrial confinement pending resolution of appeal. HELD: "The right to liberty is too fundamental to apply an 'almost good enough' standard to the government's actions."

23. Mailing within 20 days meets the requirements of "forwarding." *United States v. Bolado*, 34 M.J. 732 (N.M.C.M.R. 1991) *aff'd* 36 M.J. 2 (C.M.A. 1992).

24. The Chief, Government Appellate Division, makes the decision whether to file the appeal; therefore coordinate with Government Appellate from the beginning.

F. Appellate Review

1. Initially, *must be* filed at Court of Criminal Appeals.

2. Appellate counsel represent the parties. But trial counsel and trial defense counsel must maintain close contact with appellate counsel.

3. Priority review.

4. Courts of Criminal Appeals "may take action only with respect to matters of law." *See United States v. Solorio*, 21 M.J. 251 (C.M.A. 1986).

5. Standard of review.

a. Did the military judge "err as a matter of law"?

(1) Questions of law are reviewed de novo. *United States v. Kosek*, 41 M.J. 60 (1994).

(2) *See United States v. Rittenhouse*, 62 M.J. 509 (A. Ct. Crim. App. 2005) (holding military judge erred in applying the law to computer evidence and admissions).

b. Findings of fact?

(1) "[I]f a military judge's finding of fact is supported by the evidence of record (or lack thereof), then it shall not be disturbed on appeal taken under Article 62." *United States v. Vangelisti*, 30 M.J. 234 (C.M.A. 1990).

(2) *United States v. Lincoln*, 42 M.J. 315 (1995). NMCMR reversed MJ on a government appeal of the suppression of a confession, and ordered the confession admitted into evidence. CAAF noted, "on questions of fact the appellate court is limited to determining whether the military judge's findings are clearly erroneous or unsupported by the record. If the findings are incomplete or ambiguous, the 'appropriate remedy . . . is a remand for clarification' or additional findings."

(3) *United States v. Reinecke*, 30 M.J. 1010 (A.F.C.M.R. 1990). When ruling on motions to suppress, the MJ is required to state essential findings on the record; findings stated separately and succinctly; findings logical and complete enough so the appellate court does not have to resort to other parts of record for meaning; after stating findings, MJ should state legal basis for decision, *i.e.*, legal standards applied and analysis of the application of the standards to the facts previously stated; and, MJ should state any conclusions made and why.

(4) **BUT** "clearly erroneous" factual findings do not bind Courts of Criminal Appeals.

(5) *United States v. Burris*, 21 M.J. 140 (C.M.A. 1985); *United States v. Clarke*, 23 M.J. 519 (A.F.C.M.R. 1986), *aff'd* 23 M.J. 352 (C.M.A. 1987) (…."We will reverse for an abuse of discretion if the military judge's findings of fact are clearly erroneous or if his decision is influenced by an erroneous view of the law…. " *United States v. Dooley*, 61 M.J. 258 (2005), citing *United States v. Gore*, 60 M.J. 178 (2004).

(6) *United States v. Hatfield*, 43 M.J. 662 (N.M. Ct. Crim. App. 1995). MJ dismissed charges on speedy trial grounds. NMCCA reversed on government appeal, applying standard of review that "findings by the trial court are 'clearly erroneous' when, although there is some evidence to support them, the appellate court is left with the definite and firm conviction that a mistake has been made." Appellate court cannot simply substitute its own judgment of what constitutes "reasonable diligence."

6. The CAAF or U.S. Supreme Court may stay trial pending additional review.

II. EXTRAORDINARY WRITS.

A. Introduction.

In 1948, Congress enacted the All Writs Act, 28 U.S.C. §1651(a), which gave federal appellate courts the ability to grant relief in aid of their jurisdiction. The All Writs Act does not confer an independent jurisdictional basis; rather, it provides ancillary or supervisory jurisdiction to augment the actual jurisdiction of the court. In 1969, the Supreme Court held that the All Writs Act applied to our military appellate courts. *Noyd v. Bond*, 395 U.S. 683 (1969). Consistent with federal courts, our military appellate courts view writ relief as a drastic remedy that should only be invoked in those situations that are truly extraordinary. Further, our courts will exercise extraordinary writ jurisdiction sparingly.

At trial, if a party (usually defense) seeks extraordinary relief, there is no requirement to continue the trial to allow the party to petition the appellate court. If the appellate court grants a stay, however, the military judge must stop the proceedings pending resolution of the issue.

B. The All Writs Act.

1. "All Writs Act." 28 U.S.C. § 1651(a). "The Supreme Court and *all courts established by act of Congress* may issue all writs *necessary or appropriate* in *aid of their respective jurisdictions* and *agreeable to the usages and principles of law*."

2. "[A]ll courts established by act of Congress." Includes both Court of Appeals for the Armed Forces and service Courts of Criminal Appeals. *United States v. Dowty*, 48 M.J. 102 (1998); *McKineey v. Jarvis*, 46 M.J. 870 (Army Ct. Crim. App. 1997). *See also Noyd v. Bond*, 395 U.S. 683 (1969); *United States v. Curtin*, 44 M.J. 439 (1996); *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979); *McPhail v. United States*, 1 M.J. 457 (C.M.A. 1976); *United States v. Frischholz*, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966).

C. Theories of Jurisdiction.

1. **Actual Jurisdiction**: The authority of the appellate courts to review a court-martial on direct review.

   a. Article 66, UCMJ—Court of Criminal Appeals jurisdiction. Every court-martial in which the approved sentence extends to death, dismissal, punitive discharge or confinement for one year or more.

   b. Article 67, UCMJ—Court of Appeals for the Armed Forces jurisdiction. Every court-martial in which the sentence as affirmed by a Court of Criminal Appeals extends to death . . . cases certified by the Judge Advocate General . . . and cases reviewed by Courts of Criminal Appeals where accused shows good cause for grant of review.

   c. Article 69, UCMJ—The Court of Criminal Appeals may review any court-martial where action was taken by the Judge Advocate General pursuant to his authority under Article 69, or has been sent to the Court by the Judge Advocate General for review.

2. **Potential Jurisdiction**. The authority to determine a matter that may reach the actual jurisdiction of the court.

a. *San Antonio Express-News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996). Petition for writ of mandamus to open Article 32 hearing to public where USAF major charged with murder of child. Court found jurisdiction to consider petition for extraordinary relief in exercising supervisory authority over court-martial process, and over cases that may potentially reach court on appeal. Since Article 32 hearing is integral part of court-martial process, then court has jurisdiction to supervise each tier of military justice process. *And see, The Denver Post Corp. v. the U.S. and CPT Robert Ayers*, Army No. 20041215 (February 23, 2005).

b. *U.S.N.M.C.M.R. v. Carlucci, et al*, 26 M.J. 328 (C.M.A. 1988); *Waller v. Swift*, 30 M.J. 139 (C.M.A. 1990). ("The sentence adjudged by the court-martial included a punitive discharge and so was of a severity that would have authorized direct appellate review by this court. Indeed, even in its commuted form, the sentence is of such severity." *Id*. at 142*). See also Addis v. Thorsen*, 32 M.J. 777 (C.G.C.M.R. 1991).

3. **Ancillary jurisdiction**. The authority to determine matters incidental to the court's exercise of its primary jurisdiction, such as ensuring adherence to a court order. *Boudreaux v. U.S.N.M.C.M.R.*, 28 M.J. 181 (C.M.A. 1989); *United States v. Montesinos*, 28 M.J. 38, n.3 (C.M.A. 1989) (Because the integrity of the judicial process is at stake, appellate courts can issue extraordinary writs on their own motion).

4. **Supervisory Jurisdiction**. The broad authority to determine matters that fall within the supervisory function of administering the military justice system.

a. *Unger v. Zemniak*, 27 M.J. 349 (C.M.A. 1989). Military appellate courts have jurisdiction to grant extraordinary relief under the All Writs Act over courts-martial that do not qualify for review in the ordinary course of appeal.

b. *Jones v. Commander*, 18 M.J. 198 (C.M.A. 1984) (Everett, C.J., dissenting). The court refused to exercise writ jurisdiction over a nonjudicial punishment proceeding.

