DEPARTMENT OF THE ARMY PAMPHLET NO. 27–10

DEPARTMENT OF THE AIR FORCE PAMPHLET AFP 111–1–1

MILITARY JUSTICE HANDBOOK

The Trial Counsel and The Defense Counsel

DEPARTMENTS OF THE ARMY AND THE AIR FORCE
NOVEMBER 1962

DA PAMPHLET
No. 27-10
AF PAMPHLET
No. 111-1-1

DEPARTMENTS OF THE ARMY
AND THE AIR FORCE
WASHINGTON 25, D.C., *30 November 1962*

MILITARY JUSTICE HANDBOOK

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*This pamphlet supersedes DA Pam 27-10/AF Pam 111-1-1, 6 December 1954, including C 3, 27 March 1959.

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KEY TO REFERENCES

Reference	*In open text*	*In parentheses*
Manual for Courts-Martial, United States, 1951.	the Manual	(MCM)
An article of the Uniform Code of Military Justice.	Article 38	(Art. 38)
A paragraph of the Manual	paragraph 46 of the Manual.	(MCM, 46)
An appendix of the Manual	appendix 8 of the Manual.	(MCM, app. 8)
A paragraph of this handbook	15	(15)
An appendix of this handbook	appendix V	(app. V)

Chapter 1

GENERAL

1. PURPOSE AND SCOPE

This handbook has been designed as a practical guide to assist trial counsel, defense counsel, and pretrial investigation counsel in the performance of their duties. It is not considered a substitute for the *Manual for Courts-Martial, United States, 1951*, or as superseding any of the provisions thereof, and should not be cited as legal authority. In this handbook, counsel will find a description and discussion of the duties which he is to perform prior to, during the progress of, and after the trial. The handbook suggests workable solutions for many specific problems which may arise both before and at the trial. Counsel are cautioned that much of the discussion contained in chapters 3 and 4 is mutually applicable, and that these chapters should be read together.

2. QUALIFICATIONS OF COUNSEL

a. ***General.*** Figure 1 lists the legal qualifications of counsel of general and special courts-martial, as well as the factors which disqualify a person from acting as counsel in a particular case. The authority convening a court-martial is responsible, in the first instance, for the appointment of properly qualified counsel. In the second instance, the court is required by paragraph 61*e*, *f*, of the Manual, and the trial procedure guide (MCM, app. 8*a*, pp. 502–503) to ascertain: (1) that properly qualified personnel were *appointed* as trial counsel and defense counsel; and (2) that counsel *conducting* the prosecution and defense have the requisite legal qualifications, and are not disqualified because of their prior participation in the same case, or in a closely related case.

It is important that each person appointed as counsel or assistant counsel examine the order appointing the court to ascertain whether the statement of his legal qualifications or lack of legal qualifications is correct. If the statement is not correct, the person concerned should report the error to the convening authority at once so that corrective action can be taken. Similarly, if a person appointed as counsel discovers that he is disqualified from acting in a particular case because of his prior participation therein, or in a closely related case, he not

	Legal qualifications				Disqualifying factors
	General court-martial		Special court-martial		General or special court-martial
	Appointed counsel	Counsel conducting trial [1]	Appointed counsel	Counsel conducting trial [1]	May not act if he has acted in same case
PROSECUTION	(1) TC must be judge advocate of Army or Air Force or law specialist of Navy or Coast Guard, who is graduate of accredited law school, *or* any officer who is a member of bar of Federal court or of highest court of a State *and* certified as competent by TJAG of his armed force. (Art. 27*b*). (2) Assistant TC need not be certified under Article 27*b*, but he must be a qualified attorney.	Must have same legal qualifications as appointed TC. (Art. 38*d*).[2]	(1) TC need not have legal qualifications. (2) Assistant TC need not have legal qualifications. (MCM, 6*c*).	Need not have legal qualifications. (Art. 27(*c*)).	He has acted [5] for the defense or as pretrial counsel for the accused, or as investigating officer, court member, or law officer. (MCM, 61*e*).

DEFENSE	(1) DC must have same legal qualifications as appointed TC. (Art. 27*b*). (2) Assistant DC need not be certified under Article 27*b*, but he must be a qualified attorney.	Must have same legal qualifications as appointed DC, except that individual counsel need not be certified.	(1) DC need not have legal qualifications if appointed TC has none. (2) DC must be qualified as counsel of GCM if appointed TC is so qualified. (3) DC must be judge advocate, law specialist, or member of bar of Federal court or of highest court of a State if appointed TC is one of these.[2] (4) Assistant DC need not have legal qualifications. (Art. 27*c*; MCM, 6*c*).	(1) Need not have legal qualifications if no member of prosecution has any. (2) Must be qualified as counsel of GCM if any member of prosecution is so qualified.[4] (3) Must be judge advocate, law specialist, or member of bar of Federal court or of highest court of a State if any member of prosecution is one of these.[2] (Art. 27*c*, 38 *b*, *e*; MCM, 61*f*(1)).	(1) He has acted [5] for the prosecution. (2) He is the accuser, or has acted as investigating officer, court member, or law officer—*unless expressly requested by accused.* (MCM, 61*f*(4)). (3) He is designated to defend two or more accused at a joint or common trial and there is a conflict of interest in the conduct of their defense. (MCM, 48*c*).

[1] The conduct of a case does not devolve upon an assistant counsel when the trial or defense counsel, as the case may be, is present in court (MCM, 6*d*). An assistant counsel is deemed to perform out-of-court duties under the direction of the trial or defense counsel, as the case may be (MCM, 45, 47).

[2] An accused may represent himself, but may not otherwise be represented by a nonlawyer at a general court-martial. However, the accused may consult with a nonlawyer at any time, and may even have a nonlawyer present at the trial and seated at the counsel table.

[3] In Air Force, DC must be certified (Art. 27*b*) under these and other conditions. See AFR 111-8.

[4] Unless accused expressly requests that he be represented by the counsel who is conducting the defense and states that he does not wish the services of counsel who has the required legal qualifications (MCM, 61*f*(3); app. 8*a*, p. 503). (Not applicable to a general court-martial.)

[5] A person who, between the time the case has been referred for trial and the trial, has been an appointed counsel or assistant counsel of the court to which the case has been referred is presumed to have *acted* as a member of the prosecution or defense, as the case may be (MCM, 6*a*). Record must show he has not acted to remove the inference.

Figure 1. Qualifications of counsel.

only should he refuse to act as counsel in the case, but he also should advise the convening authority promptly of his inability to act. When for any reason the convening authority cannot be notified of counsel's disqualification, the person concerned should advise the law officer (president of a special court-martial) of the matter *prior to the time when the court is called to order.* If these rules are followed, the court will not be called to order for the trial of a particular case unless counsel for both sides are properly qualified.

b. Examples. The examples below illustrate the action which counsel should take to assure that the requirements in figure 1 are met.

(1) *Matters affecting legal constitution of court.* An order appointing a special court-martial shows that the trial counsel and the defense counsel have no legal qualifications, but the trial counsel actually is a member of the bar of the highest court of Texas. *Action*: As the court is not legally constituted, the trial counsel should advise the convening authority of the error so that he can appoint as defense counsel an officer with legal qualifications equivalent to those of the trial counsel or can replace the legally qualified trial counsel with an officer having no legal qualifications.

