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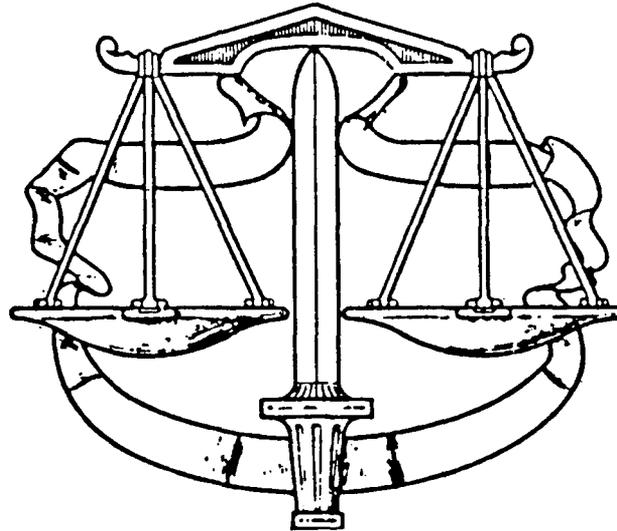
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REHABILITATIVE POTENTIAL OF THE ACCUSED

CAPTAIN JOHN R. MORRIS

SAFE PASSAGE THROUGH THE MANUAL FOR COURTS-MARTIAL, 1984

MAJOR ERNEST F. PELUSO

DEFENSE STRATEGIES FOR UNCHARGED MISCONDUCT ON SENTENCING

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1. This issue marks the final issue of publication of The Advocate. For fifteen years The Advocate has proudly served as a legal resource for defense counsel. The pages of this legal journal have contained many scholarly and practical works which have provided assistance to military counsel in their work as the representatives of military accused in all of the military services in locations throughout the world.
2. In the future, The Advocate will continue its function of presenting the defense viewpoint in a different format. The Advocate will join forces with The Army Lawyer beginning in January, 1985. The Army Lawyer will feature an "Advocacy" section which will contain articles prepared or written by The Advocate editorial staff.
3. The Advocate thanks its many readers for their support and readership in the past and trusts that readers will continue to find the defense viewpoint well represented in the "Advocacy" section of The Army Lawyer.

A handwritten signature in cursive script, reading "Wm G Eckhardt".

William G. Eckhardt
Colonel, JAGC
Chief Appellate Attorney
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OPENING STATEMENTS

This issue is the final issue of The Advocate. The Editorial Board thanks our contributors and subscribers who have supported The Advocate during our fifteen years of publication. In the future, we will merge with The Army Lawyer and begin publishing monthly. Authors of defense oriented articles are encouraged to submit their articles to the Editorial Board, Defense Appellate Division, U.S. Army Legal Services Agency, HQDA (JALS-DA), Nassif Building, Falls Church, Virginia 22041. The Editorial Board will continue to analyze and edit defense articles prior to publication.

Subscriptions will be converted to subscriptions to The Army Lawyer. Private subscribers who do not wish to receive The Army Lawyer may contact Superintendent of Documents, U.S. Government Printing Office, ATTN: SSCM, Washington, D.C. 20402 to cancel their subscription and request a refund. All others subscribers may contact the Editorial Board, USALSA/DAD, 5611 Columbia Pike, Falls Church, Virginia 22041.

REHABILITATIVE POTENTIAL OF THE ACCUSED: HAVE THE
FLOODGATES BEEN OPENED ON SENTENCING?

*by Captain John R. Morris**

Midnight, 31 July 1984. It was a time to remember, to reflect back upon the good old days when the trial defense counsel controlled much of the presentencing portion of a court-martial. Admittedly, records of nonjudicial punishment might be received into evidence, and perhaps even aggravating circumstances of the crime would come before the court. Nevertheless, the trial defense counsel and the accused held the key to Pandora's box, the contents of which remained out of the Government's grasp, although prosecutors were anxious to pour it out into the record of trial. Is the accused a good soldier? Can he be rehabilitated? These were questions that the trial defense counsel often skirted, sometimes charged toward but retreated from before the door was actually opened or the trial counsel given a crack through which to parade his rebuttal witnesses.¹

Effective 1 August 1984, the newest version of the Manual for Courts-Martial, United States (1984) [hereinafter cited as MCM, 1984] made sweeping changes in the court-martial system. No revision, however, may undermine the existing tactics of a trial defense counsel more than Rule 1001 of the Rules for Courts-Martial (R.C.M.), subsection (b)(5) of which provides:

Evidence of rehabilitative potential. The trial counsel may present, by testimony or oral deposition in accordance with R.C.M. 702(g)(1), evidence, in the form of opinion, concerning the accused's previous performance as a servicemember and potential

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1. For an example of the result of "flying too close to the candle," see United States v. Strong, 17 M.J. 263, 266-67 (CMA 1984) (defense counsel responsible for specific evidence offered, as well as the reasonable inferences which must be drawn from same).

for rehabilitation. On cross-examination, inquiry is allowable into relevant and specific instances of conduct.

I. The Ramifications of the New Rule

By virtue of the clear and unmistakable language of R.C.M. 1001, a trial defense counsel may now find himself representing an accused who, in the moments before sentence is announced, stands before the Court not only as a convicted man but also as an individual identified by the members of his chain of command as a ne'er-do-well. While the defense counsel may take early steps to lessen the potential impact of the anticipated government evidence,² the defense will no longer be able to rely on a tearful but limited statement by the accused, a few aging documents from a personnel file, and a moving argument from counsel in an attempt to avoid a punitive discharge or confinement at hard labor. Instead, the government now possesses the ability to construct an up-to-the-moment, often devastating portrait of the accused as painted by those who know him best.

II. Some Thoughts and Suggested Tactics

If any one character trait best epitomizes the successful trial defense counsel, it is resourcefulness. As some defenses are taken away,³

2. E.g., in a case involving a plea of guilty, the accused could bargain for a limit on the number of government witnesses on these issues or on the form of the evidence (for example, by stipulation of expected testimony only). Counsel should also consider objections to presentation of cumulative opinion evidence under Military Rule of Evidence [MRE] 403.

3. E.g., the "fraudulent enlistment" defense was virtually eliminated by the amendments to Article 2 of the Uniform Code of Military Justice in 1980.

newer avenues of attack are discovered; as established methods of litigation are removed,⁴ newer tactics replace them. With this in mind, the defense counsel must strive to dissect the facts of a case and the personality of the accused to determine how best to serve the client.

R.C.M. 1001(b)(5) permits opinion evidence during presentencing concerning the accused's previous performance as a servicemember and his potential for rehabilitation. A trial defense counsel may face the following testimony from a government witness during presentencing:

Q&A: [The trial counsel establishes, for the record, the initial, routine information about the witness.]

Q: First Sergeant, do you know the accused in this case, Specialist Four [SP4] Smith?

A: Yes, sir, I do; I'm his First Sergeant.

Q: First Sergeant, how long have you known SP4 Smith?

A: Sir, he's been in Charlie Battery for almost twenty months. I was his platoon sergeant for the first twelve months and his first sergeant for the last eight.

Q: First Sergeant, what has been your contact with SP4 Smith in Charlie Battery?

A: As a platoon sergeant, sir, I had daily contact with him, supervised him, worked with him in garrison and in the field, even ate with him. As a first sergeant, I still have daily contact,

4. E.g., the trial defense counsel can no longer prevent a prior court-martial conviction from being received into evidence during presentencing solely because it is not yet final or because it did not occur in the six years next preceding the commission of any offense of which the accused has been found guilty. Compare R.C.M. 1001(b)(3)(A) and (B), MCM (1984) with Paragraph 75b(3)(A) and (B), Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter cited as MCM, 1969]. (evidence of such convictions formerly not admissible).

and although the number of times I see him are fewer than before, I talk with his supervisors daily to find out how he is doing. We're a tight unit.

Q: First Sergeant, based on your personal knowledge of SP4 Smith, are you able to form an opinion concerning SP4 Smith's previous performance as a soldier in the United States Army while a member of your battery?

A: Yes, sir, I am.

Q: First Sergeant, what is that opinion?

A: Sir, I believe that SP4 Smith is a substandard soldier whose performance is among the worst I've seen in the entire twenty-four years I've been in this Army.

Q: First Sergeant, SP4 Smith now stands before this Court convicted of barracks larceny. Based on this knowledge, together with the facts with which you are personally acquainted regarding SP4 Smith and his performance over the past twenty months, are you able to form an opinion concerning his potential for rehabilitation?

A: Yes, sir, I am.

Q: First Sergeant, what is that opinion?

A: Sir, I don't believe that SP4 Smith can be rehabilitated at all. No, sir, not at all.

Q: Thank you, First Sergeant.

[To defense counsel]: Your witness.

Whether in a trial with members or by military judge alone, the foregoing testimony is devastating. If the court has adverse information on the accused from his personnel file, the cumulative effect of that information and opinion testimony could send SP4 Smith home from the Army with an interim stop at Ft. Leavenworth. The defense counsel must vigorously challenge the adverse opinion evidence concerning prior performance and rehabilitative potential in order to lessen its effect.

The watchword for the successful trial defense counsel is preparation: thorough, personal preparation. Talk to the accused's chain of command; go through his personnel file (and, perhaps, those of anticipated witnesses); talk to the members of the unit. Only after this procedure is completed will counsel have a true picture of his or her client, and only then will he or she be able to "do battle." With insight into the situation, the trial defense counsel may be able to present the following cross-examination of our first sergeant under R.C.M. 1001 (b)(5):

Q: First Sergeant, how would you rate yourself as a First Sergeant?

A: I think I'm a very good First Sergeant, sir.

Q: First Sergeant, I believe you stated before that you've been in the United States Army for twenty-four years?

A: Yes, sir, that's correct.

Q: First Sergeant, during the first five years of your twenty-four year career with the U.S. Army, did you ever get into trouble yourself? [Possible objection on relevance grounds. Defense proffers, out of hearing of the witness, that the defense is attempting to establish the witness's definition of "rehabilitative potential" which, by human nature, is fixed by one's own life experiences. Defense proffers that the relevance will be clear almost immediately. Objection overruled.]

A: Well, sir, that depends on what you mean by "trouble."

Q: Well, First Sergeant, did you ever get called into the office of your first sergeant or CO for doing something, or not doing something, that they felt strongly about?

A: Yes, sir, I guess we all have at some time or another. It's a learning experience.

Q: In fact, First Sergeant, you have in your records a conviction by summary court-martial from the time when you were a corporal, don't you?

[Objection - not relevant and fails to provide sufficient foundation for impeachment. Defense proffer, out of hearing of the witness, that the defense offers this fact for the limited purpose of exploring his witness's personal opinions, based on his own experiences, regarding rehabilitation and when, if ever, soldiers deserve a second chance. Objection overruled.]

A: Yes, sir, but that was a long time ago.

Q: First Sergeant, did that conviction end your career as a soldier in the United States Army?

A: No, sir, it did not.

Q: First Sergeant, were you able to overcome that conviction and become a better soldier for the experience?

A: Yes, sir, I was.

Q: First Sergeant, someone gave you a second chance, didn't they?

A: Sir, I earned that second chance.

Q: First Sergeant, someone had to give it to you, didn't they?

A: They trusted me, sir; they had faith in me.

Q: But we don't know who, or how many, may have disagreed with that decision to give you a second chance, do we?

A: [No answer.]

Q: First Sergeant, you're not on trial here, and I certainly don't want to make it seem that way. You say you're a good First Sergeant, and I'm sure many other people agree. I'm just trying to understand your earlier answers, OK?

A: Yes, sir.

Q: First Sergeant, what is the mission of your field artillery battery?