D. Actual v. Supervisory Jurisdiction; the All Writs Act and *Goldsmith*

1. **Pre-Goldsmith Case Law.**

a. *ABC Inc. v. Powell*, 47 M.J. 363 (1997). Absent "good cause," petitions for extraordinary relief should be submitted initially to the Court of Criminal Appeals. The CAAF exercised supervisory jurisdiction under the All Writs Act to grant relief during an Article 32(b) Investigation.

b. *Loving v. Hart*, 47 M.J. 438 (1998). The CAAF has jurisdiction to issue a writ under the All Writs Act even after the case has been affirmed by the Supreme Court. The accused sought extraordinary relief because his death sentence was based in part on a conviction of felony murder that was unsupported by a unanimous finding of intent to kill or reckless indifference to human life. This was an issue raised by Justice Scalia during oral argument before the Supreme Court. The CAAF heard the petition but denied relief.

c. *United States v. Dowty*, 48 M.J. 102 (1998). The CAAF has authority under the All Writs Act to exercise jurisdiction over issues arising from proceedings where the Court would not have had direct review.

d. *Dew v. United States*, 48 M.J. 639 (A. Ct. Crim. App. 1998). Under the All Writs Act, the Army Court has supervisory jurisdiction to consider, on the merits, a writ challenging the action taken by The Judge Advocate General pursuant to Article 69(a), UCMJ. The accused was convicted of making and uttering worthless checks by dishonorably failing to maintain funds. The Office of the Army Judge Advocate General reviewed the case and denied relief. The accused petitioned the Army Court, challenging the decision made by the Office of the Judge Advocate General. The Army Court exercised its supervisory authority under the All Writs Act, heard the petition, but denied relief.

e. *Morgan v. Mahoney*, 50 M.J. 633 (A.F. Ct. Crim. App. 1999). The government involuntarily recalled the accused (a member of the retired reserves) to active duty to face a court-martial. At trial, the accused challenged the jurisdiction of the court-martial. The military judge denied the accused's motion, and the accused petitioned the Air Force Court seeking an extraordinary writ ordering the military judge to dismiss all charges and specifications. The service court held that it had jurisdiction under the All Writs Act to hear the issue and denied the accused's relief. In denying the writ, the court found that the accused was a member of retired reserves, which made him part of the reserve component and subject to lawful orders to return to active duty. Since the accused was in an active duty status at the time of trial, the court-martial did not lack *in personam* jurisdiction.

2. ***Clinton v.Goldsmith*, 119 S.Ct. 1538 (1999).** The CAAF exercised supervisory jurisdiction under the All Writs Act to stop the government from dropping the accused from the rolls of the Air Force. The Supreme Court held that the CAAF lacked jurisdiction, under the All Writs Act, to issue the injunction in question because, (1) the injunction was not "in aid of" the CAAF's strictly circumscribed jurisdiction to review court-martial findings and sentences; and (2) even if the CAAF might have had some arguable basis for jurisdiction, the injunction was neither "necessary" nor "appropriate," in light of the alternative federal administrative and judicial remedies available, under other federal statutes, to a service member demanding to be kept on the rolls. In a unanimous decision, the Supreme Court held that CAAF exceeded its supervisory jurisdiction under the All Writs Act.

3. **Case Law (Post-Goldsmith).**

a. *United States v. Byrd*, 53 M.J. 35 (2000). In October 1996, the Navy-Marine Corps Court affirmed the accused's conviction and sentence, which included a punitive discharge. The accused did not petition CAAF for review until 22 January 1997. On 2 January 1997 the convening authority executed his sentence under Article 71. The service court held that since the accused did not petition CAAF for review within 60 days, the intervening discharge terminated jurisdiction. CAAF vacated the lower court's decision on the grounds that the Govt. failed to establish the petition for review as being untimely and, therefore, the sentence had been improperly executed. CAAF also stated it has jurisdiction to review such a case under the All Writs Act, notwithstanding execution of the punitive discharge, but declined to decide which standard of review was more appropriate, direct or collateral.

b. *United States v. King*, No. 00-8007/NA, 2000 CAAF LEXIS 321 (Mar. 16, 2000). Accused filed a motion to stay Article 32 proceedings but was denied relief by the NMCCA under *Clinton v. Goldsmith*. CAAF disagreed and granted the motion to stay under the All Writs Act. In a concurring opinion, Judge Sullivan stated, "this Court clearly has the power to supervise criminal proceedings under Article 32, UCMJ." *See also King v. Ramos*, No. NMCM 200001991 (Jan. 26, 2001).

c. *Ponder v. Stone*, 54 M.J. 613 (N-M. Ct. Crim. App. 2000). Accused refused order to receive anthrax vaccination and submitted a request for a stay of proceedings by way of a writ of mandamus. Government argued that the Navy court lacked jurisdiction to entertain the petition under *Goldsmith*, because the court could only grant extraordinary relief on matters affecting the findings and sentence of a court-martial. NMCCA disagreed, stating that review of the petition under the All Writs Act was properly a matter in aid of its jurisdiction.

d. *Fisher v. United States*, 56 M.J. 691 (N-M. Ct. Crim. App. 2001). Accused filed petition for extraordinary relief. The government argued that the appellate court had no jurisdiction to consider the petition because the accused's court-martial was final under Article 76. The NMCCA disagreed and considered the petition but denied it.

e. *United States v. Denedo*, 129 S. Ct. 2213 (2009). The accused filed an extraordinary writ in the Navy-Marine Court, alleging ineffective assistance of counsel almost ten years after his case had become final under Article 71. The Navy-Marine Court denied relief. The CAAF granted review of the accused's extraordinary writ. The government appealed the CAAF's decision to the Supreme Court, asserting that neither the Navy-Marine Court nor the CAAF had jurisdiction in this case. Without overturning *Goldsmith*, the Supreme Court ruled that the CAAF and the Navy-Marine Court did, in fact, have jurisdiction. The Supreme Court reasoned that jurisdiction was proper since the accused's petition directly challenged the validity of his conviction.

E. Extraordinary Circumstances.

1. Much like the military appellate courts, federal courts struggle with the scope of their jurisdiction under the All Writs Act. The Supreme Court held that federal courts can exercise writ jurisdiction to protect the legal rights of parties, and are not limited to orders protecting just the courts' own duties and jurisdiction. *See United States v. New York Telephone Co.*, 434 U.S. 159 (1977).

2. Ordinary course of appellate review of trial cannot give adequate relief. *Andrews v. Heupel*, 29 M.J. 743 (A.F.C.M.R. 1989). "An extraordinary writ is not to be a substitute for an appeal even though hardship may ensue from delay and perhaps an unnecessary trial."