(2) *Matters affecting right of court to proceed.* An order appointing a special court-martial shows that the trial counsel and the defense counsel and their assistants have no legal qualifications, but the assistant trial counsel actually is a member of the bar of a Federal court. *Action*: The trial counsel should advise the convening authority of the error so that he can replace the assistant trial counsel with an officer who has no legal qualifications or can provide the accused with counsel having legal qualifications equivalent to those of the assistant trial counsel.

(3) *Matters involving prior participation in the same case.*

(a) In a case referred to a general court-martial for a rehearing, the assistant trial counsel discovered that he was named as assistant defense counsel in the order appointing the court which first tried the case. However, he took no part in the defense at the prior trial, as he was absent on leave at the time. *Action*: Although it is presumed that the assistant trial counsel did act for the defense at the prior trial of the case (MCM, 6*a*), this presumption may be rebutted by an uncontested statement of the trial counsel at the rehearing to this effect:

> Lieutenant X, who is named as assistant trial counsel of this court, was named as assistant defense counsel of the court which originally tried this case. However, he did not act for the defense in any capacity at the prior trial. (As a matter

of fact, he was absent on leave from the time of referral of the charges to the court until after the trial had been concluded.)

This statement should be made even though Lieutenant X is not to act for the prosecution at the rehearing. In this connection, see the illustration which follows.

(*b*) In a case referred to a special court-martial for a rehearing, the defense counsel discovered that he had acted as trial counsel of the court which first tried the case. *Action*: The defense counsel must take no action in the case except to notify the convening authority of his inability to act; the convening authority should appoint a new defense counsel. For the reasons indicated in the preceding example, newly appointed counsel for defense should announce at the trial that the disqualified defense counsel did not act for the defense (MCM, 6*d*).

(*c*) In a case referred to a general court-martial, the assistant trial counsel discovered that he had acted as the pretrial investigating officer. *Action*: The assistant trial counsel must not act for or assist the prosecution in any capacity. If the trial counsel is to conduct the prosecution, it would be necessary to report the disqualification of the assistant trial counsel to the convening authority. However, the trial counsel may conduct the trial if he can and does make a statement at the trial substantially as follows:

> Lieutenant Y, who is named as the assistant trial counsel, acted as the pretrial investigating officer in this case. I have not conferred with him concerning the prosecution of this case except to advise him that he would not be eligible to act for the prosecution. He has not acted for the prosecution in this case.

(*d*) Appointed trial counsel served as defense counsel at the separate trial of another accused who was tried for the same offense committed jointly with the accused. *Action*: Under such circumstances, trial counsel would be ineligible since he had previously acted as defense counsel in what must be considered to be "the same case" within the meaning of Article 27*a*. Accordingly, trial counsel should take no action in the case except to advise the convening authority of his inability to act. His replacement must be able to and should announce at the trial that the disqualified trial counsel did not act for or assist the prosecution.

(*e*) An officer was appointed to defend an accused charged with purchasing a stolen pistol. Counsel had previously defended the prosecution's principal witness who was tried on charges of stealing and selling the same pistol. *Action*:

circumstances, appointed defense counsel would be placed in the legally precarious position of having a duty to safeguard the interests of the accused and at the same time to retain the confidence derived from his attorney-client relationship with the prosecution witness. Under such circumstances, accused would be deprived of the effective assistance of counsel. Appointed defense counsel should inform accused of his inability to act and report the matter to the convening authority.

8. DUTIES IN GENERAL

*a. **Personal preparation.*** The trial counsel and the defense counsel should give priority to the serious duties which they perform. To prepare himself adequately for his duties, an officer must acquaint himself with the Manual. Counsel must acquire a sound working knowledge of those paragraphs of the Manual which pertain to courts-martial procedure (MCM, 52 to 77), the attendance of witnesses and the taking of depositions (MCM, 115 and 117), the rules of evidence (MCM, 137 to 154), and the punitive articles (MCM, 156 to 213). The principal provisions of the Manual pertaining to the duties of the trial counsel will be found in paragraphs 44, 45, 61, 82, and 83; those pertaining to the duties of the defense counsel will be found primarily in paragraphs 46, 47, and 48. Careful study of these paragraphs by the officers concerned is essential. Both the trial counsel and the defense counsel should be thoroughly familiar with appendixes 8, 9, 10, and 11 of the Manual. The Manual should, however, be used with care, inasmuch as many changes thereto have been effected by decisions of the United States Court of Military Appeals and Executive orders promulgated by the President. These changes normally will be reflected in the cases and Executive orders reported by the Army in the current cumulative pocket part to the Manual and by the Air Force in "slip sheet" annotations to the Manual. Reference should always be made to these sources. Nonlegally qualified counsel may obtain assistance from the local staff judge advocate in understanding the changes thus effected.

*b. **Gaining experience.*** An officer should seek experience in court-martial work to prepare him for the day when he will perform as counsel. An officer can gain much of this experience without actually participating in a trial. Every officer without considerable trial experience should take advantage of opportunities to watch actual trials by courts-martial, particularly those by general courts-martial. During the trial, he should check the proceedings against the procedural guide (MCM, app. 8) and should observe carefully the manner in which counsel for each side presents his case. He should note any unfamiliar matters that arise during the trial and, at a recess

or at the conclusion of the trial, should compare the court's action with the rules in the Manual. He soon will have a good understanding of the practical aspects of trial practice. Still more valuable experience is gained by serving as an assistant to an experienced counsel. As the assistant, he should be present at, and should carefully observe, each phase of the preparation of the case. After acting as an observer, he should be ready to perform some of the pretrial and trial duties under the supervision of experienced counsel. In a short time—assuming he is an apt pupil and has applied himself well—he should be able to try or defend almost any special court-martial case in a competent manner.

*c. **Behavior in court.*** Counsel before any court-martial should conduct himself during the trial in a courteous, gentlemanly, and military manner. Whenever he has occasion to address the court, he should rise. This courtesy not only is indicative of proper respect for the court but adds to the dignity of the proceedings as well.

The counsel who approaches witnesses in a fair and courteous manner creates the best impression on the court and accomplishes the most for the side he represents. Unnecessary harassment of witnesses is improper.

*d. **Professional conduct.*** The trial counsel and the defense counsel are expected to exert themselves to the utmost on behalf of the Government and the accused, respectively. Partisan zeal, however, is never an excuse for any impropriety or unethical conduct in or out of court. A counsel guilty of such misconduct may be subject to disciplinary action, and he may be prohibited from ever again acting as counsel (MCM, 43). Moreover, a court-martial may punish counsel for contempt if he uses any menacing words, signs, or gestures in its presence or if he disturbs the proceedings by causing any riot or disorder. Fear of official disapproval should not, however, deter counsel in the proper and vigorous presentation of a case (MCM, 118).

Rules of conduct for counsel who appear before courts-martial are found in various paragraphs of the Manual, particularly paragraphs 42, 44, 46, 48, and 72. Additional rules of conduct and the procedure for suspension of counsel are prescribed by departmental regulations (SR 22–130–5).