- A: Sir, to provide artillery support in combat to divisional units wherever and whenever necessary; to maintain effectiveness by achieving unit readiness; and to be prepared to fight and win.
- Q: First Sergeant, in order to maintain unit readiness and unit effectiveness, you have to keep an eye on your people, don't you?
- A: Yes, sir. Some have to be watched closer than others.
- Q: And you watch your people in order to identify the stragglers, the slackers, the people who just don't belong, don't you?
- A: Yes, sir.
- Q: And it's your job, your duty, to be watchful and to identify these substandard soldiers, isn't it?
- A: Yes, sir.
- Q: It's important to do that, isn't it?
- A: Yes, sir.
- Q: And you're a good First Sergeant because you do your duty and do it well, don't you?
- A: Yes, sir, I try.
- Q: And you were a platoon sergeant before you became a first sergeant, weren't you?
- A: Yes, sir.
- Q: And it was your duty then and now to identify the people who don't belong in our Army, isn't it?
- A: Yes, sir.
- Q: And you're good at it, aren't you?
- A: Yes, sir, I think so.
- Q: You're good enough to have lasted for twenty-four years and to be now the senior NCO of a combat, field artillery battery, aren't you?

A: Yes, sir.

Q: First Sergeant, when SP4 Smith first arrived in Charlie Battery twenty months ago from the Ft. Sill OSUT, he was a Private E2, wasn't he?

A: Yes, sir.

Q: And you were his platoon sergeant?

A: Yes, sir.

Q: First Sergeant, within five months of his arrival, PV2 Smith was promoted to PFC, wasn't he?

A: Yes, sir.

Q: First Sergeant, twelve months later, he was promoted to Specialist Four, wasn't he?

A: Yes, sir.

Q: And you knew about his promotion?

A: Yes, sir.

Q: You didn't try to block it, did you?

A: No, sir.

Q: You supported it, didn't you?

A: Yes, sir, at the time.

Q: Approximately ten months before his promotion from PFC, SP4 Smith received a company-grade Article 15 from the CO, didn't he?

A: Yes, sir, while he was a PFC.

Q: And you knew about it?

A: Yes, sir. I was the platoon sergeant.

Q: The CO called in you and the rest of the chain of command to help him determine a fair and just punishment, didn't he?

A: Yes, sir.

Q: And you gave him your opinion, didn't you?

A: Yes, sir.

Q: That opinion was that a reduction in rank was too severe and that loss of money and extra duty were sufficient, wasn't it?

A: Yes, sir.

Q: Was he reduced?

A: No, sir.

Q: Subsequent to that, he was promoted to Specialist Four, wasn't he?

A: Yes, sir.

Q: And you supported it?

A: Yes, sir.

Q: First Sergeant, in the past twenty months, how many times have you formally counselled SP4 Smith?

A: Formally, sir?

Q: Yes, First Sergeant, formally. The type of counselling that is sufficiently serious to warrant a record of the session and the conduct itself.

A: Formally, sir, not at all.

Q: First Sergeant, it is your duty as the senior NCO, and was as a platoon sergeant, to document unsatisfactory behavior, isn't that correct?

A: Yes, sir, when we can.

Q: And you're where you are now in the Army because you do your duty and do it well, right?

A: Yes, sir.

Q: And you are able to have done so because you have the talent and the ability to see a soldier who really is a soldier and, at the same time, see through a soldier who just dosen't belong, right?

A: Yes, sir.

- Q: You reward the good soldiers and punish those who deserve punishment, don't you, First Sergeant?
- A: Yes, sir, whenever I can.
- A: Rewards include promotions, commendations, giving a soldier increased responsibility, isn't that correct?
- A: Yes, sir, among other things.
- Q: And for substandard soldiers, the so-called bad soldiers, there are ways to deal with them, aren't there?
- A: Yes, sir.
- Q: First Sergeant, you do know what a "Chapter 13" is, don't you?
- A: Yes, sir.
- Q: An administrative separation for someone who just doesn't belong, right?
- A: Yes, sir.
- Q: It's available for your unit to use in the situation of a junior enlisted soldier who just doesn't belong, isn't that correct?
- A: Yes, sir.
- Q: And you have that type of action available to you through your own CO, don't you?
- A: Yes, sir.
- Q: And it is your duty -- to your unit, to your mission and to your people -- to use this type of action to get rid of the bad soldiers, isn't it?
- A: Yes, sir, when we can.
- Q: First Sergeant, you and your CO actually initiate separations under Chapter 13, don't you?
- A: Yes, sir, we can.

Q: When you identify a bad soldier, a substandard soldier, a poor soldier, one who just can't make it, surely you don't waste our precious resources -- our time, our money, our training -- on someone like that, do you, First Sergeant?

A: No, sir, not when I have a choice.

Q: You've known SP4 Smith for about twenty months?

A: Yes, sir.

Q: You were his platoon sergeant for a year?

A: Yes, sir.

Q: Worked with him, ate with him, supervised him?

A: Yes, sir.

Q: Did your duty as a platoon sergeant so well that your commanders promoted you and gave you an entire battery of your own?

A: Yes, sir.

Q: You've been talking with SP4 Smith's supervisors about his performance, is that correct?

A: Yes, sir.

Q: First Sergeant, you've talked with SP4 Smith's supervisors often since you've become First Sergeant, isn't that what you testified to earlier?

A: Yes, sir.

Q: First Sergeant, based on those interested inquiries you've made, how many formal counseling statements have other supervisors in the battery written on SP4 Smith, to the best of your knowledge?

A: None that I'm aware of, sir.

Q: First Sergeant, other than the Article 15 from about ten months ago, the one in which you supported SP4 Smith (then a PFC), how many Article 15's has SP4 Smith received during the entire time he's been in the United States Army?

A: No others, sir, that I know of.

Q: First Sergeant, is SP4 Smith now pending administrative discharge under Chapter 13 or any other provision of AR 635-200?

A: No, sir, not that I'm aware of.

Q: First Sergeant, to the best of your knowledge, has any administrative separation ever been initiated for SP4 Smith at any time since he's been in Charlie Battery?

A: Not that I know of, sir.

Q: First Sergeant, in the past eight months, Charlie Battery has administratively discharged thirteen soldiers, hasn't it?

A: I'm not sure, sir.

Q: Let me attempt to refresh your memory.
[Defense counsel marks an exhibit (a list) and hands it to the witness.]

Q: First Sergeant, do you recognize the names on that list?

A: Yes, sir.

Q: They are the names of thirteen soldiers whom Charlie Battery has administratively separated from the United States Army because they didn't belong, isn't that correct?

A: Yes, sir, we chaptered them out.

Q: First Sergeant, those thirteen soldiers were separated while you've been First Sergeant, weren't they?

A: Yes, sir.

Q: Thirteen in eight months.

A: Yes, sir, I guess so.

Q: You were doing what you had a duty to do, weren't you -- identifying and separating the bad soldiers?

A: Yes, sir.

Q: And, yet an administrative discharge packet was never drawn up on SP4 Smith, was it?

A: No, sir.

Q: In fact, First Sergeant, SP4 Smith is not even barred from reenlisting, is he?

A: No, sir.

Q: Not barred from reenlisting, never processed for administrative separation, promoted, not reduced by the one Article 15 in his file, no formal counselling statements -- is this the same substandard soldier who can't be rehabilitated about whom you testified earlier, First Sergeant?

A: [No answer.]

DC: No further questions.

You have now, in lengthy but necessary fashion, painted a picture of the accused and this witness. On redirect, the trial counsel may seek to rehabilitate his witness by obtaining testimony that the accused had slipped between the cracks, that he was next on the list of soldiers to be removed, or that some promotions are taken as given. You, however, have established that the witness knows his duty, does it well, and, over the entire time he has scrutinized the accused, he has done little, if anything, that is consistent with his in-court opinion. It is even conceivable that in one or two more questions, the witness would acknowledge that his opinion about "rehabilitative potential" was based almost totally on the seriousness of the present charges; if so, the trial defense counsel must move to strike such opinion as improper and, if the trial were with members, move for a mistrial.

III. Conclusion

In preparing for the final and all-important sentencing stage of a court-martial, the trial defense counsel must rely on more than blind luck if he is to serve his client effectively. Few witnesses admit inconsistencies on the stand unless painted into the proverbial corner; too many respond "I don't know" to the critical question. Unless the defense counsel has facts and figures to show that he will not retreat from, for example, establishing the number of administrative separations

initiated by the witness in the recent past (a fact available from the battalion legal clerk), cross-examination is often pointless and futile.

Under R.C.M. 1001(b)(5), trial defense counsel will be faced with an area ripe for imaginative tactics and in-depth preparation. Does the witness have skeletons in his own closet? Show that people do change and that second chances can be constructive. Is the witness eager for the discharge of this accused? Demonstrate the type of bias that can blind him from seeing positive features and real potential. Is the witness too far removed from the accused's everyday activities? Bring in even a single, favorable witness who supervised the accused closely and who, as a member of the non-commissioned officer or officer corps, has faith in the accused. Does the witness rely almost exclusively on facts and opinions provided by others? Argue to the court that such a third-or fourth-generation opinion is of little probative value in sentencing and that a sufficient foundation has not been established to admit it as opinion evidence, rather than reputation evidence. Is the witness immovable in the face of obvious and inconsistent matters? Save your breath for argument, for the point has been made.

The new Rules for Courts-Martial have altered some of the traditional rules of presentencing procedure and made the task of the trial defense counsel even more difficult. However, the stakes remain far too high to concede defeat.

SAFE PASSAGE THROUGH THE MANUAL FOR COURTS-MARTIAL, 1984

*Major Ernest F. Peluso**

I. Introduction

Fifteen years ago the military justice system experienced one of the most significant and sweeping transitions in its long history. Congress promulgated innovative legislation¹ which was supplemented by executive order² that created a radically altered set of procedural guidelines embodied in the Manual for Courts-Martial.³

The substantive and procedural modifications imposed upon the armed services "judicialized" the criminal justice system. Much of the responsibility, albeit little real authority, for justice matters was passed to attorneys assigned to the Judge Advocate General's Corps, or the equivalent, of the various military services.

In retrospect, it is apparent that the drafters of both the legislation and MCM, 1969 took special care to scrupulously protect the rights of an accused at each stage of the criminal justice process. The government adopted a "paternal" approach to protect accuseds before its courts-martial and many of the decisions of the Court of Military Appeals were supportive of the government's paternalistic attitude.⁴

The protective stance towards accused occurred during the height of the Vietnam War. Perhaps that armed conflict and the domestic turmoil it

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1. The Military Justice Act, Pub. L. 90-632, 82 Stat. 1335, 10 U.S.C. § 801 (1968).
2. Exec. Order No. 11476, June 19, 1969.
3. Manual for Courts-Martial, United States, 1969 (Revised edition). The former Manual will be cited hereinafter as MCM, 1969. The present Manual for Courts-Martial, United States, 1984 will hereinafter be cited as MCM, 1984.
4. United States v. Heard, 3 M.J. 14 (CMA 1977); United States v. Burton, 44 CMR 166 (CMA 1971).

engendered was, in part, responsible for the extensive modification of criminal procedures and the paternalistic attitude embodied therein. Since that time, society has experienced many changes which are in turn reflected within the administration of the justice system. There has been a shift in emphasis away from the protection of the rights of the accused to the protection of societal interests. Recent Supreme Court decisions regarding the exclusionary rule,⁵ rights warnings⁶ and prisoner rights⁷ indicate that the focus has been transferred in federal courts away from the protection of the individual to the protection of society as a whole.

The military justice system has recently experienced the most comprehensive change since 1969. On 1 August 1984, MCM, 1984 went into effect, and practice before military tribunals will now be significantly different from prior military practice. What will not change is that there will still be an adversary system, wherein two opposing attorneys present cases before a trier of fact in order to adjudicate the guilt or innocence of an accused according to constitutional standards, procedural rules and evidentiary guidelines. Nevertheless, MCM, 1984 is not just a cosmetic alteration designed to bring the military justice system in line with its civilian federal counterpart. A common thread which runs throughout MCM, 1984 is a fundamental tone or attitude of "de-paternalization." In this regard, the changes are highly significant and will have a serious impact upon the approach and basic philosophy which a defense counsel must apply to the representation of his client.