3. Circumstances warrant extraordinary relief.

a. *McCray v. Grande*, 38 M.J. 657 (A.C.M.R. 1993). Petitioner seeks extraordinary writ for release from confinement. CA commuted BCD to four months, but did so five months after sentencing. Accused was immediately taken to the brig at Camp Lejeune. The brig determined that the accused's sentence ran from date of sentence and not confinement and released the accused. A week later, the accused was taken to an Army facility. The Army facility took the position that the accused's sentence began on the date that the CA commuted the BCD to six months and incarcerated petitioner. Proper subject for review by Court, and ordered release.

b. *Keaton v. Marsh*, 43 M.J. 757 (Army Ct. Crim. App. 1996). Petition for writ of habeas corpus by accused who was ordered released from pretrial confinement by military magistrate, and subsequently ordered back into pretrial confinement by military judge. Court found propriety of accused's pretrial confinement proper subject for extraordinary writ, and ordered release.

c. Petition for writ of prohibition by accused who was a retiree challenging the right of the military justice system to exercise jurisdiction over him was an extraordinary situation warranting consideration. *Pearson v. Bloss*, 28 M.J. 764 (A.F.C.M.R. 1989). *See also Sands v. Colby*, 35 M.J. 620 (A.C.M.R.). 1992).

d. *Toohey v. United States*, No. 04-8019, 2004 CAAF LEXIS 656 (Jul. 2, 2004). Petitioner seeks extraordinary writ for release from confinement because of lengthy appellate delay. The chronology of the case indicates that the Petitioner has not received his first level of appeal as of right more than five years and ten months after his sentence was adjudged. Court agrees that delay is unreasonable but does not order release. Court gives Navy-Marine Corps Court 90 days to issue decision.

e. *United States v. Kreutzer*, 60 M.J. 453 (2005). (Crawford, J., dissenting). As Petitioner not currently under sentence of death, writ of mandamus granted to the extent that Petitioner must be moved from death row.

f. *United States v. Buber*, 61 M.J. 70 (2005). (Crawford, J., dissenting). Army Court dismissed specification supporting remaining confinement and Government filed for reconsideration. Writ of habeas corpus granted with direction to release Petitioner from post-trial confinement immediately.

4. Available remedies are exhausted.

5. Relief will advance judicial economy.

a. Maximize utility of judicial resources.

b. Resolve recurrent issues that will inevitably lead to more cases in the future.

c. To prevent a waste of time and energy of military tribunals.

F. Writ classifications.

1. **Mandamus**. Directs a party to take action; rights are not established or created; pre-existing duty enforced.

2. **Prohibition**. Directs a party to cease doing an act or prohibits execution of a planned act that violates a law or an individual's rights.

3. **Error Coram Nobis**. "Error in our court"; a review of a court's own prior judgment predicated on a material error of fact, or to correct constitutional or fundamental errors, including those sounding in due process.

4. **Habeas Corpus**. "That you have the body"; directs the release of a person from some form of custody.

G. Filing a writ.

1. Preliminary Considerations.

a. Does the case qualify?

(1) Jurisdiction.

(2) Relief sought.

(3) Extraordinary Circumstance.

b. Must the military judge grant a continuance?

(1) Discretion of the military judge (R.C.M. 906(b)(1)).

(2) No automatic stay; but once a stay is issued by CCA or CAAF, proceedings **must** stop.

c. Which forum?

(1) There is a preference for initial consideration by a CCA. *See ABC, Inc. v. Powell,* 47 M.J. 363 (1997); *United States v. Redding,* 11 M.J. 100 (C.M.A. 1981) (opinion of Cook, J.); *See also* R.C.M. 1204(a), Discussion (C.M.R. filing favored for judicial economy).

(2) CAAF, Rules of Practice and procedure, Rule 4(b)(1): The Court may, in its discretion, entertain original petitions for extraordinary relief . . .. Absent good cause, no such petition shall be filed unless relief has first been sought in the appropriate Court of Criminal Appeals. Original writs are rarely granted.

d. Considerations of time and subject matter.

2. <u>Special rule for trial counsel</u>. Before filing an application for extraordinary relief on behalf of the government, government representatives should (will) coordinate with Appellate Government.

H. Procedure.

1. Petitioner has initial burden of persuasion to show jurisdiction and extraordinary circumstances. The party seeking relief has an "extremely heavy burden." *McKinney v. Jarvis,* 46 M.J. 870, 873 (Army Ct. Crim. App. 1997; *United States v. Mahoney,* 36 M.J. 679, 685 (A.F.C.M.R. 1992). The petitioner must show that the complained of actions were more than "gross error" and constitute a "judicial usurpation of power." *San Antonio Express-News v. Morrow,* 44 M.J. 706 (A.F. Ct. Crim. App. 1996).

2. The "show cause" order shifts burden.

III. CONCLUSION.

TAB AA

SEXUAL ASSAULT PREVENTION & RESPONSE PROGRAM, DOMESTIC ABUSE PROGRAM

I. REFERENCES.....1

II. SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM 2

III. DOMESTIC ABUSE PROGRAM.....10

IV. LAUTENBURG AMENDMENT 17

V. CONCLUSION. 21

LTC ERIC CARPENTER

JANUARY 2011

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I. REFERENCES.

A. Gun Control Act of 1968, 18 U.S.C. § 921-928 (Supp. 1997).

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C. Under Secretary of Defense for Personnel and Readiness Policy Memorandum, "Restricted Reporting Policy for Incidents of Domestic Abuse" (January 22, 2006).

D. DoD Directive (DoDD) 6495.01, Sexual Assault Prevention and Response Program (November 7, 2008)

E. DoD Instruction (DoDI) 6495.02, Sexual Assault Prevention and Response Program Procedures (November 13, 2008).

F. DoD Instruction (DoDI) 6400.06, Domestic Abuse Involving DoD Military and Certain Affiliated Personnel (August 21, 2007)

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T. Dep't of Air Force Instruction (AFI) 36-6001, Sexual Assault Prevention and Response Program (30 September 2009).

U. OPNAV Instruction 1752.1B, Sexual Assault Victim Intervention Program (29 December 2006).

V. Marine Corps Order 1752.5A, Sexual Assault Prevention and Response Program (5 February 2008).

W. US Coast Guard Commandant Instruction 1754.10c, Sexual Assault Prevention and Response Program (20 December 2007).

X. A National Protocol for Sexual Assault Medical Forensic Examinations, U.S. Department Of Justice Office on the Violence Against Women (September 2004).

II. SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM

A. Basics.

1. The Sexual Assault Prevention and Response (SAPR) Program reinforces the Army's commitment to eliminate incidents of sexual assault through a comprehensive policy that centers on awareness and prevention, training and education, victim advocacy, response, reporting and follow-up. Army policy promotes sensitive care and confidential reporting for victims of sexual assault and accountability for those who commit these crimes.

2. Sexual Assault Policy. Sexual assault is a criminal offense that has no place in the Army. It degrades mission readiness by devastating the Army's ability to work effectively as a team. Every Soldier who is aware of a sexual assault, should immediately (within 24 hours) report incidents of sexual assault. It is incompatible with the Army Values and is punishable under the UCMJ and other federal and local civilian laws.

3. SecArmy and CSA Sends: "The prevention of sexual assault needs our full attention. It is our duty and moral obligation to set the climate and the conditions which leave no doubt that such behavior has no place in our ranks. . . . [W]e want the Army to be recognized as the national leader in sexual assault and sexual harassment prevention. Reaching this goal requires a clear cultural change that repudiates sexual assault. . . . Your Army leadership is joining with Soldiers across the Army in a commitment to eliminate sexual assault and harassment from our ranks. . . . As our Army erased the ugly stain of racism and built our Nation's model organization for color-blind opportunity, so must we succeed in this effort."

B. Definition of Sexual Assault. For the purpose of DoD-wide sexual assault prevention and response awareness training and education, the term "sexual assault" is defined as intentional sexual contact, characterized by use of force, physical threat or abuse of authority or when the victim does not or cannot consent. This definition does not affect in any way definition of any offenses under the UCMJ.

1. Sexual assault includes rape, nonconsensual sodomy (oral or anal sex), indecent assault (unwanted, inappropriate sexual contact or fondling), or attempts to commit these acts. Sexual assault can occur without regard to gender or spousal relationship or age of victim.

2. "Consent" shall not be deemed or construed to mean the failure by the victim to offer physical resistance. Consent is not given when a person uses force, threat of force, coercion, or when the victim is asleep, incapacitated, or unconscious.

C. Victim Advocacy Program. Victim's use of advocacy services is optional; however, commanders must ensure that victims have access to a well-coordinated, highly responsive sexual assault victim advocacy program that is available 24 hours a day/seven days a week both in garrison and in a deployed environment.