4. RELATIONSHIP BETWEEN COUNSEL, THE ACCUSED, AND THE CONVENING AUTHORITY

*a. **Counsel and accused.*** It is not the duty of the trial counsel to advise or assist the defense in the preparation or conduct of its case. After he has served a copy of the charge sheet on the accused and notified the appointed defense counsel of the service of charges, neither the trial counsel nor his assistants may deal with the accused except through the counsel representing him. For example, if the trial counsel desires to know how the accused intends to plead or whether an

enlisted accused desires enlisted personnel on the court, he will ask counsel for the accused and in that manner obtain the desired information.

b. ***Channels of communication.*** The Manual and this handbook make numerous statements to the effect that certain matters relating to future proceedings in a trial are to be reported to the officer who appointed the court. As a practical matter, however, the trial counsel or the defense counsel of a court appointed by an officer who has a judge advocate on his staff usually will consult with the judge advocate. When the convening authority has no judge advocate on his staff, the trial counsel or the defense counsel may either deal directly with the convening authority or consult with an officer or other person designated by the convening authority.

c. ***Relations between counsel.*** A spirit of cooperation and mutual trust should exist between the trial counsel and the defense counsel. Each should assist the other in the performance of his official duties when such assistance is *consistent* with the proper performance of his own duties. For example, if the trial counsel has arranged to make a trip so that he can interview a material witness who is located at some distance from the place of trial, he should extend to the defense counsel an invitation to accompany him for the purpose of interviewing the witness.

d. ***Right of defense to examine allied papers, records, and real evidence.*** Documents in the custody and control of military authorities which are admissible in evidence and are relevant and material to the issues at the trial normally must be made available to the defense upon proper request (MCM, 115*c*). The trial counsel will, except as otherwise directed by the convening authority, permit the defense to examine any papers accompanying the charges. Similarly, any item of real evidence in the Government's possession should be made available to the defense for inspection. Whenever copies of accompanying papers are withheld or their examination by the defense denied by order of the convening authority, the defense counsel and the accused should be so informed. Usually, the trial counsel receives the charge sheet and allied papers in duplicate. He should, therefore, provide the defense with a duplicate copy of all documents in his possession while retaining the originals for his own use. If necessary to the preparation of his case, defense counsel should be allowed to inspect the originals. In addition, the defense will be furnished a copy of the orders appointing the court and all amendatory orders.

5. PRELIMINARY CONSIDERATIONS IN PREPARING A CASE

a. ***Presentation of evidence.*** Counsel must be thoroughly familiar with the rules of evidence. They must know, in each case, what evidence can be used to prove each offense charged, how this evidence

can be introduced, and what evidence of the opposing side they will attempt to exclude by appropriate objection during trial. Accordingly, counsel should familiarize themselves before trial with the rules of evidence which are most likely to arise at the trial. They should determine the order in which their witnesses will testify so that the case will be presented in the most understandable and effective manner. Generally, this result is obtained by presenting the evidence in chronological order. In complex cases involving several specifications, counsel may advise the court, in his opening statement or before a witness testifies, as to which charges and specifications the witness will testify. Also, if evidence as to a charge or specification will be introduced out of logical sequence, the attention of the court may be invited to the anticipated deviation.

*b. **Examination of premises; preparation of exhibits.*** As soon as the counsel have analyzed the expected testimony, they should consider the desirability of examining the place where the offense is alleged to have occurred. In some cases, this examination is not important, but in cases which involve such offenses as murder, rape, various assaults, robbery, or larceny, complete familiarity with the site of the offense may be necessary for an intelligent interrogation of witnesses.

When the locations of objects and matters of distance are important, suitable diagrams, sketches, or photographs should be prepared for use during the pretrial interrogation of witnesses and for possible use at trial. Inexperienced counsel frequently overlook the value of this kind of evidence. A single photograph, sketch, X-ray, map, or diagram—when properly used—may speak more clearly than thousands of words of oral testimony and ordinarily will assist the court in understanding the proceedings. In determining how to prove a fact or a set of facts, counsel should ask himself this question: How can I best show this to the court and the reviewing authorities? He must remember that at the start of the case the court is completely ignorant of the facts!

To avoid having to testify as a witness in order to authenticate a diagram, sketch, photograph, etc., counsel should have these exhibits prepared by another person who will be available to testify at the trial. If possible, the diagram, sketch, photograph, etc., should be large enough so that all the members of the court can see the details as they are pointed out by the witness. The exhibit usually can be reproduced photographically or by other reproduction means for inclusion in the record. If the trial counsel and the defense counsel have examined the scene of the alleged offense, they may be able to agree as to distances and locations of objects and buildings. If such agreement is reached, they will be able to stipulate as to those matters at the trial. See paragraph 26, *infra*, on stipulations. Sim-

[illegible] as to the authenticity of a map, diagram, [illegible] of the scene. Unless conclusions as to distance, direction and other facts are stipulated to, exhibits of this character should be prepared, printed or written upon prior to verification by the witness on the stand.

Preliminary interviews—purpose. After becoming familiar with the principles applicable to each offense alleged, with the statements of [illegible] testimony, and, when appropriate, with the scene of the alleged offense, counsel should interview all available witnesses. It is essential that they know what the testimony of the various witnesses will be. Counsel should follow the well-established practice of knowing from personal interview (even though it is necessary to request a recess in an exceptional case) the gist of a witness' testimony before placing him on the stand. Careful interrogation of all known witnesses and a canvass of persons known to frequent the area where the offense occurred may lead to new and essential evidence. Pretrial interviews will enable counsel to evaluate the testimony of their witnesses, to estimate the probable relative impression they will make upon the court, and to determine which of the opposing witnesses they should cross-examine.

All witnesses should be interviewed as soon after receiving the case as possible. An interview with a witness should be very detailed. He should first be permitted to tell his own story with as little interruption as possible, and then be questioned exhaustively concerning the facts about which he is to testify. His answers should be checked against any prior statements he has made. In addition, counsel should require the witness to locate his position on a sketch or diagram of the area in question and to locate also the position of all objects and other people, and in appropriate cases should ask the witness to accompany him to the scene. This is one of the most effective means of discovering whether the witness was in a position to see or hear what he says he saw or heard. Counsel should then prepare adequate trial notes showing the competent testimony that he wants to elicit from the witness. Thereafter, he should prepare the witness carefully for his direct examination and warn him of the probable questions that he will be asked on cross-examination. This preparation is not, of course, for the purpose of inducing the witness to testify falsely but to enable him to testify truthfully, coherently, and chronologically about the facts of which he has knowledge.