It is expected that a great volume of litigation will be engendered by the many alterations made by MCM, 1984. The military legal system has become less apt to excuse defense counsel error or waiver. Defense counsel's tenacity and creativity will therefore be tested as never before during this new round of litigation.

This article will focus upon several of the most significant provisions of MCM, 1984 and their impact upon trial practice, from the defense perspective. The following discussion will not attempt to follow a chronological pattern, nor will it be comprehensive. Rather, the goal is

5. United States v. Leon, 104 S.Ct. 3405, (1984).

6. Berkemer v. McCarty, 104 S.Ct. 1703, (1984).

7. Hudson v. Palmer, 104 S.Ct. 3194, (1984).

8. Manual for Courts-Martial, United States, 1984.

is to alert trial defense counsel to a number of legal minefields which now exist as a result of MCM, 1984 and to suggest a possible safe passage.

II. Reorganization of the Manual for Courts-Martial

The drafters of MCM, 1969 used the traditional military system of paragraphs to organize its contents into a logical sequence. MCM, 1984 adopts a completely different framework. It is divided into several sections including a preamble,⁹ Rules of Court-Martial (R.C.M.),¹⁰ Military Rules of Evidence¹¹ and various appendices. The Rules of Court-Martial are the procedural canons for courts-martial. Our analysis will begin with an examination into the relationship and relative interaction among the rules concerning pretrial restraint, pretrial confinement and speedy trial.

III. Speedy Trial Considerations

The system which has evolved since 1969 gave the commander broad discretion to take action against an accused assigned to his unit while charges were pending. If the officer or his delegate found it was necessary, a soldier suspected of an offense under the Uniform Code of Military Justice¹² could be placed in pretrial confinement subject to a review by a magistrate¹³, who would invoke a 2-prong formula¹⁴ to determine the necessity of pretrial confinement. On those occasions when physical restraint was not deemed appropriate, a commander could impose various degrees of restriction or arrest.¹⁵ If pretrial confinement or restriction tantamount to confinement was imposed, a judicially created 90 day

9. MCM, 1984, part I.

10. Id. Part II.

11. Id. Part III.

12. Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1982) [hereinafter cited as UCMJ].

13. Army Reg. 27-10, Legal Services-Military Justice, para. 9-5 (1 Nov. 1982).

14. United States v. Heard, supra note 4, at 20-22.

15. MCM, 1969, para. 20a and b.

clock¹⁶ began to tick against the government. After 90 days had elapsed, if the accused was still confined without having been tried, and in the absence of defense delay, the government had a "heavy burden" of showing that extraordinary circumstances beyond its control prevented a trial before the expiration of the 90 day period. The recent modifications incorporated in MCM, 1984, attempt to substantively change the rules governing: the forms of pretrial restraint, the system of review for pretrial confinement decisions, the standard of review for pretrial confinement orders, thus supplanting the 90 day rule enunciated in United States v. Burton.¹⁷

A. Pretrial Restraint in General

R.C.M. 304(2) defines pretrial restraint very broadly. It includes such innovations as "conditions on liberty"¹⁸ and restates old remedies such as restriction and arrest. Conditions on liberty are the least egregious form of restraint and amount to nothing more than "orders directing a person to do or to refrain from doing specified acts."¹⁹ R.C.M. 304 has in effect formalized a system of moral restraints which a commander has at his disposal to assist him in maintaining discipline in his unit and in controlling the accused while charges are pending.

Experience suggests that commanders will often make use of the disciplinary tools that they have available to them prior to the trial of the accused. Thus, defense attorneys can expect that some form of corrective action may have been taken against their clients long before the case files find their way through the chain of command. Under MCM, 1984,²⁰ any commissioned officer can place any enlisted person under pretrial restraint, including, but not limited to: commanders, executive officers, operation officers, and officers-in-charge (OIC) of administrative sections. Additionally, a commander may delegate²¹ this authority to warrant officers and noncommissioned officers within the command. Since so many persons

16. In United States v. Driver, 49 CMR 376 (CMA 1974), the "three months" specified in Burton was refined to "90 days".

17. United States v. Burton, 44 CMR 166 (CMA 1971).

18. R.C.M. 304(a)(1).

19. Id.

20. R.C.M. 304(b)(2)

21. R.C.M. 304(b)(3).

within the system are empowered to impose pretrial restraint, there is an increased likelihood that it will be imposed. The challenge will be for defense counsel to be alert and to recognize the existence of conditions on liberty when they have been imposed upon an accused. Recognition of this possibility can make a critical difference to the accused's case.

There are two basic reasons why a defense counsel must determine the presence of R.C.M. 304 restraint before he takes any substantive steps in the case including a request for a continuance or delay. The primary reason is that any imposition of restraint under R.C.M. 304 will initiate a 120 day period²² during which the accused must be tried or the case dismissed. The speedy trial problem is obviously more complicated than this and will be discussed more thoroughly infra. The second reason for determining whether pretrial restraint has been imposed is that where there is pretrial restraint which is tantamount to physical confinement, there are several ways that a post-trial credit can be used to offset and mitigate a sentence of confinement at hard labor.²³

In the past, trial defense counsel have, upon receipt of their case files, immediately negotiated a delay or continuance with the government. If this practice continues without a careful inquiry into the existence, nature and length of pretrial restraint, a defense counsel may discover that he has effectively waived a critical issue in his case, perhaps the only litigable point.

B. Pretrial Confinement

Under MCM, 1984 the military commander will have enhanced authority²⁴ to place members of his unit into pretrial confinement. Additionally, there is a modified procedure²⁵ for review of the commander's decision, and a new legal standard²⁶ by which to evaluate evidence.

22. R.C.M. 707, MCM, 1984.

23. United States v. Larner, 1 M.J. 371 (CMA 1976); R.C.M. 305(k).

24. R.C.M. 305.

25. R.C.M. 305(i).

26. R.C.M. 305(i)(3)(C).

In the past, a member was placed into pretrial confinement by the Commander or his delegate subject to a review within seven days.²⁷ In many cases a trial defense counsel first learned about a case at this review. This situation is unlikely to change dramatically. However, there are now more specific and comprehensive rules governing the review.

At the initial stage of determining the propriety of pretrial confinement, MCM, 1984 provides that a commander or his delegate need only believe that there is probable cause that an offense has been committed, that the accused committed the crime, and that confinement is warranted by the circumstances.²⁸ While this appears to be a fairly low standard, the rule does require the commander to review the confinement decision within 72 hours.²⁹ Upon this review, the commander must order release unless there are reasonable grounds to believe that an offense has been committed, the accused committed it and he will not appear at the proceedings, or the accused will engage in serious criminal misconduct.³⁰

Since 1969, the standards for pretrial confinement have been thoroughly litigated. The leading case in this area is United States v. Heard,³¹ which provides that at all levels of consideration there are only two factors which can justify pretrial confinement: to insure the accused's presence at trial or to prevent the accused from committing serious criminal acts. Other considerations are not proper.³²

The drafters of MCM, 1984 explain the term "serious criminal misconduct" in the broadest possible terms to include situations "which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness or safety of the command."³³

27. Supra note 13.

28. R.C.M. 305(d).

29. R.C.M. 305(h)(2)(A).

30. R.C.M. 305(h)(2)(B).

31. 3 M.J. 14 (CMA 1977).

32. Berta v. United States, 9 M.J. 390 (CMA 1980).

33. R.C.M. 305(h)(2)(B)(iv)(emphasis added).

In their analysis of this portion of R.C.M. 305, the drafters attempted to justify the imposition of pretrial confinement upon "quitters" and "pains in the neck" whose attitude has had an adverse impact upon the morale of their unit.³⁴ It is clear from the express language of the rule, the non-binding discussion, and the analysis, that the clear intention was to broaden the scope of pretrial confinement to include service members whose presence in the unit while awaiting trial has become a "morale factor". Such a basis for pretrial confinement would seem to be precluded by Heard. While not dealing specifically with this question, Heard clearly established that there are only two factors justifying the imposition of pretrial confinement.

Defense counsel should recognize that until this issue can be litigated at the appellate level, commanders will be using R.C.M. 305(h)(2)(B) to justify an increased use of pretrial confinement. It will be important for each counsel to be thoroughly familiar with the intricacies of the new review procedure and to require specificity of the commander³⁵ and the reviewing officer³⁶ in their memoranda, so that the issue can be fully litigated before the military judge and preserved for appeal.³⁷

Another good reason to require specific determinations and clear findings for the record is that R.C.M. 305(i)(3)(c) establishes a clear standard by which the justification for pretrial confinement will be measured, to wit: by a preponderance of the evidence.

These changes in MCM, 1984 should alter the defense approach to litigating pretrial confinement at all stages. It is suggested that wherever possible, the attorney should contact the commander or his delegate to ascertain the justification for incarceration before appearance at the magistrate's review hearing. Careful preparation and a clear record can conceivably afford the basis for a client's release, credit for illegal pretrial confinement and possibly a successful appellate review of these interesting issues.

34. Appendix 21 R.C.M. 305(h), Analysis at 21-15,16, MCM 1984 [hereinafter cited as R.C.M., Analysis].

35. R.C.M. 305(h)(2)(C).

36. R.C.M. 305(i)(6).

37. R.C.M. 305(j).

C. Has Burton been superceded?

In their analysis of Rule 707 the drafters opined that:

The experience with the 90-day rule under United States v. Burton . . . led to the conclusion that 120 days, coupled with greater flexibility in excludable time periods under subsection (c), is an appropriate time limit."³⁸

Thus, after determining that 120 days plus exclusions would be more "appropriate", the government promulgated a new rule involving speedy trial which will create a number of serious concerns for defense counsel.

R.C.M. 707(a) set forth two events which start the 120 day clock. The defendant must be brought to trial³⁹ within 120 days of notice of preferral of charges⁴⁰ or the imposition of any form of pretrial restraint under R.C.M. 304. Therefore, whenever any commissioned officer, or the warrant officer/noncommissioned officer delegate of a commander imposes any condition on an enlisted defendant's liberty, a 120 day clock begins to run against the government. For example, if a captain in the S-3 section of a battalion instructs his subordinate accused to refrain from contact with another enlisted person who is the alleged victim of an assault, the government then has 120 days from the date of that order to bring the case to trial or face a viable motion for dismissal.

On first impression this rule sounds very beneficial to the defense. However, there are so many exclusions⁴¹ that they literally disembowel the rule. There are excludable periods for such understandable reasons as defense requested delay⁴² and periods necessary to determine the mental capacity of the accused.⁴³ The clock is also tolled for government

38. R.C.M. 707(2), Analysis at 21-37.

39. R.C.M. 707(b)(3).

40. R.C.M. 308,

41. R.C.M. 707(c).

42. R.C.M. 707(c)(3).

43. R.C.M. 707(c)(1)(A).

appeals, unusual operational conditions within the unit⁴⁴ and military exigencies.⁴⁵ Obviously, these last three are not within the control of the accused and are subject to broad interpretation. Additionally, there are other exceptions like the unavailability of a military judge,⁴⁶ and the defense failure to act or give notice in a timely manner⁴⁷ which are likely to be litigated thoroughly on the trial level and should be interesting appellate issues.

More likely than not at the general court-martial (GCM) level the rule will not have a significant impact. During the pendency of a GCM there is normally intense participation by the trial counsel from the inception of the investigation of the charges. Indeed R.C.M. 405 will encourage trial counsel participation at the pretrial investigation. Inasmuch as the prosecutor has so many exclusionary tools at his disposal he can effectively ameliorate the consequences of the rule. Nonetheless, a real benefit can theoretically be realized at the misdemeanor level. It is not uncommon for offenses which are destined to be tried in lesser courts to be treated with less enthusiasm and timeliness than those referred to a GCM.