1. Garrison environment. Three echelons of sexual assault victim advocates.

a) The Installation Sexual Assault Response Coordinator (SARC) is responsible for coordinating the local program. The Installation SARC is a DA or contract

civilian employee who works for the Family Advocacy Program Manager (FAPM) and reports directly to the Installation Commander for matters concerning incidents of sexual assault. SARCs will:

(1) Serve as the program manager of victim support services who coordinates and oversees the local implementation and execution of the Sexual Assault Prevention and Response Program.

(2) Ensure overall local management of sexual assault awareness, prevention, training, and victim advocacy.

(3) Oversee Victim Advocates and Unit Victim Advocates in the performance of their duties providing victim services.

(4) Ensure victims are properly advised of their options for restricted and unrestricted reporting. Ensure victim acknowledges in writing his/her preference for restricted or unrestricted reporting on a DD Form 2910, Victim Reporting Preference Statement (VRPS).

(5) Ensure all unrestricted reported incidents of sexual assault are reported to the first O-5 in the chain of command, CID, MPs and the Installation Provost Marshal with 24 hours of receipt.

(6) Ensure that non-identifying personal information/details related to a restricted report of sexual assault is provided to the Installation Commander within 24 hours of occurrence. This information may include: rank, gender, age, race, service component, status, time and location. Ensure that information is disclosed in a manner that preserves a victim's anonymity. Careful consideration of which details to include is of particular significance at installations or other locations where there are a limited number of minority females or female officers assigned.

b) Victim advocates work directly with the SARC, victims of sexual assault, unit victim advocates, and other installation response agencies.

(1) Installation Victim Advocates (IVAs). The IVAs are DA civilian or contract employees trained to provide advocacy services to victims of sexual assault. The IVA reports directly to the SARC for sexual assault cases.

(2) Unit Victim Advocates (UVA) are Soldiers trained to provide victim advocacy as a collateral duty. There are two UVAs appointed on orders by each Battalion-level commander and trained to perform collateral duties in support of victims of sexual assault particularly in deployed environments. UVAs are supervised in the performance of their duties by the SARC. The UVA will be an NCO (SSG or higher), Officer (1LT/CW2 or higher), or Civilian (GS-9 or higher). UVAs will:

(a) When assigned by the SARC, provide crisis intervention, referral, and ongoing non-clinical support to the victim. The victim alone will decide whether to accept the offer of victim advocacy services.

(b) Report to and coordinate directly with the SARC or designated IVA when assigned to assist a victim.

(c) Inform victims of their options for restricted and unrestricted reporting, and explain the scope and limitations of the SARC's role as an advocate.

(i) If the victim chooses restricted reporting, ensure the victim is taken to a healthcare provider in lieu of reporting the incident to law enforcement or chain of command.

(ii) If victim chooses the unrestricted reporting option, UVA will immediately notify law enforcement and healthcare provider.

(iii) Safeguard documents in their possession pertaining to sexual assault incidents and protect information that is case related.

2. Deployed environment. Two echelons of victim advocates.

a) Deployable SARCs are Soldiers trained and responsible for coordinating the sexual assault prevention and response program as a collateral duty in a specified area of a deployed theater. There is one deployable SARC at each brigade and higher echelon. The deployable SARC will be an NCO (SFC or higher), Officer (MAJ/CW3 or higher), or Civilian (GS-11 or higher).

(1) Ensure overall management of sexual assault awareness, prevention, training and victim advocacy.

(2) Be trained by the Installation SARC prior to assuming duty.

(3) Advise the victim on their options for restricted and unrestricted reporting. Ensure victim acknowledges in writing his/her preference for restricted or unrestricted reporting on the VRPS.

b) Unit Victim Advocates (UVA) are Soldiers trained to provide victim advocacy as a collateral duty. There are two UVAs for each battalion-sized unit.

c) The deployable SARC and the UVA must be carefully selected as they are likely to become involved in highly charged, emotionally stressful situations in assisting victims of sexual assault. As a result all candidates must be properly screened and complete training in responding appropriately to victims of sexual assault.

3. Unit commanders' must take the following actions for unrestricted reports of sexual assault.

a) Ensure the victim's physical safety. Ensure that victims of sexual assault receive sensitive care and support and are not re-victimized as a result of reporting the incident.

b) Collaborate closely with the SARC, legal, medical, and chaplain offices and other service providers to provide timely, coordinated, and appropriate responses to sexual assault issues and concerns.

c) Make administrative & logistical coordination for movement of victim to receive care.

d) Notify CID and the Sexual Assault Response Coordinator.

e) Report all incidents of sexual assault to the office of the staff judge advocate within 24 hours.

f) Flag any Soldier under charges, restrain, or investigation for sexual assault in accordance with AR 600-8-2, and suspend the Soldier's security clearance in accordance with AR 380-67.

4. Authority to dispose of cases resulting from allegations of sexual assault are withheld to the Battalion commander level and above. A commander authorized to dispose of cases involving an allegation of sexual assault may do so **only** after receiving the advice of the servicing judge advocate. As with any case, any disposition decision involving an allegation of sexual assault is subject to review by higher level commanders as appropriate.

5. Training. The objective of SAPR training is to eliminate incidents of sexual assault through a comprehensive program that focuses on awareness and prevention, education, victim advocacy, reporting, response, and follow up. There are four categories of training for the SAPR Program. The categories are Professional Military Education (PME) training, Unit Level training, Pre-Deployment training, and Responder training.

a) PME training is progressive and sequential in areas such as (including but not limited to):

(1) Initial Entry Training;

(2) Pre-commissioning/Basic Officer Leadership Instruction – I (BOLC I) to include ROTC;

(3) Captain's Career Course;

(4) Pre-command Course.

b) Unit Level Training. All Soldiers will attend and participate in unit level SAPR training annually. Training will be scenario based, using real life situations to demonstrate the entire cycle of reporting, response, and accountability procedures.

c) Pre-Deployment Training. Pre-Deployment training will incorporate information on sexual assault and response. As part of the pre-deployment training, Soldiers will be presented with information to increase awareness of the customs of the host country and any coalition partners, in an effort to help prevent further sexual assaults outside of CONUS.

d) Responder Training. Primary responders to sexual assault incidents will receive the same baseline training throughout the DoD, to ensure that nay Service member who is assaulted will receive the same level of response regardless of Service component. Training should emphasize coordinating victim support services is a team effort and to be effective all the team members must be allowed to do their job and must understand the role of the others on the team. First responders agencies include:

(1) Healthcare;

(2) MPs and CID;

(3) Judge Advocates;

(4) Chaplains;

(5) SARCs; and

(6) Installation and Unit Victim Advocates

6. Confidential Reporting. Confidential Reporting allows a uniformed member of the Army to report a sexual assault to specified individuals. Confidential reporting consists of two components: Restricted and Unrestricted reporting.

a) Restricted Reporting. Restricted reporting allows a Soldier who is a sexual assault victim, on a confidential basis, to disclose the details of his/her assault to specifically identified individuals and receive medical treatment and counseling, without triggering the official investigative process. Soldiers who are sexually assaulted and desire restricted reporting under this policy should report the assault to the Sexual Assault Response Coordinator (SARC), victim advocate, Chaplain or a healthcare provider.

b) Restricted reporting may be made only to the following individuals:

(1) The SARC

(2) Healthcare Provider

(3) Chaplain

(4) UVA

c) Unrestricted Reporting. Unrestricted reporting allows a Soldier who is sexually assaulted and desires medical treatment, counseling, and an official investigation of his/her allegation to use current reporting channels (e.g., chain of command, law enforcement, or he/she may report the incident to the SARC or the on-call Victim advocate). Upon notification of a reported sexual assault, the SARC will immediately notify a victim advocate. Additionally, with the victim's consent, the healthcare provider shall conduct a forensic examination, which may include the collection of evidence. Details regarding the incident will be limited to only those personnel who have a legitimate need to know.