In certain instances it may be desirable to secure a signed statement from a witness prior to trial. In taking a statement counsel should ascertain whether the party signing the statement can read or write. If he can read, the statement should conclude with a statement acknowledging that the witness has read each page of the statement. If the witness cannot read, another person should read

the statement to him prior to the trial, and he should acknowledge that the statement as read to him reflected a true and correct statement of the facts. In the event this statement is to be offered in evidence, the person who read the statement must then be called as a witness at the trial to testify that he correctly read the statement to the declarant and that the declarant acknowledged the reading of it.

d. ***Pretrial interviews—manner of conducting.*** Counsel ordinarily should conduct the pretrial interview of a witness in the absence of third parties so that, as far as possible, a friendly, personal relationship may be established between counsel and the witness. This relationship usually results in a complete and truthful disclosure of the facts by the witness. When a witness is reluctant for any reason to make a full and truthful disclosure of the facts, counsel may find it advantageous to interview the witness in the presence of an impartial and reliable third party. The third party will be useful for impeachment purposes in the event the witness changes his testimony at the trial. As indicated previously, it would be wise to reduce such a statement to writing.

e. ***Pretrial interviews—timid witnesses.*** It is especially important to prepare carefully a witness who appears to be timid or who demonstrates undue fear at the prospect of testifying. Counsel should tell him that he will be given sufficient time to think about each question before he answers it; that he should ask to have the question repeated if he doesn't understand it; and that if he doesn't know the answer to a question he should testify that he does not know. Above all, counsel should emphasize that the witness will have nothing to fear if he is careful to speak only the truth when he is upon the witness stand.

f. ***Pretrial interviews—testing and establishing competency.*** A child or a person whose competency as a witness is likely to be attacked by the opposing side should be examined at great length about his understanding of the difference between truth and falsehood and of the moral importance of telling the truth. Additionally, the witness must have the mental capacity to have observed with reasonable accuracy the matters in issue and to recollect and describe them reasonably accurately. Accordingly, counsel should ascertain whether the witness understands the moral necessity of telling the truth and whether he had accurately observed and could describe the matters in issue. In conducting this part of the pretrial interview, counsel should use simple terms that can be understood by the witness. Counsel should make notes of the terms that are most easily understood by the witness so that the same terms can be used when counsel is establishing the competency of the witness at trial.

After counsel is satisfied that the competency of such a witness can be established at the trial, he should then go into every detail of the expected direct and cross-examination of the witness. If the examination will involve questions that may cause the witness to be unduly embarrassed, such as questions pertaining to sexual offenses, counsel must explain the necessity for full and truthful answers. In some instances, it may prove helpful to conduct the pretrial interview of a child in the presence of a parent. Care must be taken, however, that the parent does not attempt to shape the testimony of the witness but limits his assistance to adjurations to the witness to answer all questions fully and truthfully. Counsel must determine in each case just what procedure he will follow in preparing a witness of this type so that he will be able to testify fully and truthfully at the trial.

g. Pretrial interviews—expert witnesses. An expert witness is one who is skilled in some art, trade, profession or science or who has knowledge and experience in relation to matters which are not generally within the knowledge of men of common education and experience. His function is to render necessary assistance to the court in the interpretation of facts which have been presented to it. Thus, the expert witness may express an opinion on a state of facts which is within his speciality and which is involved in the inquiry.

Although proof of the special qualifications of an expert is waived by the failure to object to his testimony on the ground of a lack of such proof, it may be expected that the witness will not be permitted to give expert testimony at trial unless he is first established to be an expert in the particular field. Accordingly, special attention must be given to the pretrial interview of expert witnesses. The interview should serve three purposes: First, it will enable counsel to determine whether the witness is qualified as an expert and, if so, the manner in which his qualifications should be presented to the court. Second, it will acquaint counsel with the testimony he can expect from the expert. Third, it will help to provide counsel with sufficient background information in the expert's field to enable him to ask proper and intelligent questions to bring out this testimony at the trial.

As indicated in paragraph 138*e* of the Manual, the relevant opinion of an expert witness is admissible in evidence if (1) it is based on facts of which the expert has personal knowledge, (2) it is based on an examination or study conducted by the expert, or (3) it is based upon facts (either in evidence or later to be received in evidence) which have been made known to the expert by a carefully phrased hypothetical question. If the expert's opinion is based upon personal knowledge of the facts, counsel should prepare him to specify at the trial the facts upon which his opinion is based. If the facts must be made known to the expert witness by a hypothetical question, counsel should seek the assistance of the expert witness in formulating the

question. The expert will be able to advise counsel of the effect of the various facts upon his opinion and thus enable counsel to prepare questions which will be based upon the established facts that are most favorable to his theory of the case.

It is said that it takes an expert to cross-examine an expert. Therefore, if counsel is preparing to cross-examine an expert witness, he should make every practicable effort to educate himself in the matters about which the expert will testify. This may be done by discussing the matter with the prospective witness or other experts or by studying treatises on the subject of the expert's specialty. Counsel might bear in mind that in cross-examining an expert the requirement on direct examination that hypothetical questions shall be based on facts in evidence does not apply. Also, if the expert has based his opinion to some extent upon his reading of books or papers dealing with his specialty, he may be cross-examined by reference to other reputable works in his field.

Chapter 2

EVIDENCE

6. BASIC PRINCIPLES OF THE RULES OF EVIDENCE

Evidence is that which tends to prove or disprove any matter in question, or to influence the belief respecting it. It is the means by which any alleged matter of fact, the truth of which is submitted to inquiry, is proved or disproved; it includes all matters, except comment or argument, legally submitted to a court to enable it to decide a question before it.

The rules of evidence for courts-martial are contained in chapter XXVII of the Manual. The discussion of evidence contained in this pamphlet is predicated upon the discussion in the Manual and in DA Pam 27–172, Evidence (see also AFM 110–8, Military Justice Guide). It is not intended to be exhaustive; therefore, counsel must not feel that they have an adequate knowledge of the law of evidence after reading this pamphlet only.

A decision of a court-martial based on insufficient or incompetent evidence cannot be upheld. A good knowledge of the rules of evidence must, therefore, be possessed by counsel. Those untrained in the law are not expected to be fully conversant with all the rules, but they should know the fundamental principles which apply to the particular case being tried. Nonlegally qualified counsel are encouraged to discuss with the local staff judge advocate or member of his staff any particular evidentiary problems they might encounter.

7. DIRECT EXAMINATION

a. General. The purpose of direct examination is to present testimony to the court to prove or disprove an issue in the case. The witness should testify comprehensively, clearly, briefly, and, normally, in a chronological manner about what he has seen, heard, or done. If material to the inquiry, it is usually desirable to bring out all the facts known by the witness on direct examination even though some of them may be unfavorable to the side calling the witness. The complete disclosure of facts on direct examination is preferred, because unfavorable facts are usually more damaging when brought out for the first time on cross-examination. The witness should be prepared at the pretrial interview for the part he will take in the direct examina-

tion. In preparing himself for the direct examination, counsel should outline in his mind, and perhaps jot down in his trial notes, the two or three preliminary questions that will identify the witness and focus attention on the events about which he is to testify.

b. ***Form of questions.*** Counsel may either elicit the testimony of the witness by a series of questions about specific facts or he may ask the witness to tell his story in narrative form. In the latter case the attention of the witness will be directed to the incident in question and he will then be requested to tell what he saw and heard on that occasion. With an intelligent witness, the narrative form of questioning is more effective than specific interrogation. The narrative seems to come from the witness rather than the counsel. The spontaneous telling of the witness' story in his own words will be more interesting and impressive than if counsel elicited the same testimony piecemeal from the witness. When placing evidence before the court in this fashion, however, counsel must be alert and watchful to assure that the witness does not give inadmissible testimony. Unless the witness is hostile, timid, cannot express himself clearly, or becomes confused (MCM, 149*c*), counsel should permit him to tell his story in his own way and in his own words without unnecessary interruption.

c. ***Witness' answers must be responsive.*** The testimony of the witness must be responsive to the questions asked. If a witness' answers are not responsive, the counsel questioning him may request that they be stricken from the record. The opposing counsel does not have this right. A witness, however, cannot be required to answer a question by a simple "yes" or "no" unless it is clear that such an answer will be a complete response to the question. The witness will always be permitted at some time before completing his testimony to explain such an answer.

d. ***Leading questions.*** A leading question is one which either suggests the answer desired of the witness or which, embodying a material fact not as yet testified to by the witness, is susceptible of being answered by a simple "yes" or "no." The use of leading questions on direct or redirect examination is generally prohibited. In certain cases, however, such as when questioning a witness on preliminary or introductory matters, when questioning a witness who appears hostile or adverse to the party calling him, when it appears that the witness has made an inadvertent error in his testimony, when the witness appears to be timid or embarrassed, when the witness is having difficulty in directing his mind toward the subject matter of the inquiry, or when memoranda are being used to refresh the witness' memory or as a record of his past recollection, leading questions may be used in the discretion of the law officer or the president of a special court-martial. For a further discussion of leading questions, see paragraph 149*c*, MCM, US, 1951.