A defense counsel must now be on guard for any case where pretrial restraint was imposed in some form and the charges were allowed to languish for an extended period in the military bureaucracy. Obviously, a defense counsel must determine the existence of such conditions as expeditiously as possible and then weigh them against other factors in the case prior to requesting a delay or continuance. To act otherwise is to risk tolling the clock and sacrificing a rare advantage.

Since pretrial confinement is restraint within the meaning of R.C.M. 304, as well as R.C.M. 305, it will also start the 120 day time clock. The initial dilemma is that this rule does not coincide with the 90 day rule established in United States v. Burton. As previously stated, Burton and its progeny mandate that once pretrial confinement exceeds 90 days the government has a heavy burden to demonstrate diligence in bringing a defendant to trial. If appropriate diligence cannot be shown then a dismissal of all charges is the remedy. R.C.M. 707 not only significantly extends the time frame by one third, but also allows several

44. R.C.M. 707(c)(8).

45. Id.

46. R.C.M. 707(c)(2).

47. R.C.M. 707(c)(4).

exclusions⁴⁸ which are specifically not deductible for Burton purposes. The 120 day rule in R.C.M. 707 is simply a much lower standard than the Burton rule. R.C.M. 707 offers almost no real protection from the abuses which generated the Burton precedent in the first place.

The drafters have made no effort to conceal the fact that they seek to supplant the Burton rule with the illusive protections of the new rule. Whether or not this attempt will succeed must of course ultimately be resolved by the appellate courts. Therefore, defense counsel must be vigilant to preserve this issue for appeal. Delays must be carefully considered, chronologies must be scrupulously prepared, objections must be made and motions filed in a timely manner. Finally, sound, lucid legal arguments properly delineating this conflict must be made at the trial level. Despite the intent of the MCM, 1984, it can be successfully argued that R.C.M. 707 supplements but does not replace the Burton rule.

IV. Pretrial Advice

The MCM, 1984 also implements a number of provisions of the Military Justice Act of 1983.⁴⁹ For instance, R.C.M. 406 signals a significant change from current practice. The rule outlines the requirements for the staff judge advocate's pretrial advice which will remain a condition precedent to a trial by general court-martial.⁵⁰

Despite the procedural similiarity to present practice, the format of the new pretrial advice has been radically altered.⁵¹ Each advice must now make conclusions concerning whether each specification states an offense, whether the allegation of each offense is warranted by the evidence, and whether there is jurisdiction as well as make a recommendation as to disposition.⁵¹

48. R.C.M. 707(c)(2), (5), (8).

49. Pub. L. No. 98-209, 97 Stat. 1393 (1983)(amending the Uniform Code of Military Justice arts. 1-140, U.S.C. §§ 801-940 (1982)[hereinafter cited as Military Justice Act of 1983].

50. R.C.M. 406(a).

51. R.C.M. 406(b).

52. Id.

Defense counsel must recognize that this change is a vast departure from prior practice. As a result, the defense will have to fill in the gaps where necessary in a particular case. For instance, if in order to achieve a referral to a special or summary court-martial it is advantageous to furnish to the convening authority information as to the accused's good military record, it will be the responsibility of the defense counsel to see that this is done. It is expected that this modification, along with its posttrial counterpart⁵³ will substantially increase the defense workload. This change is one of the best examples of the less paternalistic in attitude under MCM, 1984.

V. Pretrial Investigations⁵⁴

In the past, it was not unusual for a defense counsel to first learn of the existence of a major case, where there was no pretrial confinement, when he was notified by an officer appointed to investigate charges in accordance with Article 32, UCMJ.⁵⁵ Since the investigating officer was assigned this work as an additional duty and since the UCMJ⁵⁶ required that a report or an alternative be filed within eight days, there was always a sense of haste surrounding the scheduling of these events which prevented thorough preparation. This was unfortunate because, from the accused's perspective, this pretrial procedure afforded an excellent means of discovery. At the Article 32 hearing, the vast majority of the government's evidence could be intensely scrutinized, their witnesses could be observed and cross-examined, and the basic tactical approach of the prosecution could be analyzed. All of these benefits could be obtained with relatively little risk to the accused. The appellate courts have long recognized the dual purpose of the Article 32 pretrial investigation as both a procedural safeguard⁵⁷ and the defense's first and often best shot at meaningful discovery.⁵⁸

R.C.M. 405 will implement the requirements of Article 32. A careful analysis of this rule demonstrates substantial modification which, depending upon their appellate interpretation, could radically alter the

53. R.C.M. 1112.

54. See Side Bar, this issue, for tactical approaches to the Article 32.

55. 10 U.S.C. § 832.

56. Article 33, UCMJ, 10 U.S.C. § 833.

57. United States v. Samuels, 10 USCMA 206, 27 CMR 280 (1959).

58. Hutson v. United States 19 USCMA 437, 42 CMR 512 (1970).

method of practice at this stage of pretrial preparation. The value of the pretrial investigation as a discovery tool is also in jeopardy.

As in the MCM, 1969, a pretrial investigation is a condition precedent to the GCM level.⁵⁹ However, some subtle changes in R.C.M. 405(5) combined with the modifications in R.C.M. 405(g) have the potential of substantially eliminating the relative usefulness of this device.

Paragraph 34, MCM, 1969 provided that:

[T]he officer appointed to make such an investigation should be a mature officer, preferably an officer of the grade of major or lieutenant commander or higher, or one with legal training and experience.

(emphasis supplied). R.C.M. 405(c) provides that any commissioned officer can be appointed to preside at a pretrial investigation. To counsel who have little or no experience at a pretrial investigation, this may seem like a small, fairly insignificant distinction. The reality is that we can expect to see frequent appointment of junior, less experienced officers to conduct these proceedings. These younger, less knowledgeable investigators, will have to deal with the Criminal Investigation Command (CID), commanders, victims, witnesses, evidence custodians, and opposing counsel. These younger officers may lack the experience and clout to be as effective as older, higher ranking, more influential officers. As we will see, the defense counsel has a vested interest in having an aggressive, effective and efficient investigating officer conduct the investigation.

In order for an Article 32 investigation to be a meaningful discovery device the defense must be able to glean information and determine the demeanor of government witnesses, which it could not do by other means. For example, it does very little good for a defense counsel to read a sworn statement of a government witness at the hearing, when that statement would have been made available anyway. It is the presentation of live testimony that makes the Article 32 hearing of importance to the to the defense.

R.C.M. 405(g) provides for the production of witnesses⁶⁰ and physical evidence at the Article 32 hearing. This article will discuss witnesses availability; but it must be remembered that questions concerning the availability of evidence follow a parallel track.⁶¹

59. R.C.M. 405(a).

60. R.C.M. 405(g)(1)(A).

61. R.C.M. 405(g)(1)(B).

Once the preliminaries of an investigation have been conducted, the investigating officer will begin to receive evidence. Unless the defense specifically objects, the investigating officer can consider alternative evidence other than testimony⁶², i.e. sworn statements, telephonic statements under oath, depositions, stipulations, unsworn statements and offers of proof. Failure of the defense to object to the evidence at the time of its consideration⁶³ constitutes waiver of the defect.⁶⁴ If the defense objects, the investigating officer must determine the "reasonable availability" of the witness in question.⁶⁵ R.C.M. 405(g) creates a balancing test to determine whether a witness is reasonably available. Basically, the rule requires that "when 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 witness should be summoned to appear.⁶⁶ If the investigator concludes that the witness is not reasonably available, he is required to inform all the parties⁶⁷ and he may then use some of the above-described alternatives.⁶⁸

The procedure becomes interesting when the investigating officer makes a preliminary conclusion that a particular witness is reasonably available. Once this occurs, the witness' immediate commander then makes a final determination whether the witness is in fact reasonably available. A negative determination by the commander cannot be appealed, but is subject to review at the trial level.⁶⁹

The practical result is that even if the investigating officer determines that a witness should be summoned, his decision can be effectively vetoed by the witness' commander. It is at this juncture that

62. R.C.M. 405(g)(4)(A).

63. R.C.M. 405(h)(2).

64. R.C.M. 405(k).

65. R.C.M. 405(g)(4)(B)..

66. R.C.M. 405(g)(1)(A).

67. R.C.M. 405(g)(2)(A).

68. R.C.M. 405(g)(4)(B).

69. Supra at note 67.

the difference between higher and lower ranking officers may be most apparent. Older, more influential officers, who are already mission oriented, can often obtain what they need in these circumstances while younger investigating officers may encounter more difficulty in dealing with commanders.

As noted above, R.C.M. 405 has adopted a comprehensive system of objection or waiver. Any dispute as to any defect must be evidenced by an objection, which at the discretion of the investigating officer must be in writing.⁷⁰ The objection must be made promptly upon discovery of the error. If there is an objection to the formal report of the investigation it must be made within five days of the receipt of the report by the accused.⁷² Failure to make a timely objection at any stage constitutes waiver of the objection.⁷²

The result of all of these modifications to the pretrial investigation is that counsel will no longer have the luxury of not having to prepare for a hearing before an investigating officer. If counsel desire to continue to make use of this preliminary procedure as an excellent discovery tool, they will have to have some advance knowledge of the substance of the potential witness testimony or they will not be able to effectively litigate the issue of reasonable availability. Failure to properly prepare and protect the record with specific and material objections can constitute a waiver of the whole issue.

A recurring dilemma is anticipated when the defense needs additional time to properly prepare for an Article 32 hearing and some form of pretrial restraint has initiated the running of the 120 day clock under R.C.M. 707.

VI. Discovery

In the past trial defense counsel have had the benefit of almost unlimited no risk discovery of evidence and information in the hands of the prosecution. As a result defense counsel frequently used "Boiler Plate" discovery motions asking the government for everything imaginable.

70. Supra note 63.

71. R.C.M. 405(j)(4).

72. Supra note 64.

It has been common practice in some jurisdictions to serve these comprehensive requests upon the government as soon as the charges were preferred and a defense counsel was detailed to the case. Prior to MCM, 1984 this was advantageous inasmuch as a discovery motion commenced the flow of information and the defense had almost no responsibility to reciprocate.⁷³

R.C.M. 701 substantially alters the current discovery practice by affording the government the right to reciprocal discovery.⁷⁴ Thus, now the defense requests inspection of documents, photos, books and other tangible evidence within the control of the government⁷⁵, the government will have the right to obtain the same kind of information from the defense. In addition the defense has an obligation under R.C.M. 701 to provide notice to the government of anticipated alibi and mental responsibility defenses.⁷⁶ Under certain circumstances, a counsel for the accused could even be required to disclose the results of mental and physical examinations conducted by defense experts.⁷⁷

In their justification for this bold innovation, the drafters do not contend that these changes are designed to bring military practice more closely in line with its civilian counterpart. Instead, they concede that "the rule provides for broader discovery than is required in federal practice"⁷⁸ and explain that their purpose was to eliminate "gamesmanship." The simple fact is that discovery practice has been significantly modified in the military, subject to further clarification upon appellate review. Defense counsel must now think about what they need from the government and plan a discovery strategy. Timing of the request will be very important and the effects of other rules will have to be considered. The boiler plate discovery motion may be an endangered species. Its use without careful consideration could prove to be a tactical error.

73. Para. 44n, MCM, 1969; Mil. R. Evid. 304(d)(1) and 32(c)(1). See United States Acqurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83 (1963).

74. R.C.M. 701(b)(3).

75. R.C.M. 701(a)(2)(A).

76. R.C.M. 701(b)(1), (2).

77. R.C.M. 701(b)(4).

78. R.C.M. 701, Analysis at A21-29.

VII. Immunity

While many of the modifications instituted by MCM, 1984 are detrimental from the defense point of view, R.C.M. 704 is beneficial to the defense. This rule provides a clear and comprehensive framework for the granting of testimonial and transactional immunity in trials by court-martial.

R.C.M. 704(e) contains language which can be a very useful tool for defense counsel in a large number of cases. It clearly stipulates that only a general court-martial convening authority has the discretion to issue grants of immunity. However, the rule also provides a framework for judicial review of convening authority denials of defense requests to have witnesses immunized.