7. Sexual Assault Forensic Examination (SAFE). If a DoD healthcare provider is not available, the victim will be appropriately referred to a civilian provider for the forensic examination, if the victim requests such a forensic examination.

a) Whenever possible, military installations should have established formal memoranda of understanding (MOU) with military facilities or off-base non-military facilities for the purpose of conducting sexual assault examinations.

b) The SARC or victim advocate will ensure that a victim is aware of any local or state sexual assault reporting requirements that may limit the possibility of restricted reporting, prior to proceeding with the SAFE at the local off-post non-military facility.

8. Restricted Report Case Number (RRCN).

a) Each Military Service will designate a military agency to generate an alpha-numeric RRCN, unique to each incident, that will be used in lieu of personal-identifying information to label and identify the evidence collected from a SAFE (i.e., Sexual Assault Evidence Collection kit (SAE kit), accompanying documentation, personal effects, clothing).

b) Upon completion of the SAFE, the HCP will package and label the evidence with the RRCN and notify the service-designated military agency trained and capable pf collecting and preserving evidence, to assume custody of the evidence using established "chain of custody" procedures. MOUs with off-post non-military facilities should include instructions for the notification of a SARC, receipt and application of a RRCN and disposition of evidence back to the military agency. The RRCN and general description of the evidence shall be entered into a log to be maintained by the military agency.

c) One year storage period.

(1) Thirty days prior to the expiration of the one-year storage period, the military agency shall notify the appropriate SARC that the one year storage period is about to expire. The SARC shall notify the victim accordingly.

(2) If a victim does not desire to change to an unrestricted report and does not request the return of any personal effects or clothing maintained as part of the evidence prior to the expiration of the one-year storage period, in accordance with established procedures for the destruction of evidence, the military agency shall destroy the evidence maintained under the victim's RRCN.

(3) The evidence shall similarly be destroyed if, at the expiration of one year, victims do not advise the SARC of their decision or the SARC is unable to notify a victim because the victim's whereabouts are no longer known.

(4) If, at any time, a victim elects to change their reporting preference to the unrestricted reporting option, the SARC shall notify CID, who will then assume custody of the evidence maintained by the RRCN from the military agency under established chain of custody procedures.

9. Confidential Communication.

a) Regardless of whether the Soldier elects restricted or unrestricted reporting, confidentiality of medical information will be maintained IAW current guidelines on Health Information Privacy Portability Act (HIPPA).

b) In cases where a victim elects restricted reporting, the SARC, assigned VA (whether uniformed or civilian), and healthcare providers may not disclosed covered communications to law enforcement or command authorities, either within or outside DoD, except as provided in the exceptions below.

c) Covered communications are oral, written or electronic communications of personally identifiable information made by a victim to the SARC, assigned VA or to a healthcare provider related to the sexual assault.

d) In the event that information about a sexual assault is disclosed to the commander from a source independent of the restricted reporting avenues, or to law enforcement and law enforcement from other sources, the commander will report the matter to law enforcement and law enforcement remains authorized to initiate its own independent investigation of the matter presented.

e) Additionally, a victim's disclosure of his/her sexual assault to persons outside the prospective sphere of persons covered by this policy may result in an investigation of the allegations.

f) This SAPR policy does not create any actionable rights for the alleged offender or the victim, nor constitute a grant of immunity for any actionable conduct by the offender or victim. Covered communications that have been disclosed may be used in disciplinary proceedings against the offender or the victim, even if such communications were improperly disclosed.

g) Improper disclosure of covered communications, improper release of medical information, and other violations of this policy are prohibited and may result in discipline under the UCMJ, loss of credentials, or other adverse personnel or administrative action.

10. Exceptions to Confidentiality. In cases in which victims elect restricted reporting, the prohibition on disclosing covered communications is waived to the following persons when disclosure would be for the following reasons:

a) Command officials or law enforcement when disclosure is authorized by the victim in writing.

b) Command officials or law enforcement when disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of the victim or another.

c) Disability Retirement Boards and officials when disclosure by a healthcare provider is required for fitness for duty for disability retirement determinations, limited to only that information which is necessary to process disability retirement determination.

d) SARC, VAs or healthcare provider when disclosure is required for the supervision of victim services.

e) Military or civilian courts of competent jurisdiction when disclosure is ordered by or is required by federal or state statute. SARC, VAs, and healthcare providers will consult with the servicing legal office in the same manner as other recipients of privileged information to determine if the criteria apply and they have a duty to obey. Until those determinations are made, non-identifying information should only be disclosed.

11. Collateral Misconduct of Victim. In unrestricted reported sexual assault cases where there is evidence of collateral victim misconduct, to prevent the erroneous perception that the Department of Defense views a victim's collateral misconduct as more serious than the crime of sexual assault, commanders should defer disciplining the victim for the victim's misconduct until all investigations are complete and the sexual assault allegation has been resolved, unless extenuating or other overriding circumstances make delay inappropriate in the judgment of the commander and/or legal counsel.

a) Additionally, for those sexual assault cases for which command action on victim's collateral misconduct is deferred, Military Service command action reporting and processing requirements should take such deferrals into consideration and allow for the time deferred to be subtracted from applicable metrics and processing times.

b) Commanders and judge advocates must also be mindful of any potential statue of limitations when determining whether to defer action.

12. Administrative separations.

a) GCMCA lowest separation authority for cases involving Soldiers who filed an unrestricted report of sexual assault in the last 24 months.

b) When initiating an administrative separation on any Soldier for any reason (voluntary or involuntary), include on the Notification / Acknowledge / Election of Rights form:

(1) Whether the Soldier filed an unrestricted report of sexual assault in the last 24 months.

(2) Whether the Soldier does / does not believe that this separation is a direct / indirect result of the sexual assault.

c) If the separation appears to be in retaliation for the Soldier filing an unrestricted report of sexual assault. If so, consult with the JA.

d) If the separation involves a medical condition that is related to the sexual assault, to include PTSD. If so, consult with the appropriate medical personnel.

e) If the separation is in the best interests of the Army, the Soldier, or both. If not, consult with the JA.

f) The status of the case against the alleged offender, and the effect of the Soldier's (victim's) separation on the disposition or prosecution of the case. If the case is still open, consult with the servicing CID unit and JA.

13. Essential Training Tasks for Judge Advocates. All judge advocates shall receive training at initial military legal and periodic refresher training on the DoD and Army Sexual Assault Response Policies:

a) Confidentiality Policy Rules and Limitations.

(1) Use of "restricted" reports by command, investigative agencies, trial and defense counsel.

(2) Relationship of "restricted" reports to MREs. The SAPR policy does not create any privileges outside of those already contained in the MREs (e.g., MRE 503 and MRE 513).

b) Victim Rights:

(1) Familiarity with VWAP.

(2) VWAP challenges in the deployed environment.

D. Victimology. The process of analyzing victim types or victims and their behavior after an assault. Victims experience a variety of negative mental health effects from a sexual assault such as:

1. Post-traumatic stress symptoms.

2. Reactions of family and friends.

3. Secondary victimization experiences when they seek help.

4. Processing the rape and post-rape experiences.

5. Post Traumatic Stress Disorder (PTSD). Rape is one of the most common causes of PTSD.

6. Traumatic Event. Experienced an event that involved actual or threatened death or serious injury or a threat to the physical integrity of self or others.

7. Rape Trauma Syndrome. The acuter phase and the long-term reorganization process that results from a forcible or attempted forcible rape, consisting of behavioral, somatic, and psychological reactions to the attack. This normally not a categorized syndrome. This term pre-dates PTSD. However, it is not a DSM-IV classification. Many consider it a subcategory of PTSD.

8. Common and Counterintuitive Victim Behaviors.

a) Easily Explained Victim Behaviors.

b) Counterintuitive Behaviors.

(1) Delayed Reporting.

(2) Denial, Minimization, Recantation.

(3) Inconsistent Disclosure.

(4) Motivations for False Accusations.

(5) Military Considerations

(6) Alcohol Intoxication and Memory

(7) Expert Testimony

9. Understanding Sex Offenders.

a) Stereotypes/myths.

(1) Rapists are usually a stranger to the victim.