Ambiguous, misleading, or suggestive questions. Ambiguous or misleading questions are unfair and should not be used by counsel either on direct or cross-examination. A common error is for counsel to phrase the question so that is assumes as true matters to which the witness has not testified and which are in dispute between the parties.

A suggestive question is one asked for the purpose of suggesting matters not known to exist or facts which are inadmissible in evidence. Questions subject to this interpretation should be avoided by counsel.

8. THE PRIVILEGE OF A WITNESS AGAINST COMPULSORY SELF-INCRIMINATION

The privilege against compulsory self-incrimination extends to all witnesses; it is the privilege to refuse to respond to a question, the answer to which may tend to incriminate the witness. The privilege must be asserted personally by the witness and not by counsel.

Where it appears likely that a witness may invoke his privilege, counsel and the law officer should question the witness in an out-of-court hearing to determine whether he intends to avail himself of his right not to testify. If, however, a witness is called who properly invokes his privilege, extended interrogation of such a witness should be avoided. Although an answer to a question apparently would incriminate or tend to incriminate a witness, he may be required to answer it if he can successfully object to being tried for the offense as to which the privilege is asserted because of a grant of immunity, former trial, the running of the statute of limitations, or some other reason.

9. THE ART OF CROSS-EXAMINATION

It is impossible to lay down any specific rules of when and how to cross-examine. It has been said that cross-examination is an art because it takes an artist to know when *not* to cross-examine. There are, however, several general principles that are followed by every experienced cross-examiner. Some basic principles are outlined below.

The testimony of the witness on direct examination must be followed closely. Any discrepancies between the testimony and any prior statements of the witness, as well as his reactions to particular questions, should be observed carefully. If the testimony of a witness is to the point, convincing, and so far as counsel can tell, truthful (that is, consistent with his pretrial statements and with the probabilities of the case as outlined by other witnesses) counsel should not cross-examine except for the purpose of bringing out matters which he knows will be favorable to his side.

If counsel has prepared his case properly, he will have interviewed all the opposing witnesses except the accused and will know what

their testimony should be. Accordingly, he should have no reason to go on a "fishing expedition" during his cross-examination, hoping to catch something favorable to his side of the case. A good rule to follow in cross-examining a witness is this: Don't ask a question of a witness unless you know what his answer will be. If the answer is unknown, it is especially dangerous to ask questions of the "how" or "why" variety, as they may give the witness an opportunity to bolster testimony that may already be damaging. If counsel elicits a discrepancy on cross-examination it is often better for him to wait and stress the inconsistency in argument than to press the witness with it. If there is an explanation, it is opposing counsel's responsibility to elicit this on redirect examination.

If an opposing witness, whose testimony at the trial was damaging, made a statement (or engaged in other conduct) prior to trial inconsistent with portions of his testimony on the stand, counsel should prepare to attack his credibility by laying the necessary foundation for the introduction of the prior inconsistent statement. In this connection, see paragraph 153*c* of the Manual. Immaterial or inconsequential discrepancies between the testimony and a prior statement should not be made the basis of an attack on the witness' credibility. Such an attack may serve only to irritate the court.

It is usually bad practice on cross-examination to have the witness repeat the testimony he gave on direct examination. In some cases, this method may elicit answers that vary slightly from those adduced on direct examination, and in some rare instances it may tend to discredit the witness by showing that he has memorized his testimony. In most cases, however, nothing will be accomplished except to emphasize the strong points of the direct testimony.

Cross-examination should be confined to those portions of the direct testimony which can be successfully attacked. A point damaging to the case of the opponent which is clearly established on cross-examination is more impressive standing alone than the same point obscured by a mass of futile testimony. For example, if it is planned to attack only the credibility of the witness, the cross-examination should be confined solely to that matter. If counsel wishes only to bring out testimony favorable to his side on a particular point, he usually should lead the witness directly to the point involved, elicit the desired information, and release the witness.

10. CROSS-EXAMINATION OF ACCUSED

*a. **Scope, generally.*** The accused may testify or not, in his discretion. If he does not testify, neither comment on that fact nor an inference therefrom as to his guilt is permissible. If he does testify, he becomes subject to cross-examination under oath like any other witness, except that his cross-examination is usually wider in scope. When the accused testifies in denial or explanation of any offense for

which he is being tried, his cross-examination may cover the whole subject of his guilt or innocence of that offense. Any fact relevant and material to the issue of the accused's guilt or to his credibility as a witness is properly the subject of cross-examination, and the accused, having taken the stand, cannot avail himself of the privilege against self-incrimination to escape proper cross-examination concerning an offense about which he has testified. However, he can claim his privilege as to questions asked merely for the purpose of attacking his credibility and not otherwise relevant to the offense at issue. (See MCM, 149*b*(1), for scope of cross-examination of accused in a case involving multiple offenses, and in a case where accused testifies for a limited purpose.)

*b. **Character of the accused, evidence of other offenses.*** If the accused has testified as a witness, his credibility is in issue and is subject to attack. Where the accused has not testified, it is a general rule that evidence that the accused has a bad moral character or has committed other offenses may not be introduced for the purpose of raising an inference of guilt, as there might be a tendency to find him guilty simply because of his bad record.

In order to show the probability of his innocence, the accused may—whether he testifies or not—introduce evidence of his own good character, such as evidence of his military record and evidence of his general character as a moral and well-conducted person. He may not introduce evidence as to some specific trait of character unless proof of that trait would have a reasonable tendency to show that it was unlikely that he committed the particular offense charged. For example, evidence of good character for peaceableness would be admissible in the prosecution for an offense involving violence, but would be inadmissible in a prosecution for a nonviolent theft. After the accused introduces evidence as to his good character, the prosecution may introduce evidence as to his bad character. However, the character evidence in rebuttal will be limited by the scope of the character evidence introduced by the accused. Thus, in a prosecution for larceny, if the accused has introduced evidence of his honesty, the prosecution must limit its rebuttal evidence to proof of his bad character as to honesty.

As a general rule, evidence that the accused has committed other offenses or acts of misconduct is not admissible because it would tend only to prove that the accused had a predisposition to do acts of the kind committed and, consequently, that he did the act charged. The general rule does not apply, however, if the evidence of other offenses or acts of misconduct has a substantial value in tending to show a fact other than that of predisposition to commit crimes. For example, such evidence is admissible if it tends (1) to identify the accused as the perpetrator of the offense charged, (2) to show his motive,

plan or design, (3) to show the accused's consciousness of guilt (if guilty knowledge or intent is a requirement of the offense charged), (4) to refute the accused's claim that his participation in the offense was the result of accident or mistake or was the result of entrapment, or (5) to rebut any particular defense raised by the accused.