The new rule requires that if a defense request to have a particular witness immunized is denied by the GCM convening authority then the defense can seek a review by the military judge through a motion for appropriate relief. If, upon hearing, the military judge finds that the testimony of the witness in question is of such central importance as to be essential to a fair trial,⁷⁹ and that the witness will be invoking his right against self-incrimination, then he must enter one of two possible directives: that the appropriate convening authority grant the immunity or that the proceedings be abated.

VIII. Conclusion

The 1984 version of the Manual for Courts-Martial is a masterful work. It is more of a lawyer's tool than its predecessors, and its logical organization and clarity should facilitate use by a wide spectrum of service members.

The tenor and tone of the criminal justice system have been modified. There seems to have been a shift from the paternalism of the past. Defense counsel must adjust their priorities accordingly. Despite the difficulties created for the defense counsel by the modifications, the next few years should be an exciting time to be a litigator in the military justice system.

⁷⁹. R.C.M. 704(e).

DEFENSE STRATEGIES FOR UNCHARGED MISCONDUCT ON SENTENCING

*by Captain Peter D.P. Vint**

The sentencing proceeding is often the most critical part of a court-martial, but there is a tendency on the part of some defense counsel not to challenge evidence consisting of uncharged misconduct. Often evidence ostensibly presented in aggravation or in rebuttal really consists of uncharged misconduct. This grants a great deal of leeway to prosecutors to introduce evidence which tends to show that the accused is not just a one-time offender but represents a continuing threat to society and therefore does not deserve any leniency. In fact, once guilt has been determined, ordinarily the only purpose that uncharged misconduct can serve is to "convince the court-martial that the accused (is) a bad man".¹ Furthermore, as the Court of Military Appeals recently stated: "[S]uch evidence has a strong 'tendency to arouse undue prejudice' in the court against an accused, 'confuse and distract' the court from the issues before it, 'engender time consuming side issues and... create a risk of unfair surprise.'" (citation omitted).²

Owing to the tremendous negative impact of uncharged misconduct on sentencing, the defense counsel must prepare a careful trial strategy to counter its introduction. First, he should be familiar with the military rules regarding the admissibility of the various types of uncharged misconduct during sentencing. Second, he must ascertain the existence of uncharged misconduct and anticipate the form it may take through interviewing the accused and witnesses and through discovery. Third, the defense counsel should remain alert during sentencing to challenge the entry of the uncharged misconduct. Finally, the defense counsel should endeavor to minimize or prevent any damage to the defense case through motions, objections, cross-examination, and requests for instructions.

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1. United States v. Taliaferro, 2 M.J. 397, 398 (ACMR 1975).
2. United States v. Gambini, 13 M.J. 423, 427 (CMA 1982).

The rules relating to introduction of uncharged misconduct evidence under the Manual for Courts-Martial, United States, 1969 (Revised edition)³ including the Military Rules of Evidence⁴ as interpreted by military case law have been incorporated into the Manual for Courts-Martial, United States, 1984.⁵

I. Forms of Uncharged Misconduct

Evidence of uncharged misconduct may arise at several points during a court-martial. First, it may be admitted during findings for certain purposes (discussed *infra*). In guilty plea cases, it may arise during the providence inquiry, or in a stipulation of fact required as a condition of a pretrial agreement (often insisted upon by trial counsel). Trial counsel may also introduce during sentencing other documents containing uncharged misconduct, such as confessions or various personnel records. Also, uncharged misconduct may be elicited from prosecution or defense witnesses during direct or cross examination.

II. Anticipating Uncharged Misconduct

Defense counsel can foresee in advance of trial the possibility of uncharged misconduct by carefully interviewing the accused and witnesses, and through the use of discovery techniques.

Military law generally provides for much broader discovery than that available in civilian criminal cases.⁶ Article 46, Uniform Code of Military Justice⁷, provides that defense counsel and trial counsel shall have equal opportunity to obtain witnesses and other evidence.

An Article 32, UCMJ investigation is generally viewed as a discovery device in which all relevant evidence in the hands of the government is made directly available to the accused.⁸

3. Hereinafter cited as MCM, 1969.

4. Hereinafter cited as Mil. R. Evid.

5. Hereinafter cited as MCM, 1984.

6. United States v. Franchia, 32 CMR 315 (CMA 1962).

7. Hereinafter cited as UCMJ.

8. Id. See also paragraph 34, MCM, 1969; Rule for Court-Martial [hereinafter cited as R.C.M.] 405, MCM, 1984.

Trial counsel is also required to advise defense counsel of probable prosecution witnesses,⁹ and upon reasonable request must produce documents and other evidentiary materials.¹⁰ The trial counsel must also disclose, upon request by defense counsel, documents and names of witnesses to be offered at sentencing.¹¹

Mil. R. Evid. 304(d)(1) and R.C.M. 701(a)(1)(c) require production of known relevant confessions and admissions by the accused within armed forces control, and Mil. R. Evid. 311(d)(1) requires production of any evidence seized from the person or property of the accused.

A change to previous discovery practice is contained within R.C.M. 701(b)(3). Defense counsel who request to examine documents, tangible objects, and reports in the possession of the trial counsel which the trial counsel intends to rely upon in the government's case in chief are subject to a reciprocal demand. Government counsel may demand to examine documents and tangible objects under the control of the defense. Since defense counsel would rarely intend to rely upon evidence of uncharged misconduct in the defense case in chief, evidence of uncharged misconduct is probably not subject to disclosure under R.C.M. 701(b)(3). However, defense counsel must closely scrutinize the evidence within his possession first, to determine whether this is evidence which will be relied upon in the case in chief, and secondly, if it is to be relied upon, whether it carries with it overtones of uncharged misconduct, e.g., laboratory reports showing the level of alcoholic intoxication when the defense will be lack of specific intent if the laboratory report will also show that the accused had ingested controlled substances. If the defense does intend to introduce evidence consisting of uncharged misconduct or which will lead the trial counsel to discover evidence of uncharged misconduct, the defense counsel needs to make a tactical decision as to whether to initiate a discovery request. Certainly, the standard boilerplate request must be scrutinized, analyzed and tailored, if necessary, to avoid the situation where the defense counsel becomes a source of disclosing uncharged misconduct to the trial counsel.

Finally, the American Bar Association Model Code of Professional Responsibility (amended Aug. 1980) and Standards for Criminal Justice (1980) provide various ethical rules governing discovery.

9. Paragraph 44h, MCM, 1969; R.C.M. 702(a)(3)

10. Paragraph 115c, MCM, 1969; R.C.M. 701(a)(2)

11. R.C.M. 701(a)(5).

It is important that defense counsel formulate a specific discovery request regarding evidence of uncharged misconduct well in advance of trial, and then follow up shortly before trial. Such a request could ask for any confessions or admissions of uncharged misconduct by the accused, any searches or seizures from the accused relating to uncharged misconduct, names and addresses of any witnesses having knowledge of uncharged misconduct by the accused, and any documents and or other evidentiary matters containing uncharged misconduct by the accused. Timing of the initial defense request under R.C.M. 701(a)(2)(A) is especially important when a reciprocal government request pursuant to R.C.M. 701(b)(3) is likely to uncover uncharged misconduct. An earlier defense request will, of course, afford greater lead time to prepare the defense. A later request, however, may be more advantageous since it will tend to shorten the government's time to react via a reciprocal discovery request.

III. Rules For Admissibility of Uncharged Misconduct During Sentencing

A. Aggravating Circumstances Relating to the Offense

Paragraph 75b(4), MCM, 1969 provided that when an accused pleads guilty, the prosecution may introduce any further aggravating circumstances relating to the offense for which he has pled guilty. The limitations regarding evidence of such aggravating circumstances were set forth in paragraph 70a, MCM, 1969:

A plea of guilty does not exclude the taking of evidence, and if there are aggravating or extenuating circumstances not clearly shown by the specification and plea, any available and admissible evidence as to those circumstances may be introduced. If the plea is accepted, such evidence shall be introduced during the presentencing proceedings under Paragraph 75, except when the evidence is otherwise admissible on the merits. (Emphasis added).

Thus, formerly following a plea of guilty, aggravating circumstances could be introduced in two ways, either (1) under paragraph 75, MCM, 1969 or if (2) "otherwise admissible on the merits."

B. Paragraph 75, R.C.M. 1001, and the Vickers Rule

Paragraph 75, MCM, 1969, concerned aggravating circumstances relating to the particular offense for which the accused has pled guilty, but not other offenses. In United States v. Vickers,¹² it was the holding of the Court of Military Appeals that regardless of the accused's plea,

12. 13 M.J. 403 (CMA 1982).

trial counsel could, after findings of guilty, present evidence directly related to the offense for which an accused is to be sentenced so that the circumstances surrounding that offense or its repercussions may be understood by the sentencing authority. In that case, following the accused's conviction of disobedience of an order, trial counsel introduced evidence that the accused's failure to obey the order that had been the basis for bringing the charges had exacerbated a disturbance, causing the officer in charge to lose control of the situation.

Uncharged misconduct which is part of the same transaction as the crime charged is admissible during sentencing.¹³ This may also be called res gestae evidence, admissible because it is so closely intertwined with the offense as to be part and parcel of that offense.¹⁴

R.C.M. 1001(b)(4) basically incorporates the rules of paragraph 70(a) and 75b(4) MCM, 1969 and Vickers. It provides that after findings of guilty, the prosecution may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty.¹⁵ It does not directly address evidence "otherwise admissible on the merits," discussed below.

However, where uncharged misconduct is separated in time and place from the charged offense, it is not a circumstance surrounding that offense or a repercussion of that offense, and paragraph 75, MCM, 1969, Vickers and R.C.M. 1001(b)(4) obviously do not apply.

C. Evidence "Otherwise Admissible on the Merits"

As stated in Paragraph 70, MCM, 1969, evidence of aggravating circumstances not admissible under paragraph 75, MCM, 1969 (i.e., lacking a Vickers nexus to the charged offense), must be "otherwise admissible on the merits." R.C.M., 1001(b)(4) does not mention this concept, but clearly evidence of uncharged misconduct not specifically admissible in aggravation must be otherwise admissible under the rules of evidence.

13. United States v. Doss, 15 M.J. 409 (CMA 1983).

14. United States v. Keith, 17 M.J. 1078 (AFCMR 1984).

15. This article focuses on uncharged misconduct by the accused, and not on repercussions of the charged offense, such as effect on a victim. See, e.g. United States v. Marshall, 14 M.J. 157 (CMA 1982); R.C.M. 1001(b)(4).

There are several military rules of evidence which relate to admissibility of uncharged misconduct as an aggravating circumstance, including Mil. R. Evid. 401, 402, 403 and 404(h). These rules are the same in MCM, 1969 and MCM, 1984.

Mil. R. Evid. 401 and 402 define relevant evidence and provide for its admissibility. However, Mil. R. Evid. 403 provides that even where evidence is relevant, it may be excluded if there is a danger of unfair prejudice, confusion of the issues, or undue waste of time.

Mil. R. Evid. 404(b) specifically relates to the admissibility of uncharged misconduct:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted 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.

The cited purposes all relate to use of uncharged misconduct to prove guilt during the findings portion of a particular case. If uncharged misconduct is properly admitted during findings, e.g., for one of the above-cited purposes, then it is already before the court and may be considered during sentencing.¹⁶ However, there is no need, following a determination of guilt, for the prosecution to prove the identity of the accused, an opportunity to commit the crime, or any absence of mistake or accident. For example, in United States v. Brown,¹⁷ the court held that following a plea of guilty, the accused's identity was no longer an issue, and introduction of uncharged misconduct during sentencing to prove his identity was error. Evidence which falls under Mil. R. Evid. 404(b) which was not introduced on the merits may not be reserved for sentencing.