(2) Rapists usually use a weapon or inflict significant physical injury.

(3) Rapists act a certain way.

(4) False allegations of rape are common.

b) Rapist Typology. Most common includes five categories:

(1) Power reassurance;

(2) Power assertive;

(3) Anger retaliation;

(4) Anger excitation;

c) The Undetected Rapist. The rapist who displays behavior often seen in the college dorm or barracks acquaintance rape situation. This offender is motivated by sexual gratification in that they intend to have sex with the victim whether the victims consents or not. The undetected rapist plans the assault. They use alcohol to reduce the victim's inhibitions or to incapacitate. They seldom use a weapon or any threats. Instead they use alcohol, size, and strength to commit the rape.

III. DOMESTIC ABUSE PROGRAM.

A. Army policy for domestic abuse.

1. Domestic violence is a pervasive problem not only in society, but also in the military.

a) In the ten-year period from FY98-07, the military averaged 14.67 substantiated incidents of spousal abuse per 1000 couples. *See* Department of Defense Family Advocacy Program, *Child Abuse and Spouse Abuse Data Trends from 1998 to 2007, available at* http://www.militaryhomefront.dod.mil/dav/lsn/LSN/BINARY_RESOURCE/BINARY_CONTENT/2265251.pdf (last visited 11 October 2009).Abuse includes acts of physical violence and/or sexual violence and/or emotional abuse. Every year showed a significant downward trend: 19.8 substantiated incidents of spousal abuse per 1000 couples in FY 98 compared to 10.2 in FY 07.

b) Also in the same time period, FY98-07, the military averaged 6.29 substantiated incidents of child abuse per 1000. Id. These rates were fairly constant throughout the nine-year period.

c) A recent Army funded study published in the Journal of the American Medical Association concluded that "[a]mong families of enlisted Soldiers in the US Army with substantiated reports of child maltreatment, rates of maltreatment

are greater when the Soldiers are on combat related deployments." Deborah A. Gibbs, MSPH; Sandra L. Martin, PhD, Lawrence L. Kupper, PhD; Ruby E. Johnson, MS, *Child Maltreatment in Enlisted Soldiers' Families During Combat-Related Deployments*, 298 JAMA (Aug. 1, 2007), available at http://jama.ama-assn.org/cgi/content/abstract/298/5/528 (last visited 11 October 2009The study found that among female civilian spouses, the rate of maltreatment during deployment was more than 3 times greater, the rate of child neglect was almost 4 times greater, and the rate of physical abuse was nearly twice as great. Id.

2. Department of Defense (DoD) Policy. In November 2001, Deputy Defense Secretary Wolfowitz issued a memorandum addressing domestic violence, stating that domestic violence is an "offense against the institutional values of the Military Services of the United States of America." The memorandum calls upon leaders at all levels within the DoD "to take appropriate steps to prevent domestic violence, protect victims, and hold those who commit it accountable."

3. Like the Sexual Assault Prevention and Response Program, the domestic violence policy does not create any actionable rights for the alleged offender or the victim, nor constitute a grant of immunity for any actionable conduct by the alleged offender or victim, nor does it create any form of evidentiary or testimonial privilege.

4. Army Regulation 608-18, The Army Family Advocacy Program (30 October 2007), establishes Army policy for handling domestic violence issues.

5. DA takes a 4-part approach to child and spouse abuse:

a) **Prevent** incidents of abuse.

b) **Protect** victims of abuse.

c) **Treat** those affected by abuse.

d) **Train** personnel to intervene and respond properly to allegations of abuse.

B. Responsibilities.

1. At DA level, the ACSIM has responsibility for the Family Advocacy Program.

2. The Commander, U.S. Army Community and Family Support Center develops policy and programs.

3. Installation Commanders:

a) Establish programs for preventing, reporting, and treating spouse and child abuse as per AR 608-18.

b) Appoint an installation Family Advocacy Program (FAP) Manager on orders to manage the program and ensure compliance with regulation.

c) Review and approve FAP funding.

d) Submit consolidated FAP budget requirements through MACOM for forwarding to CFSC.

e) Designate a reporting point of contact (RPOC) and ensure a 24-hour emergency response system.

f) Establish mandatory counseling and educational programs under the FAP for Soldiers involved in substantiated abuse.

g) Establish voluntary educational and counseling programs and encourage maximum participation.

h) Consider CRC recommendations when taking or recommending disciplinary or administrative actions on Soldiers or civilians involved in abuse.

i) Direct development of an MOA with Child Protective Services (CPS) and other civilian agencies adjoining Army installations.

j) Appoint members of the CRC, FAC, and fatality review committees by written order and name for a minimum 1-year appointment.

k) Review CRC and FAC minutes and FRC recommendations.

l) Establish training to ensure that all subordinate commanders and senior enlisted advisers (E-7 to E-9) are briefed on FAP within 45 days of assuming command, and annually thereafter.

4. Unit Commanders:

a) Attend spouse and child abuse commander education programs designed for unit commanders.

b) Schedule time for Soldiers to attend troop awareness briefings.

c) Be familiar with rehabilitative, administrative, and disciplinary procedures relating to abuse.

d) Report and investigate suspected abuse to RPOC.

e) Direct Soldier to participate in FAP assessment.

f) Attend Case Review Committee (CRC) presentations when unit Soldiers involved.

g) Encourage Soldier cooperation in Family Advocacy Programs (also ensuring that Soldiers are properly advised of Article 31 rights).

h) Provide written no-contact orders, as appropriate; counsel Soldiers; and take other actions, as appropriate, regarding compliance with civilian orders of protection.

i) Support and comply with CRC recommendations to maximum extent possible.

j) Consider CRC recommendations before taking administrative or disciplinary action.

k) Notify CRC chairperson when reassigning Soldiers or moving family members who are involved in treatment for abuse.

l) Encourage participation of civilian family members in treatment programs.

m) Be aware of Lautenberg Amendment issues.

5. The Family Advocacy Program Manager (FAPM) - works for the director of Army Community Services on-post. The FAPM has numerous responsibilities, among them:

a) Coordinates all FAP efforts to ensure compliance with regulation.

b) Ensures that all abuse reports from ACS are forwarded to the RPOC.

c) Central installation POC for all FAP briefing or training requests.

d) Supervises ACS prevention staff.

e) Provides liaison with civilian and military service providers. Has lead responsibility for developing and coordinating an installation MOA.

f) Assesses the special FAP needs of military families on installation and in surrounding communities.

g) Identifies prevention and treatment resources and submits budget requests.

h) Develops training programs, provides statistical reports.

6. The Family Advocacy Committee (FAC):

a) is the multidisciplinary team that advises installation commander on FAP policy and procedure.

b) is chaired by the garrison or base support battalion commander or designee.

c) is composed of:

(1) Pediatrician or other MD.

(2) Community Health Nurse (ad hoc).

(3) DENTAC commander or representative.

(4) Provost Marshall or senior representative.

(5) CID representative.

(6) SJA or representatives (CRC representative and the victim/witness coordinator).

(7) ASAP clinical director or senior representative.

(8) Child and Youth Services coordinator.

(9) Installation Chaplain or representative.

(10) Installation Command Sergeant Major.

(11) Public Affairs Officer

(12) Consultants (e.g. school liaison officers, child protective services, and local court representative).

d) Meets at least quarterly.

e) Identifies trends requiring a command or community response, coordinates civilian and military resources, facilitates an integrated community approach to the prevention of child and spouse abuse, develops community, command and troop education prevention programs, publicizes how to report abuse, and addresses administrative details.

7. Case Review Committee (CRC):

a) Is a multidisciplinary team appointed on orders by the installation commander and supervised by the medical treatment facility (MTF) commander.

b) chaired by the Chief, Social Work Services.

c) the unit commander exercising UCMJ authority over the alleged abusers, will be invited to attend when the case involves one of his/her personnel.

d) tracks and evaluates cases of reported abuse.

(1) cases are either substantiated or unsubstantiated.