III. CROSS-EXAMINATION OF WITNESSES OTHER THAN ACCUSED

a. General. It is fundamental that each side must be given the opportunity to cross-examine the witnesses called by the other side. Ordinarily cross-examination should be limited to the issues concerning which the witness has testified on direct examination and to the question of his credibility. The cross-examiner will be allowed reasonable latitude, however, as he may not wish to disclose in advance what pertinent facts he believes he can bring out on cross-examination. Cross-examination is an effective means of sifting out the truth, revealing the whole truth, and exposing falsehood in the trial of cases. One particularly important purpose of cross-examination is to bring out the whole truth if only a part of the truth has been stated on direct examination. This can only be done by having the witness explain the details of matters which he mentioned generally in his direct testimony or, in those instances where he has omitted some material circumstance, by having him supply the omitted matter.

Another important purpose of cross-examination is to test the extent to which the witness can be believed. Very few witnesses will consciously distort the truth and still fewer will commit deliberate perjury or falsehood. The cross-examiner should stress defects of observation, and inconsistencies between the testimony of the witness and any former statements he may have made. The cross-examiner's manner, however, should always be that of a man who is trying to establish that the witness is honestly mistaken in some one or more material features of his testimony. A hostile or aggressive manner, or one which gives the impression that the cross-examiner thinks he has a duty to expose a liar, may serve only to gain sympathy for the witness and ordinarily should not be adopted.

b. Cross-examination generally limited to issues covered on direct examination. Except when impeaching a witness, cross-examination is generally limited to issues concerning which the witness testified on direct examination. Of necessity, however, the cross-examiner may have to question the witness concerning matters not touched upon by the direct examination. The extent of cross-examination with respect to a legitimate subject of inquiry is within the sound discretion of the law officer (president of a special court-martial).

c. Use of leading questions. Generally, leading questions may be used on cross-examination. Their value is that they permit counsel

to focus the attention of the witness and the court on the exact point he desires to emphasize. Such questions should be phrased so that they will require the witness to give the specific information desired and prevent him from emphasizing damaging testimony already given on direct examination. Be fair with the witness. Do not misquote him or attempt to mislead him by basing a subsequent question upon an answer which he did not give. Such tactics are unethical and unworthy of an officer. Counsel who engage in such practices, even when they are not stopped short by the court, are likely to prejudice the court against themselves and the side they represent, and, in any event, any apparent damage can be repaired easily on redirect examination.

12. IMPEACHMENT

Impeachment signifies the process of attempting to convince the triers of fact that all or part of the testimony of a witness is unworthy of belief. Any witness, including an accused who testifies, may be impeached by the adverse party. In a few instances a party may impeach his own witness, such as when the witness proves to be unexpectedly hostile or when the witness is made indispensable by the law or circumstances of the case.

In general, a witness may be impeached by showing that he (1) has a bad character as to truth and veracity, (2) has been convicted of a felony by a civil court, or by a court-martial of any type of an offense for which the maximum punishment prescribed in the Manual is confinement in excess of 1 year or a dishonorable discharge provided that the offense also is of such a nature as logically to cast some doubt upon the veracity of the witness, (3) has made a statement or engaged in other conduct inconsistent with his present testimony respecting a material issue, or (4) has reason to be prejudiced or biased.

Counsel should refer to paragraph 153 of the Manual in determining how and when to use impeaching evidence and how and when the credibility of a witness who has been impeached may be reestablished.

13. DESCRIBING WITNESSES' GESTURES

Many times a witness will answer a question by making gestures or by referring to something in or out of the courtroom. These references and gestures often are essential to a complete understanding of a case. While the actions of the witness may clarify the matter for the court, they are of no help to the reviewing authorities; therefore, counsel should describe such actions for the record. See appendix V.

14. HEARSAY RULE

a. Definition. The hearsay rule provides that no statement offered for the truth of the matter contained therein can be received as

evidence unless its maker can be subjected to cross-examination. Thus, in a prosecution for stealing property from a footlocker, testimony of A that B said he saw the accused take the property from a footlocker is not admissible to prove that accused took the property. The fact that such statement was in writing would not change the result. If B told the investigating officer that the accused took the property, even if the statement was typed, signed, and sworn to, such a written statement still would not be admissible to prove that the accused took the property. In order for this prosecution's statement to be received into evidence, B must testify in court and the defense must have an opportunity to cross-examine him.

The hearsay rule does not mean that a witness can never testify as to what he heard others say. Often one of the issues in a case is *whether a certain statement was made, not whether the facts stated therein are true.* For example, if a soldier were being tried for disrespect towards an officer by calling him a "stupid fool," a witness who heard the remark could testify as to its contents. The testimony would be admissible, not to prove that the officer was a "stupid fool," but only to show that the accused did, in fact, make that disrespectful statement.

b. ***Exceptions to the hearsay rule.*** There are certain well-established exceptions to the hearsay rule. These exceptions are based on the principle that, under certain circumstances, a statement (oral or written) of a witness made out of court is as trustworthy as if it had been made under oath in open court where he was subject to cross-examination, scrutiny, and confrontation. This trustworthiness usually stems from circumstances showing that the out-of-court statement ordinarily would not have been made unless it were true. The exceptions to the hearsay rule are discussed in detail in paragraphs 140 to 146 of the Manual.

15. ADMISSIONS AND CONFESSIONS

a. ***Definitions.*** One of the principal exceptions to the hearsay rule is that which permits evidence as to voluntary admissions or confessions made out of court by the accused. This exception to the hearsay rule may be used only by the prosecution. The defense cannot offer admissions and confessions of the accused under this exception. A *confession* is an acknowledgment of guilt. Thus, statements by a soldier that he "held up A and took his wallet" and that he "went over the hill to get out of the Army forever" are, respectively, confessions of robbery (Art. 122) and desertion (Art. 85). However, statements that he "started to pull a gun on A but ran when I saw the cops" and that he "went over the hill to see my mother for 2 days" are only admissions with respect to the offenses of robbery and desertion. The latter statement is, however, also a confession of absence without leave (Art. 86).

Confessions or admissions come in as an exception to the hearsay rule since they are declarations made out of court, not subject to cross-examination, and received as evidence of the truth of the matter declared. The rationale is that accused cannot complain of being denied an opportunity to test his own credibility and the fact that a person generally will not make an untrue admission of criminal misconduct.

The rules as to the admissibility in evidence of admissions and confessions generally apply only to statements made by an accused outside of the particular court by which he is being tried. An accused may completely acknowledge his guilt by a plea of guilty or in his testimony as a witness. Similarly, his testimony may contain damaging admissions. In such circumstances, no question of hearsay is involved. Prior to trial, counsel should make a detailed inquiry concerning the circumstances surrounding the making of the admission or confession. The purpose of this inquiry should be to determine whether the confession or omission is subject to objection at the trial on the ground that it was improperly obtained. See Article 31 and paragraph 140*a* of the Manual.

b. ***Mechanics of introducing statement in evidence.*** To introduce a written confession or admission into evidence, a witness who was present at the time the statement was written, signed, or sworn to should, after both sides have been permitted to introduce evidence of the circumstances surrounding the making, signing, or swearing, identify it as a statement written, signed, or sworn to by the accused. It should then be offered in evidence as an exhibit. An oral confession of the accused may be proved by the testimony of anyone who heard him make it.