In United States v. Taliaferro,¹⁸ the Army Court of Military Review considered whether uncharged misconduct was admissible after guilt had been determined to show motive, intent, or state of mind. In that case, the accused was convicted before members, inter alia, of two specifications of forgery of checks. During presentencing the military

16. See United States v. Warren, 13 M.J. 278 (CMA 1982); United States v. Brown, 8 M.J. 501 (AFCMR 1979).

17. 8 M.J. 749 (AFCMR 1980).

18. 2 M.J. 397 (ACMR 1975).

judge admitted, over defense objection, evidence of two uncharged check forgeries. This Court held that, following determination of guilt, evidence of such uncharged misconduct was inadmissible to show motive, intent, of state or mind, and, could only serve at this point to convince the members that the accused was a bad man.¹⁹

Subsequently, the Court of Military Appeals addressed the issue of whether uncharged misconduct lacking a Vickers nexus was admissible under a theory of relevance. In United States v. Gambini,²⁰ following the accused's plea of guilty to drug offenses, the government introduced before members evidence of prior uncharged misconduct of drug offenses. The Court held that, in order to be admissible, evidence of uncharged misconduct must have substantial value as tending to prove something other than a fact to be inferred from the disposition or character of the accused (i.e., that he is basically a "bad man"), or be a proper rebuttal of matters raised by the defense, e.g., if the defense first introduces evidence that an accused has not committed prior acts of misconduct. Where the uncharged misconduct met neither one of these purposes, even though arguably relevant, the Court found that in view of the tremendous potential for prejudice to the accused, especially before members, it was error to admit evidence regarding the prior similar uncharged misconduct. The Court also noted that uncharged misconduct raises other Mil. R. Evid. 403 considerations of confusion of the issues and undue waste of time.²¹

Erroneous admission over defense objection of uncharged misconduct during sentencing requires reassessment of the sentence.²² In Gambini the Court of Military Appeals reversed and returned the record to the review court for reassessment of the sentence. In United States v. Taliaferro,²³ where no discharge was adjudged, the Army Court of Military Review reassessed the sentence and substantially reduced the confinement at hard labor. In United States v. Eckert,²⁴ where uncharged misconduct was introduced before members, despite the failure of defense counsel to

19. Id.

20. 13 M.J. 423 (CMA 1982).

21. See also United States v. Boles, 11 M.J. 195 (CMA 1981).

22. United States v. Gambini, 13 M.J. 423 (CMA 1982).

23. 2 M.J. 397 (ACMR 1975).

24. 8 M.J. 838 (ACMR 1980).

object, the Army Court of Military Review reversed and required a re-hearing as to sentence. However, it is important to object to inadmissible uncharged misconduct on the appropriate ground, as obviously defense counsel cannot always rely on the appellate court to require sentence reassessment in every case where there is no defense objection. Defense strategies for dealing with uncharged misconduct are discussed in the next section, infra.

In summary, evidence of uncharged misconduct is generally inadmissible on sentencing, unless it has been previously admitted during findings, is directly related to the offense as a repercussion under Vickers, is part of the res gestae under Doss, or is in rebuttal to matters raised by the defense. Even where arguably relevant, uncharged misconduct is generally inadmissible under Gambini and Mil. R. Evid. 403 because of the danger of unfair prejudice, as well as confusing issues and unduly wasting time.

Because the above categories are not always strictly defined, trial counsel may attempt to introduce uncharged misconduct in the guise of an admissible category. Defense counsel, therefore, in considering what uncharged misconduct may be admissible under certain circumstances should carefully distinguish exactly where it becomes inadmissible. For example, during findings, trial counsel may attempt to introduce uncharged misconduct on the ground of, e.g., identity, where this is not really an issue. During sentencing, trial counsel may attempt to introduce evidence of prior similar offenses, which are highly prejudicial but have no Vickers nexus to the offense charged. Or, during sentencing, trial counsel may attempt to rebut via uncharged misconduct issues not really raised by the defense. In United States v. Logan,²⁵ the Army Court of Military Review held that introduction of uncharged misconduct by trial counsel to rebut an issue raised not by the defense but by the prosecution was improper.²⁶ There the court held that introduction by trial counsel of uncharged misconduct to "rebut" the accused's statement that he felt he had been punished unfairly was erroneous. The Gambini case also contains a good example of improper rebuttal. Trial counsel may attempt to introduce evidence in rebuttal that was refused in aggravation, such as defective records of Article 15 punishment. Presumably relevant evidence which is not presented in a reliable and trustworthy form lacks an adequate foundation for admission and should be rejected.²⁷

25. 13 M.J. 821 (ACMR 1982).

26. See also United States v. Armstrong, 12 M.J. 766 (ACMR 1981) (uncharged misconduct used to rebut accused's statement that he liked the Army and wished to stay in).

27. United States v. McGill, 15 M.J. 242 (CMA 1983).

IV. Defense Strategies for Dealing with Uncharged Misconduct

Once defense counsel has pinpointed how uncharged misconduct may arise, he should develop a strategy to counter it. If possible, he should prevent it from being considered by the sentencing authority. Otherwise, he should attempt to minimize its impact at trial, and, if appropriate, to preserve the issue for appeal. The defense will necessarily approach admissible and inadmissible uncharged misconduct differently.

A. Admissible Uncharged Misconduct

Since certain uncharged misconduct is admissible, defense counsel may have to make allowances for its consideration during sentencing. There are different considerations for evidence of uncharged misconduct which is admissible during findings, specifically admissible in aggravation, admissible under Vickers, and admissible in rebuttal.

In a contested case, since such evidence will then be admissible on sentencing, defense counsel may well decide to make clear that certain areas are not an issue which might be proven by evidence of uncharged misconduct under Mil. R. Evid. 404(b), e.g., the question of identity or the defense of accident or lack of knowledge. He may agree to stipulate to such an issue. If possible, this should be agreed upon before trial with trial counsel. If no agreement is possible, defense counsel may offer to stipulate to the issue at trial. If the trial counsel still attempts to prove the issue by evidence of uncharged misconduct, defense counsel may object under Mil. R. Evid. 403, in that such evidence is overly prejudicial, confuses the issues and is cumulative and a waste of time. In any case, such evidence is admitted during findings only for limited purpose, and defense counsel should request an instruction to this effect.²⁸

Paragraph 75(b)(2) and (3), MCM, 1969, and R.C.M. 1001(b)(2) specifically allow trial counsel to introduce in aggravation on sentencing certain prior nonjudicial punishment and prior military or civilian convictions, and personnel records. Where these are concerned, defense counsel should ensure that they meet requirements for admissibility, and object on the appropriate ground if they do not. Even if the objection is denied, the issue will be preserved on appeal. Moreover, even where a document itself is admissible, certain parts of it may be objectionable. For example, in United States v. Brown²⁹, the Court of Military Appeals held that where underlying records of nonjudicial punishment were improperly maintained and thus could not be introduced, trial counsel

28. See paragraph 7-13, Military Judges' Benchbook, Dept. of Army Pam. 27-9 (May 1982) [hereinafter cited as Military Judges' Benchbook].

29. 11 M.J. 263 (CMA 1981).

could not, over defense objection, introduce them through the back door via personnel records. In such cases, the Court suggested, objectionable entries could be deleted before admission of the record.³⁰

Defense counsel may offer to stipulate to circumstances directly surrounding the offense and its repercussions, admissible under Vickers. A written stipulation of fact may be far less prejudicial to the accused on sentencing than direct evidence of other misconduct by the accused. Written or oral depositions are also admissible in aggravation.³¹ However, if trial counsel does not agree to stipulate or present a deposition, it may be impossible to keep such direct evidence out. What is important here is to strictly limit trial counsel in this regard, and to vigorously oppose any attempt to bring in evidence of uncharged misconduct lacking the Vickers nexus, particularly evidence of past similar misconduct, under the principles of Gambini and Mil. R. Evid. 403.

Finally, defense counsel should prevent any rebuttal by ensuring that the defense does not raise any evidence which the prosecution may rebut using uncharged misconduct. In this regard, the accused and defense witnesses should avoid making any statements which may lead to this, such as blanket denials of any prior misconduct.³² Again, defense counsel should vigorously oppose any uncharged misconduct rebutting an issue not really raised by the defense, under the principles of Gambini and Mil. R. Evid. 403.

B. Inadmissible Uncharged Misconduct

Defense counsel is in a much stronger position to deal with inadmissible than admissible uncharged misconduct. The underlying goal is to ensure that the sentencing authority does not even consider the uncharged misconduct during sentencing, and the best approach is to obtain trial counsel's agreement before trial not to introduce it.

If this is not possible, defense should litigate the issue at an Article 39(a) UCMJ session, by way of a motion in limine to prohibit introduction of uncharged misconduct at trial, preceded by timely service of notice of motion. At the session, defense counsel can argue the appropriate grounds and request a ruling by the military judge that trial counsel not be allowed to introduce the uncharged misconduct. During

30. Id. at 266, n.3.

31. R.C.M. 1001(b)(5).

32. United States v. Feagans, 15 M.J. 667 (AFCMR 1983).

the trial, if trial counsel attempts to introduce the uncharged misconduct, defense counsel should renew his objection, again setting forth the appropriate grounds.

If the uncharged misconduct is contained in a document, even where the document itself is specifically admissible in aggravation as a personnel record under paragraph 75b(2), MCM, 1969 or R.C.M. 1001(b)(2), defense counsel can request that inadmissible uncharged misconduct contained in the document be deleted before its admission.³³

In guilty plea cases, the accused may be required as a condition of a pretrial agreement to agree to the contents of a stipulation of fact, and trial counsel may then insist on the inclusion of uncharged misconduct. However, defense counsel may not as a condition of a pretrial agreement be required to forego any motions (other than speedy trial).³⁴ Therefore, defense counsel can allow the inclusion of the uncharged misconduct in the stipulation of fact, and then move to strike that portion of the stipulation of fact during an Article 39(a) session at trial. That portion of the stipulation of fact can then, without jeopardizing the pretrial agreement, be deleted before admission of the stipulation.³⁵

During the trial, where appropriate, defense counsel may by way of a motion in limine request that trial counsel be given a cautionary instruction not to elicit uncharged misconduct from a witness, or that a witness be cautioned not to discuss it.

It is important that defense counsel anticipate the uncharged misconduct and try to prevent its consideration by the sentencing authority by acting as early as possible. Article 39(a) sessions and cautionary rulings may be requested as appropriate, and objections should be made on the appropriate ground in order to preserve the issue for appeal.

Sometimes, however, inadmissible uncharged misconduct will come out during the course of a trial. At this point, defense counsel faces a tactical decision. First, he may do nothing, so as not to draw attention to the uncharged misconduct, especially before members. Second, he may request a limiting instruction at the time by the military judge to disregard the uncharged misconduct. Finally, he may before deliberation request a sentencing instruction regarding uncharged misconduct.³⁶

33. See United States v. Brown, 11 M.J. 263 (CMA 1981).

34. See United States v. Peterson, 44 CMR 528 (ACMR 1971).

35. See United States v. Brown, 11 M.J. 263 at 266, n. 3 (CMA 1981) for a discussion concerning deletion of objectionable portions of prosecution exhibits

36. See paragraph 7-13, DA Pam 27-9, Military Judges' Benchbook, regarding instructions on uncharged misconduct.

V. Summary

Uncharged misconduct evidence may weigh heavily in the sentencing decision. Preventing or minimizing its consideration by the sentencing authority is, therefore, a primary concern. Interview and discovery techniques must be used aggressively to determine potential sources of uncharged misconduct evidence. Next, defense counsel should determine the evidentiary rules governing the introduction of such evidence. Finally, a strategy must be devised to block the introduction or limit the effect of uncharged misconduct evidence. A comprehensive approach to uncharged misconduct evidence demands appropriate tactics for the pretrial period, the trial itself, and the appellate review which often follows.