(2) the standard is fairly low: a preponderance of the evidence.

(3) a majority of members must vote to substantiate.

e) meets monthly; each case is reviewed at least quarterly.

f) determines whether civilian courts should intervene.

g) determines whether to recommend removal of children from home.

h) recommends corrective measures.

i) briefs the commander on status of case.

j) recommendations, such as treatment, foster care, etc., do not preclude criminal or adverse administrative action against a Soldier.

C. Restricted Reporting Policy for Incidents of Domestic Abuse

1. The DoD is committed to ensuring victims of domestic abuse are protected, treated with dignity and respect, and provided support, advocacy, and care. DoD policy also strongly supports effective command awareness and prevention programs and law enforcement and criminal justice activities that will maximize accountability and prosecution of perpetrators of domestic abuse. To achieve these dual objectives, the DoD policy prefers that personnel report suspected domestic abuse incidents promptly to activate both victims' services and accountability actions. However, a requirement that all domestic abuse incidents be reported can represent a barrier for victims hoping to gain access to medical and victim advocacy services without command or law enforcement involvement.

2. In order to address these competing interests, the Department of Defense issued a new instruction, DoD Instruction 6400.06 providing victims of domestic violence two reporting options: unrestricted reporting and restricted reporting.

a) Unrestricted Reporting**.** Victims of domestic abuse who want to pursue an official investigation of an incident should use current reporting channels, e.g., chain of command, Family Advocacy Program (FAP), or law enforcement. Upon notification of a reported domestic abuse incident, victim advocacy services and FAP clinical services will be offered to the victim. Additionally, at the victim's discretion/request, the healthcare provider shall conduct any forensic medical examination deemed appropriate. Details regarding this incident will be limited to only those personnel who have a legitimate need to know.

b) Restricted Reporting**.** In cases where an <u>adult victim</u> elects restricted reporting, the victim advocate and healthcare providers may not disclose covered communications (defined in the policy memorandum) to either the victim's or offender's commander or to law enforcement either within or outside DoD, except as provided by exceptions within the policy memorandum.

(1) Restricted reports must be made to one of the following individuals:

(a) Victim advocate or healthcare provider (defined in the policy memo);

(b) Supervisor of victim advocate;

(c) Chaplain.

(2) Exceptions to Confidentiality. In cases in which victims elect restricted reporting, the prohibition on disclosing covered

communications is waived to the following persons when disclosure would be for the following reasons:

(a) Named individuals when disclosure is authorized by the victim in writing.

(b) Command officials and law enforcement when necessary to prevent or lessen a serious and imminent threat to the health or safety of the victim or another person.

(c) FAP and any other agencies authorized by law to receive reports of child abuse or neglect when, as a result of the victim's disclosure, the victim advocate or healthcare provider has a reasonable belief that child abuse has also occurred. However, disclosure will be limited only to information related to the child abuse.

(d) Disability Retirement Boards and officials when disclosure by a healthcare provider is required for fitness for duty for disability retirement determinations, limited to only that information which is necessary to process the disability retirement determination.

(e) Supervisors of the victim advocate or healthcare provider when disclosure is required for the supervision of direct victim treatment or services.

(f) Military or civilian courts of competent jurisdiction when a military, Federal, or State judge issues a subpoena for the covered communications to be presented to the court or to other officials or when required by Federal or State statute or applicable U.S. international agreement.

D. Reporting Requirements.

1. Report Point of Contact (RPOC). Para. 3-3.

a) Designated by installation commander as a central POC.

b) Normally the MTF emergency room or MP Desk.

c) Manned 24 hours.

2. Who must report suspected abuse?

a) All Soldiers, civilian employees and members of military community should be encouraged to report.

b) Law enforcement, medical, social work and school personnel, Family Advocacy personnel and Child Youth Services personnel must report.

c) Commanders must report.

3. When a family member reports abuse, the commander will be notified within 24 hours.

E. Records of Reported Abuse: Chapter 5.

1. The US Medical Command, Fort Sam Houston, maintains an Army-wide, centralized data bank containing a confidential index of victim-based reported spouse and child abuse cases – Army Central Registry (ACR). Used to assist in the early identification, verification, and retrieval of reported cases of spouse and child abuse.

2. Must be substantiated spouse and child abuse.

a) The standard used by the Case Review Committee – a preponderance of the evidence available indicates abuse occurred.

b) Distinguish the standard used by CID in titling decisions: credible information exists that a crime was committed and this person did it.

3. Commander's access governed by FOIA and Privacy Act.

F. Removal of Children from Home.

1. Medical Protective Custody. If the child is properly at the MTF, child may be taken into medical protective custody as follows:

a) Obtain parental consent, if possible.

b) If consent is not given, ask whether the child suffers from abuse or neglect by a parent to the extent that immediate removal from the home is necessary to avoid imminent danger to the child's life or health.

c) The treating physician makes the initial determination.

d) Approved by MTF commander.

e) Unit commander will be notified.

2. Children cannot be removed from a home, school or child care facility unless a bona fide medical emergency exists. Coordination with civilian authorities may be appropriate.

3. Foster Care.

a) Generally, need parental consent or order from state or foreign court with jurisdiction.

b) U.S. - seek court order and work with the local child protection service even if parental consent is given.

c) Foreign Country - Coordinate with host nation authorities.

4. Emergency situations. The installation commander may authorized if abuse is substantiated and child at risk of imminent death or serious bodily harm, or serious mental or physical abuse.

G. Military Protective Orders (MPOs).

1. On 10 March 2004, the Deputy Secretary of Defense for Personnel and Readiness issued a directive on Military Protective Orders. The directive provides a standard MPO, DD Form 2873, and gives specific guidance on its use.

2. Definitions:

a) Domestic violence: An offense under the US Code, the UCMJ, or state law that involves the use, attempted use, or threatened use of force or violence against a person of the opposite sex, or a violation of a lawful order issued for the protection of a person of the opposite sex, who is:

(1) A current or former spouse;

(2) A person with whom the abuser shares a child in common; or

(3) A current or former intimate partner with whom the abuser shares or has shared a common domicile.

b) Child Abuse: The physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child. It does not include discipline administered by a parent or legal guardian to his or her child provided it is reasonable in manner and moderate in degree and otherwise does not constitute cruelty.

3. Commanders will:

a) Issue MPOs when necessary to safeguard victims, quell disturbances, and maintain good order and discipline while victims have time to pursue issuance or enforcement of protective orders through the civilian courts.

b) Use DD Form 2873 for MPOs.

c) Provide distribution for DD Form 2873 as listed on the form.

4. Issues for commanders to consider:

a) May want to limit SSN and address of victim in Block 2 of the form.

b) Higher commanders may want to establish a level of authority for issuance of MPOs . . . should it be company or battalion level?

c) Note the comprehensive nature of protections and limitations in the MPO: prohibits all direct and third-party contact, e-mail or telephonic contact; requires mandatory counseling; requires surrender and/or disposal of both government and privately-owned weapons.

IV. LAUTENBURG AMENDMENT

A. Department of Defense Implementation:

1. Memorandum, Assistant Secretary of Defense, Force Management Policy, Subject: Interim DoD Policy on Domestic Violence Amendment to the Gun Control Act (22 Oct 1997).

2. Message, 151100Z Jan 98, Headquarters, Dep't of Army, DAPE-MPE, subject: HQDA Message on Interim Implementation of Lautenburg Amendment (15 Jan. 1998).

3. Message, 311108Z Oct 97, Headquarters, Dep't of Army, DAJA-LA, subject: Interim Guidance on Lautenburg Amendment Issues (31 Oct. 1997).

4. Message, 211105Z May 99, Headquarters, Dep't of Army, DAPE-MPE, subject: HQDA Guidance on Deployment Eligibility, Assignment, and Reporting of Solders Affected by the Lautenburg Amendment.