In order for a confession to be admissible, evidence must be introduced by the prosecution showing compliance with Article 31. The evidence must reflect that the accused was properly warned in accordance with Article 31*b* and that he was not compelled or induced to make a statement in violation of Article 31*d*. When an issue of voluntariness is raised, the law officer, or the president of a special court-martial (subject to objection by any member of the court), must, after considering the evidence, either exclude the confession or receive it into evidence. If he receives it, he must then instruct the court members that they must disregard it unless they find that it was voluntary.

c. ***There must be other evidence of the offense.*** An accused cannot be convicted upon his uncorroborated confession. Other evidence must be presented, wholly apart from any confession or admission by the accused, that the *offense charged was probably committed by someone*. In military law a confession or admission must be corroborated by some evidence, either direct or circumstantial, bearing on *each ele-*

all of the offense alleged, save only the identity of the perpetrator. Thus, in a prosecution for larceny, independent evidence that the property alleged to have been stolen was taken under circumstances showing that it was taken without the consent of the owner, that the property had some value, and that the accused never intended to return the property (for example, evidence that he attempted to sell the property to a third party), would be sufficient corroboration of a confession of larceny. Evidence of a 10-day period of AWOL, however, is not alone sufficient to corroborate a confession of desertion. This is so because showing a short period of unauthorized absence without more does not satisfy the requirement that there must be some evidence to support an inference of intent to abandon the service permanently. Such intent to desert may be shown, however, by circumstantial evidence from which the probable existence of the intent may be inferred. For example, evidence that accused lived, worked, and acted as if he were a civilian would be sufficient to corroborate the element of intent.

16. DOCUMENTARY EVIDENCE

All pertinent documentary evidence must be carefully examined. For example, if the trial counsel intends to prove an initial unauthorized absence by an extract copy of a morning report, he should examine the extract to see that it is properly authenticated, that the extract actually refers to the accused (name, grade, service number, and organization), and that it contains an entry signed by a person authorized to prepare the morning report, showing the initial unauthorized absence on the date alleged in the specification. If there is a defect in the extract or if there is discrepancy between the entry and the allegation, he may have to obtain a correctly prepared extract, seek some other means of proving the offense, or obtain authority to amend the allegation in the specification to conform to the entry.

17. OFFICIAL RECORDS

a. General. An important exception to the hearsay rule is that which permits the use in evidence of official statements in writing. These statements in writing must be made as a record of a certain fact or event by an officer or other person in the *performance of official duty* (imposed upon him by law, regulation or custom) to record such fact or event. Additionally, such officer must be charged with knowing or ascertaining through appropriate and trustworthy channels the *truth of the matter recorded.* Any such record is competent evidence of the facts or events recorded without calling as a witness the officer or other person who made it. For example, enlistment papers, morning and guard reports, and service records are usually competent evidence of the facts and events recited in them.

*b. **Admissibility.*** An official statement in writing, whether in a regular series of records or a report, made as a record of a certain event is admissible as evidence of the fact or event if made by an officer or other person in the performance of an official duty, imposed upon him by law, regulation, or custom, to record such fact or event and to know, or to ascertain through appropriate trustworthy channels of information, the truth of the matter recorded. It must also be recorded in the manner prescribed. If the report is not required by law, regulation, or custom, or if it is not prepared in the manner prescribed, it will not be admissible in evidence as an official record. For example, if a morning report entry does not contain the signature of the officer responsible for submitting the original report as required by regulation, it is not admissible in evidence. However, in the case of an official record made in conformity with applicable law or regulation and prepared by one charged with the official duty of doing so, it may be inferred that such record reflects the truth. When trial counsel has a duly authenticated document, or admissible copy thereof which apparently satisfies the requirements of an official record, he may rely on the inference that the record was properly prepared by an authorized person. The fact that there was a lapse of time between the happening of an event, and the execution of a record concerning it, does not render the report inadmissible but merely affects the credibility thereof. Similarly, the fact that an entry on an official record was corrected does not affect admissibility.

The fact that a document is an official writing does not *in itself* make it admissible in evidence to prove the truth of the matter stated in it. For example, records which are made principally with a view to prosecution are not admissible. Thus, the written report of an investigating officer as to what a witness said at the investigation, or a written statement or affidavit by a military policeman that accused was apprehended, would be inadmissible.

18. BUSINESS ENTRIES

*a. **General.*** Any writing or record, whether in the form of entry in a book or otherwise, made as a memorandum or record of any fact or event is admissible as evidence of the fact or event if it was made in the regular course of business *and* if it was the regular course of such business to make such an entry at the time of the occurrence or within a reasonable time thereafter. Such entries are admissible even though they are not made or kept pursuant to any law or regulation. It must be shown, however, that the business entry was a record made for the systematic conduct of the business. The rules discussed in 21 concerning the introduction of documentary evidence are applicable to the introduction of business entries. The custodian of the records is generally used as the authenticating witness.

c. Military records. Records kept by military activities, if the requirements of paragraph 144 *c* and *d* of the Manual are met, may be admitted into evidence as business entries. Accordingly, trial counsel should be aware of the possibility of introducing into evidence a record which does not qualify as an official record either because it is not required by law, regulation, or custom or because of defective preparation. For example, tally sheets used by a depot warehouse as a convenient business method of keeping a record of military stores passing through it are admissible although no regulation, directive, or order required that such tally sheets be made or kept.

19. MAPS AND PHOTOGRAPHS

Maps, photographs, X-rays, sketches, and similar projections of localities, objects, persons, and other matters are admissible for the purpose of showing the truth of the matters depicted therein when they are verified by a witness who can state from his personal knowledge or observation that they actually represent the appearance of the subject matter in question. For example, in a prosecution for damaging a Government jeep, a photograph of the jeep taken after the alleged damage was sustained may be admitted in evidence. From an examination of the photograph, the court may find that the jeep was then in a damaged condition. If it is necessary to make markings on the maps, photographs, or X-rays in order to make them meaningful, care should be exercised to have the markings made by a person who has personal knowledge of and will be available to testify to the facts represented by the markings.

20. AFFIDAVITS, MEMORANDA

a. Affidavits. An affidavit generally is not admissible to prove the truth of the matters therein stated, for it is a hearsay assertion. Affidavits may be considered by the court in determining certain procedural questions, such as whether or not a recess or continuance should be granted because of the absence of a witness. Similarly, on interlocutory matters relating to the propriety of proceeding with the trial, as when a continuance is requested, or to the availability of witnesses, the court may relax the rules of evidence to the extent of receiving affidavits. Additionally, the defense, if it so desires, may introduce affidavits or other written statements as to the character of the accused and as to matters in extenuation.

b. Memoranda. A memorandum may be used by a witness to refresh his memory. When used for this purpose the memorandum is not admissible in evidence, but the witness may refer to it during his testimony. These memoranda must be shown to opposing counsel. For example, a military policeman, while testifying, might refer to a memorandum made by him as to the circumstances surrounding his

apprehension of the accused. It should be noted that these memoranda may be in any type of format.