SIDEBAR

ARTICLE 32 - Discovery Proceeding and Bulwark against Baseless Charges

The general court-martial convening authority may not refer a case to a general court-martial until he has complied with the procedural requirement of conducting an Article 32 investigation.¹ The investigation is an important safeguard for the accused since the convening authority may dismiss the charges if the investigation establishes a lack of probable cause to believe that an offense has been committed or that the accused committed it.²

1. Article 32, Uniform Code of Military Justice, 10 U.S.C. § 832 (1976) [hereinafter UCMJ]; Rule for Courts-Martial (RCM) 405(a), Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984] (effective 1 August 1984).

2. See paragraph 9-1 Department of the Army Pamphlet 27-173. Military Justice Trial Procedure (25 April 1978) [hereinafter DA Pam 27-173]. But see United States v. Brakefield, 43 CMR 828, 830-31 (ACMR 1971) [the Army Court found there was sufficient evidence developed by investigating officer to warrant referral of the charges to trial] in which the court stated:

The Article 32 investigation is designed to serve two functions: "It operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges." United States v. Samuels, 10 USCMA 206, 212, 27 CMR 280, 286 (1959). Notwithstanding its judicial character, the normal investigating officer is not required to "adhere to the strict rules of evidence." Id. at 213, 27 CMR [at] 287. The progenitor of this investigation is the grand jury indictment. A defendant in the United States District Court is not permitted to challenge the indictment on the ground that it is not supported by adequate or competent evidence. Costello v. United States, 350 U.S. 359 (1956). We are convinced that the same rule should be applied to courts-martial in the absence of an indication of a clear abuse of discretion or malicious intent.

Prior to the promulgation of the MCM, 1984, it was argued that the proceeding was not judicial in nature. Even though discovery took place, the proceeding was viewed as a commander's tool employed to prevent baseless charges from being referred to trial. The investigation was likened to a grand jury proceeding or a preliminary hearing, created to protect the accused. Proponents based this view upon the exigencies of military life, the simplicity of legislative and regulatory guidance regarding the proceeding and the clear legislative statement that "failure to follow [the requirements of the Article] did not constitute jurisdictional error."³

Appellate court decisions changed the requirements of the pretrial investigation model. The appellate rulings created a piecemeal progression of the Article 32 investigation from a commander's investigation to a full-blown preliminary judicial proceeding. As yet, the final word in this development has not been written. The MCM, 1984 codified many of the prior appellate court decisions. Treatment of the Article 32 investigation as an integral part of the eventual trial can bestow numerous benefits upon the defense. The purpose of this Note is to highlight some of the issues available to the defense counsel involved in a preliminary investigation pursuant to Article 32 and to present various tactical considerations which may be helpful.⁴

3. Captain Richard M. O'Meara, Article 32 - The Useful Anachronism 11 The Advocate 2 (Jan. - Feb. 1979) [hereinafter O'Meara]; Article 32(d), UCMJ. Cf. Humphrey v. Smith, 336 U.S. 695, 69 S.Ct. 830, 93 L.Ed. 987 (1949); United States v. Eggers, 3 USCMA 191, 194, 11 CMR 191, 194 (1953) ("Discovery is not a prime object of the pretrial investigation. At most it is a circumstantial by-product - and a right unguaranteed to defense counsel."); United States v. Samuels, 10 USCMA 206, 216, 27 CMR 280, 290 (1959) (Latimer, J., concurring and dissenting) ("We must not overlook the essential requirement that military law must be workable in time of war as well as in periods of peace." Dissenting from majority opinion requiring sworn statements at pretrial investigations); United States v. Ledbetter, 2 M.J. 37, 54 (CMA 1976) (Cook, J., dissenting) ("The report of the full Committee on Armed Services to the House indicates that the committee did 'not intend to endorse any provisions which will bring added delays and unnecessary technicalities' into the system of military justice.").

4. See also articles by Major Peluso, this issue, O'Meara at 4.

Production of Evidence

Any relevant witness or other evidence which is not cumulative must be produced if reasonably available. This includes witnesses requested by the accused, provided that the request is timely. In evaluating the reasonable availability of a witness, a balance must be struck between the significance of the testimony and personal appearance of the witness against the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance.⁵ This balancing test for obtaining a witnesses' testimony is also used for other evidence. A witness who is unavailable under Mil. R. Evid. 804(a)(1) through (6) is not "reasonably available" for purposes of an Article 32 investigation. Availability of the service person is not measured in terms of distance from the trial, although distance is obviously a factor to be considered.⁶

The investigating officer [IO] makes the initial determination whether evidence or a military witness is reasonably available.⁷ If the investigating officer decides that the evidence or witness is not reasonably available, the IO must so inform the parties. Otherwise, the immediate commander of the witness or custodian of the evidence will be requested to make the witness or evidence available.⁸ A determination by the immediate commander that the witness is not reasonably available is not subject to appeal by the accused but may be reviewed by the military judge under R.C.M. 906(b)(3).⁹

5. See R.C.M. 405(g); Analysis to R.C.M. 405(g), 421-22, MCM, 1984.

6. See United States v. Cruz, 5 MJ. 286, 288 (CMA 1978); United States v. Davis, 19 USCMA 217, 41 CMR 217 (1970).

7. R.C.M. 405(g)(2); R.C.M. 405(g)(2)(C).

8. Id.

9. R.C.M. 405(g)(2)(A) and (C) (These subsections allocate the responsibilities for determining reasonable availability in accordance with the practical considerations involved). See generally United States v. Chestnut, 2 M.J. 84 (CMA 1976), and United States v. Ledbetter, 2 M.J. 37 (CMA 1976); United States v. Cox, 48 CMR 723 (AFCMR), pet. denied, 23 USCMA 616 (1974).

If the immediate commander or the IO determines that the witness is not reasonably available, the reasons for that determination should be provided. The defense counsel should insist that these reasons be made a portion of the record.¹⁰

The investigating officer decides whether civilian witnesses are reasonably available.¹¹ A civilian witness may not, however, be compelled to attend a pretrial investigation. If a relevant civilian witness appears to be reasonably available, invitational travel orders should be sent to the witness and the witness should be informed, when appropriate, that necessary expenses will be paid. Should the witness decline to appear, that witness will be deemed to be unavailable.¹²

Tactical Considerations.

Unless counsel feels it tactically unwise to divulge future defense witnesses during preliminary proceedings, the request for witnesses should mirror the witness request utilized at courts-martial.¹³ Where possible, counsel should indicate personal knowledge of the expected testimony of the witness and provide specific dates, places, and events which evidence a relationship between the witness, the accused and the offense. In this regard, counsel should carefully consider his option of placing extenuating and mitigating evidence before the IO in the form of testimony by former commanders and supervisors. If the accused has been in the service a number of years, witnesses may be located on other posts. When making his request, counsel should point out the IO's responsibility to investigate thoroughly not only those facts surrounding the alleged offense, but also those facts which will aid him in a recommendation regarding disposition of the case "in the interests of justice."¹⁴

10. R.C.M. 405(g)(2)(D).

11. R.C.M. 405(g)(2)(B).

12. Discussion, R.C.M. 405(g)(2)(B).

13. See R.C.M. 703(c)(2)(B)(i), See also United States v. Jefferson, 13 M.J. 1 (CMA 1982); United States v. Vietor, 10 M.J. 69 (CMA 1980).

14. O'Meara at 15-16.

While requests for civilian witnesses are handled differently by the Government because the IO lacks authority to order their presence,¹⁵ counsel should, where appropriate, make the same representations in his request as he makes for military witnesses. In addition, counsel should place on the record his willingness to travel to the situs of the civilian witness and continue the proceeding there or take a deposition. These representations should significantly strengthen counsel's request in the eyes of the trial judge and appellate courts if the witness request is denied.¹⁶

Witness availability may be a critical consideration. If a witness is not produced at the Article 32 hearing and is not deemed reasonably available, the IO may use testimonial substitutes for the evidence which would have been provided by the witness. Such testimonial substitutes may be of minimal or limited reliability. Counsel are precluded from cross-examining the witness if testimonial substitutes are employed. Perhaps more importantly, counsel are deprived of the opportunity to "lock in" the testimony of the government's witnesses and to develop inconsistencies within the testimony of those witnesses. Counsel would be well advised to fully litigate the witness availability issue even if the witness is expected to provide testimony favorable to the government. This is of particular importance if the witness' commander refuses to provide the witness. Counsel should try, through interrogatories or otherwise, to get the witness' commander to state the specific reasons for his actions and to make those reasons a part of the record.

Evidence Considered by Investigation Officer

Unless the defense objects, the investigating officer may consider evidence in any form regardless of its reliability.¹⁷ Notwithstanding

15. See United States v. Chuculate, 5 M.J. 143 at 146 (Cook, J., concurring).

16. United States v. Chestnut, 2 M.J. 84 (CMA 1976); O'Meara at 16.

17. E.g. Unsworn statements and offers of proof. R.C.M. 405(g)(4)(A); R.C.M. 405(g)(5)(A).

the objection of the defense counsel, the investigating officer may consider testimonial substitutes, such as previously recorded sworn oral or written statements or an authenticated copy, photograph, or reproduction of similar accuracy of the evidence, but only when the witness or evidence is not reasonably available.¹⁸ These testimonial substitutes suffer from myriad infirmities, and counsel should resist any effort by the IO to rely on such substitutes.

Discovery

Pretrial discovery has been characterized as a defense counsel's dream,¹⁹ but counsel cannot count on receiving unrequested evidence. This is especially true at the Article 32 investigation where the evidence is as yet unstructured. Therefore, it is important to request by letter to the appointing authority that discoverable materials be produced "for use at the Article 32 investigation." Specific requests will vary depending on the particulars of each case and the imagination of each counsel. Certain items should always be requested prior to the pretrial proceeding, however, and a notation of the results of the request placed on the record.²⁰

Tactical Considerations.

1. Copies of all evidence viewed by or explained to the IO. It is important that the record indicate what materials, if any, to which the IO has been privy. Where documents exist, such as summaries of evidence, commander's notes, or police notes, these items can be made the subject of evidentiary objections.

2. Copies of the complete CID or MPI file, including backup notes, initial interview worksheets, and cards, which indicate the dates actions were taken. In this regard, counsel may encounter reluctance on the part of officials to release CID backup files without a request from a military

18. R.C.M. 405(g)(4)(B); R.C.M. 405(g)(5)(B).

19. Address by Edward Bellen, Esq., 20th Annual Belli Seminar, 26 June 1969.

20. O'Meara at 12.

judge. Counsel should emphasize, when appropriate, that use of these documents is intended specifically for use at the pretrial proceeding and object on the record if the documents are not provided.

The Investigation Officer

The officer selected to conduct the Article 32 investigation must be impartial. In one case, the Court of Military Appeals used broad language to the effect that "an Article 32 investigating officer who has previously had a role in inquiring into an offense is disqualified."²¹ In United States v. Parker,²² the detailed Article 32 investigating officer had conducted a prior "serious incident" investigation which fixed criminal responsibility upon the accused. The Court of Military Appeals reversed the conviction and granted a rehearing. The court stated that the investigating officer's detail was similar to the assignment of "a police detective, who has developed a criminal case for trial, to act as committing magistrate in a preliminary hearing in a civilian court."²³ However, the investigating officer is not disqualified solely because he has prior knowledge of the facts, or solely because his conduct of a closely related investigation familiarized him with the facts of the present case.²⁴ The investigating officer is disqualified if he is the accuser.²⁵

21. United States v. Lopez, 20 USCMA 76, 77, 42 CMR 268, 269 (1970).

22. 6 USCMA 75, 19 CMR 201 (1955).

23. Id. at 82, 19 CMR at 208.

24. United States v. Lopez, 20 USCMA 76, 42 CMR 268 (1970); United States v. Parker, 6 USCMA 75, 19 CMR 201 (1955); United States v. Schreiber, 16 CMR 639 (AFBR 1954), affd., 5 CMA 602, 18 CMR 226 (1955). But see United States v. Castleman, 11 M.J. 562 (AFCMR 1981) (relationship of IO to accuser and principal government witness required disqualification of IO); United States v. Natalello, 10 M.J. 594 (AFCMR 1980) (comments by IO in related investigation concerning the accused's culpability required disqualification of IO, notwithstanding subsequent disclaimer of partiality).