5. Memorandum, Under Secretary of Defense for Personnel and Readiness, Subject: Department of Defense Policy for Implementation of Domestic Violence Misdemeanor Amendment to the Gun Control Act for Military Personnel (27 Nov. 2002).

6. Final DA Implementation: Message, 221927Z October 2004, Headquarters, Dep't of Army, DAPE-MPE, subject: HQDA Message on Final Implementation of the Lautenberg Amendment to the Gun Control Act of 1968.

7. JAGNet site for Lautenberg Amendment database: http://www.jagnet.army.mil/jagnet/lautenasgm.nsf

B. Basic Provisions.

1. 18 U.S.C. § 922(d) prohibits the transfer of "any firearm or ammunition to any person whom you know or have reasonable cause to believe . . . has been convicted in any court of a misdemeanor crime of domestic violence."

2. 18 U.S.C. § 922(g) prohibits "any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence . . . to receive any firearm or ammunition which has been shipped in interstate or foreign commerce."

3. Violations of either prohibition are punishable by 10 years confinement, $250,000 fine, or both. 18 U.S.C. § 924(a)(2).

4. 18 U.S.C. § 925 formerly exempted "any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof." This "federal exemption" has been eliminated for individuals "convicted in any court of a misdemeanor crime of domestic violence."

5. Elements of a "Misdemeanor Crime of Domestic Violence," 18 U.S.C. § 921(a)(33).

a) The person was convicted of a crime classified as a misdemeanor in the jurisdiction where the conviction was entered.

b) The offense had as an element the use or attempted use of physical force, or threatened use of a deadly weapon.

c) The offender was at the time of the offense:

(1) A current or former spouse, parent or guardian of the victim;

(2) A person with whom the victim shared a child in common;

(3) A person who was cohabiting with or has cohabited with the victim as a spouse, parent or guardian of the victim;

(4) A person who was similarly situated to a spouse, parent, or guardian of victim.

d) The convicted offender was represented by counsel, or knowingly and intelligently waived the right to counsel.

e) If entitled to have the case tried by jury, the case was actually tried by a jury or the person knowingly and intelligently waived the right to have the case tried by a jury.

f) The conviction has not been expunged or set aside, or the convicted offender has not been pardoned for the offense or had civil rights restored, unless the pardon, expungement, or restoration of civil rights provides that the offender may not ship, transport, possess, or receive firearms.

C. Dep't of Defense and Dep't of Army Response.

1. Interpretation.

a) Conviction of a misdemeanor crime of domestic violence does not include a summary court-martial conviction or nonjudicial punishment under Article 15.

b) The law does not apply to crew served weapons or major weapons systems (tanks, missiles, aircraft, etc.).

c) The law applies to all other Army issue and privately owned firearms and ammunition.

d) The Army policy applies worldwide (including hostile fire areas).

2. Pursuant to the 27 November 2002 DoD Policy Memorandum, felony crimes of domestic violence are now considered qualifying convictions for Lautenberg Amendment purposes.

D. Military Department Policies under November 2002 DoD Policy Memorandum:

1. Each Department shall implement a periodic training program to inform personnel of the Lautenberg Amendment and DoD policy related thereto.

a) Training shall inform personnel of their affirmative and continuing obligation to inform commanders or supervisors of qualifying convictions.

b) DoD components will also post notices about the Amendment and DoD policy in all facilities in which Government firearms or ammunition are stored.

2. Departments may require personnel to certify whether they have qualifying convictions.

a) If so, Departments shall use DD Form 2760 for such certifications.

b) If not, DD Form 2760 shall be made available for personnel who self-report.

c) Departments will issue regulations governing the filing, maintenance and retrieval of DD Form 2760.

3. Departments may promulgate separation regulations specifically pertaining to members who have qualifying convictions.

E. Final HQDA Implementation. Memorandum dated 23 October 2003.

1. Senior mission commander (a term undefined in the message) must:

a) Ensure immediate implementation of the message.

b) Display the message outside unit arms rooms and all facilities in which Government firearms or ammunition are stored, issued, disposed, or transformed.

c) Inform Soldiers that they have an affirmative and continuing obligation to inform their superiors if they have, or later obtain, a qualifying conviction. DD Form 2760 shall be used for this purpose. Soldiers will also be informed of the use immunity provisions of DD Form 2760 (neither the information nor evidence gained from filling out the form can be used in any prosecution against a Soldier for past violations of the Lautenberg Amendment).

(1) Ensure that company-level commanders collect completed DD Form 2760s and file in local MPRF.

(2) Ensure that local pre-command courses inform company-level commanders of their obligations.

d) Implement procedures to track domestic violence arrests and convictions off-post.

2. Reporting Requirements. All Soldiers with qualifying convictions must be identified and reported to ensure compliance with the law.

3. Commanders who have reasonable cause to believe there is a qualifying conviction should take action to investigate. An investigation may be initiated by ordering a Soldier to complete DD Form 2760.

4. Soldiers who have or believe they have a qualifying conviction should be referred to a legal assistance attorney for advice. Legal assistance attorneys can assist in seeking pardon or expungement of convictions.

5. Soldiers will be given a reasonable time to seek expungement or pardon for a qualifying conviction. They can extend up to one year for that purpose.

6. If a Soldier has a qualifying conviction, or there is reasonable cause to believe he has one, the commander will immediately retrieve all government-issued firearms and ammunition and advise the Soldier to consult with a legal assistance attorney on the lawful disposal or sale of privately-owned firearms or ammunition.

7. Personnel policies.

a) Utilization. Soldiers with qualifying convictions:

(1) Must be detailed to meaningful duties that do not require bearing weapons or ammunition.

(2) May be reassigned to TDA units that deny them access to weapons and ammunition.

(3) May not be appointed or assigned to leadership, supervisory, or property accountability positions that would require access to firearms or ammunition.

(4) May not attend any service school where instruction with firearms or ammunition is part of the curriculum.

(5) Must be counseled that inability to complete service schools could impact future promotion and retention.

b) Mobilization/Deployment. Soldiers with qualifying convictions are not mobilization assets and are nondeployable for missions requiring possession of firearms or ammunition.

c) Assignment.

(1) Lautenberg Soldiers are not eligible for OCONUS assignments.

(2) OCONUS active and AGR Soldiers will complete their tours.

(3) Soldiers will not be curtailed from OCONUS assignments.

(4) For purposes of this message, OCONUS does not include Alaska, Hawaii, or Puerto Rico.

d) Retention.

(1) The Army does not have a specific “Lautenberg Chapter.”

(2) Commanders may separate Soldiers based on the underlying conduct that led to the qualifying conviction or for the conviction itself.

(3) Soldiers may be temporarily accommodated pending a bar to reenlistment or involuntary separation.

(4) Inability to perform certain missions due to a qualifying conviction may be appropriate comments for evaluation and efficiency reports.

(5) Soldiers will not be given a waiver for enlistment or reenlistment.

(6) Soldiers with qualifying convictions are not eligible for indefinite reenlistment.

(7) Soldiers who have reenlisted for options requiring a CONUS PCS will proceed to new assignment.

(8) OCONUS Soldiers will receive new assignment instructions from HRC.

(9) Soldiers who have reenlisted for retraining in an MOS where instruction includes weapons or ammunition training will be deleted from assignment instructions and may request voluntary separation.

8. Officers. Officers may request REFRAD or submit an unqualified resignation. RC officers not on active duty may submit an unqualified resignation or be recommended for involuntary separation.

9. Reporting Requirements.

a) Active Army. All Soldiers identified with qualifying convictions will be reported to HQDA.

b) Reserve Components. NGB will report for Army National Guard. USARC will report for USAR. Commander, USARC will submit AGR and IMA input. IRR, standby reserve, and retired reserve not subject to reporting requirement.

10. USR. Commanders will continue to report non-deployable personnel under this policy on the USR.

V. CONCLUSION.

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PUBLICATION DATES FOR THE CRIMINAL LAW DESKBOOK ARE: JUNE – OCTOBER – FEBRUARY.

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