25. United States v. Cunningham, 12 USCMA 402, 30 CMR 402 (1961).

In United States v. Payne,²⁶ the Court of Military Appeals addressed the issue of the impartiality of an IO and held a line officer acting as an IO to the standards of conduct outlined in the ABA standards relating to the administration of criminal justice. Prejudice was presumed where the IO sought out and received guidance from a judge advocate whom he knew would be involved in the prosecution of the case.²⁷

Tactical Considerations.

In light of Payne, it is important that counsel conduct a voir dire of the IO. Important areas of concern include the actual method of appointment; the relationship of the IO to the accused, to the Criminal Justice Section of the SJA Office,²⁸ and to the convening authority; and the IO's background and legal knowledge regarding the specific charges. In addition, the record should indicate what guidance the IO received from the Criminal Justice Section, if any, and what prior ex parte discussions the IO has had with the witnesses or with members of the CID or Military Police. If it appears that the IO is susceptible to challenge, such challenge can be made directly to the IO or by written communication immediately to the appointing authority.²⁹

26. 3 M.J. 354 (CMA 1977). [Although the Court found clear and convincing evidence in the record to rebut the presumption, the Court stated that in future cases, when testing for prejudice, doubts will be resolved against the judicial officer].

27. O'Meara at 9.

28. See United States v. Grimm, 6 M.J. 890 (ACMR 1979), pet. denied, 7 M.J. 135 (1979) (the Army Court of Military Review determined that a chief of criminal law did not "serve in a prosecutorial function," which would prohibit him from furnishing ex parte advice to an IO). See also United States v. Clements, 12 M.J. 842 (ACMR 1982).

29. O'Meara at 9-10.

Contents of Investigating Officer's Report

Upon completion of the investigation, the IO is obligated to submit a written report of the investigation to the officer ordering the Article 32 investigation.³⁰ The information in this report must include summaries of the testimony taken at the hearing, statements or other physical evidence considered by the investigating officer, a conclusion as to whether the evidence supports the charges, and recommendations as to the disposition of the charges.³¹ Upon receipt of the report, the commander ordering the investigation will provide a copy of the report to the accused. Any objection to the report or its contents must be made within five days of service on the accused. Even though the accused has a five day period within which to object to the report, the convening authority may, at his discretion, refer the charges to trial.³² Failure to make a timely objection to the report, either its contents or omissions, will constitute a waiver of those objections.³³ If good cause can be shown, however, relief from such a waiver may be granted by competent authority.

Tactical Considerations.

Counsel should request permission to review the IO's report prior to its submission to the appointing authority, although the IO is not required to honor this request, to ensure that objections are properly noted, requests properly explained, and the IO's rulings accurately recorded. After the report is completed, counsel should endeavor to make his objections known to the appointing authority. This can best be accomplished by a written notice addressed directly to the appointing authority outlining each objection and providing an explanation of the prejudicial consequences involved. These objections should be made prior to completion of the staff judge advocate's pretrial advice. In this way,

30. R.C.M. 405(j)(3).

31. R.C.M. 405(j)(2).

32. R.C.M. 405(k).

33. Id.

the staff judge advocate must consider them when he makes his required determination regarding the conduct of the Article 32 investigation.³⁴ The commander who receives an objection may direct that the investigation be reopened or take other action, as appropriate.

In addition to a timely objection for failure to produce a witness, a defense request for a deposition may be necessary to preserve the issue for later review.³⁵ A copy of the deposition may be presented to the convening authority and the defense counsel may request a new pretrial advice that considers this evidence.

If the record of the investigation is verbatim, the testimony is thereby preserved for subsequent use under the exception to the hearsay rule permitting the use of former testimony.³⁶ Counsel should request that tapes made of the proceedings be maintained until appellate action, if any, is taken.³⁷ Where possible, a verbatim transcript of the proceedings should be requested as well. If the appointing authority refuses to tape record or order a verbatim record of the proceedings,

34. O'Meara at 7-8.

35. *United States v. Teeter*, 12 M.J. 716 (ACMR 1981), affirmed 16 M.J. 68 (CMA 1983); *United States v. Chuculate*, 5 M.J. 143 (CMA 1979); *United States v. Chestnut*, 2 M.J. 84 (CMA 1976); *United States v. Clements*, 12 M.J. 842 (ACMR 1982), pet. denied 13 M.J. 232 (CMA 1982); Discussion, R.C.M. 405(j)(3)-(5).

36. See Mil. R. Evid. 801(d)(1) for prerequisites for use of former testimony. See also *United States v. Castro-Ayon*, 537 F.2d 1055 (9th Cir.), cert. denied, 429 U.S. 983 (1976) [tape recorded statements given under oath at a Border Patrol station not hearsay under Rule 801(d)(1)].

37. See *United States v. Thomas*, 7 M.J. 655 (ACMR 1979); *United States v. Scott*, 6 M.J. 547 (AFCMR 548); O'Brien, *The Jencks Act - A Recognized Tool for the Military Defense Counsel*, 11 *The Advocate* 20 (1979).

defense counsel should tape record the proceedings. Denial of a defense request to preserve the former testimony of witnesses may be prejudicial error.³⁸

Seeking Relief

Counsel representing an accused during an Article 32 investigation must be vigilant to note improprieties and irregularities occurring during the course of the hearing. It is essential that timely objections be made to the IO as he has the authority to take corrective action. Even if the IO takes no action on the motion, the IO is obligated to note the objection in his report of investigation at the request of the objecting party.³⁹ If the objection raised by counsel falls within the authority of the officer who directed the investigation (e.g., the impartiality of the IO) the objection should be promptly reported to the appointing authority.⁴⁰

Unless counsel is prepared to recognize and strenuously note objections during the proceeding, to renew those objections in the form of notice to the convening authority prior to referral, and to bring his objections to the attention of the military judge in the form of appropriate motions during trial, it is probable that appellate courts will refuse to even test for prejudice.⁴¹

38. See *United States v. Combs*, 28 CMR 866, 873 (AFBR 1959) ("There would seem to be no question that if verbatim stenographic notes are extant before trial and the Government has notice of the fact that their production may be required at the time of trial, there is a duty on the part of those in authority to preserve such notes."); DA Pam 27-17, para. 3-3a provides for verbatim transcripts when requested by the appointing authority; *United States v. Scott*, 6 M.J. 547 (AFCMR 1978) (Destruction of defense requested Article 32 verbatim recording resulted in conviction reversal).

39. R.C.M. 405(h)(2).

40. See Discussion, R.C.M. 405(h)(2).

41. See *United States v. Cruz*, 5 M.J. 286 (CMA 1978); *United States v. Combs*, 28 CMR 866, 870, n.1 (AFBR 1959). See also *United States v. Garner*, 40 CMR 778 (ACMR 1969); *United States v. Henry*, 50 CMR 685 (AFCMR 1975).

Trial Considerations.

1. Motion for appropriate relief. The Manual for Courts-Martial recognizes this motion as the most appropriate when counsel alleges a defect in pretrial proceedings. Counsel should initially identify each defect and objection to the proceeding, and clearly enunciate how these defects have prejudiced the client's substantial rights. Inability to properly prepare for trial due to denial of statutory rights to cross-examine witnesses, consideration of inadmissible/unreliable evidence by the IO, or a challenge to the independence and impartiality of the IO are three of the common reasons for requesting appropriate relief. There are numerous approaches which can be taken, but without well demonstrated prejudice the motion will normally not be granted.⁴² Secondly, counsel should tailor the motion to the relief requested. If counsel merely wishes time to depose a witness prior to trial, that is what should be requested. If, on the other hand, a new Article 32 investigation would be advantageous, counsel should demonstrate not only how prior defects have prejudiced the client's rights but also how merely reopening the Article 32 investigation would not adequately cure the prejudice.⁴³

2. Motion to dismiss. Although other pretrial defects may be grounds for counsel to move to dismiss the charges at trial,⁴⁴ an allegation of "baseless charges," e.g., that the charges have been referred to the court on the basis of insufficient evidence and a failure to afford military due process, should be considered by counsel.

42. United States v. Cruz, 5 M.J. 286 (CMA 1978); United States v. Mickel, 9 USCMA 324, 26 CMR 104 (1958). But see United States v. Natalello, 10 M.J. 594, 595 (AFCMR 1980) where the court stated at n.2: "If the accused is deprived of a substantial pretrial right, as when he is not provided qualified counsel or when the officer ordering the investigation is not authorized to do so, he is, on timely objection, entitled to judicial enforcement of his right, without regard to a showing of specific prejudice."

43. O'Meara at 17-18.

44. See Combs, 28 CMR 866 (AFBR 1959).

a. Baseless charges. A general court-martial convening authority may not refer a charge to a general court-martial unless he has determined that the charge alleges an offense under the UCMJ and is warranted by evidence indicated in the report of investigation. A motion to dismiss requests the military judge to examine the record of investigation. If he determines that the record does not contain that level of evidence necessary to refer a case to trial, the charge should be dismissed as baseless. In addition, counsel may indicate those areas where inadmissible or inherently unreliable evidence remains in the record of investigation, and move for dismissal because the charges were referred based on this inappropriate evidence.⁴⁵

b. Military due process. It has long been the law that violation of certain basic concepts of fairness and statutory protections outlined in the UCMJ which materially prejudice the substantial rights of the accused require dismissal of the charges.⁴⁶ Counsel should test the objections made at the proceeding against the statutory rights afforded the accused, e.g., impartial IO, availability of witnesses, denial of adequate representation due to IO denying defense request for a continuance, among others. Also, counsel should outline in the motion how the accused has been harmed. In addition, an explanation of why merely ordering a new hearing will not obviate the harm caused by the violations will significantly strengthen the motion.

Because the Article 32 investigation appears to be in a state of redefinition at the present time, it is suggested that counsel frame his motion regarding pretrial defects as a motion to dismiss or, in the alternative, a motion for appropriate relief. In this fashion, the military judge will be required to test the defects and prejudice alleged twice, first to determine if they are so onerous as to require dismissal and then, if not, to determine if the curative relief requested should be granted.⁴⁷

45. See also discussions in 10 The Advocate 267, 268 (1978); United States v. Engle, 1 M.J. 387, 389, n.4 (CMA 1976).

46. United States v. Clay, 1 USCMA 74, 1 CMR 74 (1951).

47. O'Meara at 18-19.

Conclusion

The Article 32 investigation is "an integral part of the court-martial proceedings,"⁴⁸ and an error in the investigation can prejudice the accused in the subsequent trial. If an investigation of the offense, conducted before the preferral of charges, afforded the accused the rights guaranteed by Article 32(b), no further investigation is required unless the accused demands it.⁴⁹ In other words, while Article 32(c) permits an accused to waive the investigation, it also permits him to insist that the government conduct an investigation which substantially complies with Article 32.

Counsel have various tactical decisions to consider in order to most effectively represent the accused. It may be appropriate to fully present the defense case in an effort to obtain dismissal of the charges at this stage. Alternatively, waiver of the Article 32 proceeding may be advisable to obtain a proposed pretrial agreement, or if there is a fear that the government may "discover" additional offenses. An aggressive, vigorous showing by defense counsel at the Article 32 hearing will frequently gain the confidence of the client as to his counsel's loyalty to his position. The investigation may help convince the accused of the desirability of a pretrial agreement. The investigation may be used to lock in the government's witnesses for later impeachment at trial (the most important reason for tape recording hearings). Alternatively cross-examination may prepare the government witnesses, thus ensuring a better government showing at trial. Imaginative use of the Article 32 proceeding can yield great dividends to the defense counsel.

48. United States v. Garner, 40 CMR 778 (ACMR 1969).

49. Article 32, UCMJ.