Counsel may also consider the use of a memorandum to supply facts once known by the witness but now forgotten. In such a case, however, the witness must be able to testify that the memorandum (e.g., an old diary) accurately represented his knowledge either at the time of the making or at the time he saw it. A memorandum of this type is admissible in evidence to show the truth of the matters therein stated.

21. INTRODUCTION OF DOCUMENTARY EVIDENCE

The following procedural steps should be taken in offering documents in evidence:

(*a*) The document should be marked for identification and shown to opposing counsel.

(*b*) The materiality, relevancy, and authenticity of the document should be established by appropriate testimony or, in the case of certain documents (MCM, 143*b*), by calling attention to the authentication of the document.

(*c*) The document should be offered in evidence. (This action should be accomplished at that stage of the trial where the document fits logically into the sequence of the case.)

(*d*) Opposing counsel should be given an opportunity to examine the document again, to object to its admission, and to support his objection by argument, by presenting evidence, and by cross-examining any witness who has testified concerning the document.

(*e*) The law officer (president of a special court-martial) must make a ruling on each offer of evidence. The document must be *offered* and *admitted* in evidence before it may be considered by the court.

(*f*) If the document is admitted in evidence, it may be read to the court by the side which made the offer. Depositions and former testimony, when admitted in evidence, should be read to the court so that opposing counsel will have an opportunity to object to any questions and answers therein. The document may then be submitted to the court for its consideration. Depositions and former testimony may not be taken into closed session by the court.

(*g*) If the document is not admitted in evidence, the counsel who offered it may request that it be appended to the record for the consideration of reveiwing authorities (MCM, 54*d*). In the Air Force, all exhibits offered but not admitted will be appended to the record (AFM 118–8). Appendix VI sets forth examples of how the more common types of documentary and real evidence may be introduced.

22. DEPOSITIONS

If a witness cannot testify in person for any of the reasons stated in Article 49, counsel may consider the possibility of presenting his testimony by deposition. It should be noted, however, that an ac-

forced to present the testimony of an essential defense by way of a deposition. The rules which must be followed in taking and using of depositions are stated in paragraphs 117 and 118, respectively, of the Manual. They provide, among other things, that the party wishing to take the deposition must give the opposing party and his counsel reasonable written notice of the time and place for the examination; counsel must furnish opposing counsel with the points to be covered by the examination; and that the deposition must be taken before a person who has the authority (Art. 136) to administer oaths—usually this should be a commissioned officer. However, judicial interpretations of Article 49 have placed further limitations on the use of depositions. The rule may be summarized briefly as follows: The accused has the right to confront the witnesses against him; therefore, a deposition taken out of his presence cannot be admitted in evidence over his objection, although he can knowingly waive his right to confrontation. Accordingly, whenever it appears that a deposition may be necessary in the trial of a case, the advice and assistance of the local staff judge advocate should be obtained.

There are two methods of taking depositions: (1) by means of oral interrogatories and (2) in the absence of an objection by the accused by means of written interrogatories. A deposition taken on oral examination is considered the more desirable of the two.

A deposition may be taken at any time after charges have been signed unless it is forbidden by the convening authority for good cause; therefore, a request similar to that appearing in appendix VIII(A) should be used. If the convening authority grants permission to take the deposition, over objection of opposing counsel, the objection may be renewed at the trial.

The attendance of a military witness at the taking of the deposition may be arranged by notifying the witness and his commanding officer. If the witness is a civilian, however, he must be subpoenaed or, if he will appear voluntarily, formally requested to appear. A subpoena may be used only after the charges have been referred to trial. In either case he is entitled to travel pay and allowances as computed under chapter 13, AR 37–106 or chapter 10, AFM 177–103, as appropriate, and the subpoena or request should be accompanied by a statement to that effect. See 35.

At the taking of a deposition by oral examination the witness is questioned by counsel representing each side. Unless the accused has waived his right to confrontation the examination must be conducted in his presence. The questions and answers are recorded verbatim for use at the trial.

A deposition taken on oral examination is particularly desirable when although the trial counsel and defense counsel can interview

the witness, the latter, for one of the reasons stated in Article 49, cannot be present at the trial. If the oral examination cannot be conducted personally by either trial or defense counsel they should prepare a memorandum of the points to be covered by the deposition. This will enable the counsel who actually conducts the examination to examine the witness fully and effectively. In this connection if a deposition is taken after the case is referred to trial, the accused must be given the opportunity to accept or reject the officer designated to represent him at the taking of the deposition if that officer has not been accepted by him

Appendix VII sets forth the form used in the taking of a deposition upon oral examination.

23. THE TAKING OF AN ORAL DEPOSITION

*a. **Mechanics.*** Counsel desiring an oral deposition should give to every other party reasonable, written notice of the time and place for the taking of the deposition. The defense must always be afforded an opportunity to object to the taking of a deposition. See appendix VII for an illustration of a letter to be used.

It is the responsibility of the party seeking the deposition to make the necessary arrangements. This includes the securing of a proper place to take the deposition, notifying and arranging for the presence of the deponent, the accused, stenographer, the interpreter if necessary, and the officer designated to take the deposition. The defense counsel may request trial counsel to assist in making these arrangements. As previously stated, accused may waive his right to be present at the taking of the deposition. If the accused is in confinement and has expressed a desire to attend, arrangements must be made for his temporary release in the custody of a guard in order to permit him to be present.

*b. **Procedure.*** Before commencing oral examination, it should be determined that the opposite party, including the accused if the deposition is being taken in behalf of the Government, has had ample opportunity to interview the deponent. The deponent will be sworn in the same manner as if present in court. Likewise, the examination of the witness will follow the usual courtroom pattern. See 7–9, 11–13. The questioning of the witness, however, is the prerogative of opposing counsel. Accordingly, the officer appointed to take the deposition will not question the witness. Objections by counsel and the accused should be recorded but no ruling may be made by the officer taking the deposition. The objection is later ruled upon at trial by the law officer or the president of a special court-martial in the event the deposition is ultimately used at trial. At the conclusion of the witness' testimony, the stenographer should read the testimony back to assure correctness of questions and answers. The record

of the proceedings, as soon thereafter as possible, should be transcribed and presented to counsel for both sides, the accused, if present, and the deponent for a final check. It should then be signed by the deponent in the presence of the officer taking the deposition. If the deponent is unavailable for signature, this would be noted under his typed name together with any reasons for his absence. Counsel for both sides should then indorse the deposition as having read it. If the case has not been referred to trial, the completely authenticated deposition should then be forwarded to the convening authority for inclusion with the allied papers in the case. If the case has been referred to trial, a Government deposition, when authenticated, is left in the custody of the trial counsel. The opposite party, however, must be given an opportunity to examine it.

24. THE ENTERING OF A DEPOSITION INTO EVIDENCE

*a. **Generally.*** A deposition is offered into evidence in the same manner as any other document. This means that the deposition must be duly authenticated. The court will ordinarily do this by taking judicial notice of the seal or the signature of the person before whom it was taken. See 147*a* of the Manual on judicial notice of signatures and seals.

The party offering a deposition must affirmatively establish that the witness is unavailable for one of the reasons set forth in Article 49. A failure to object to the absence of such showing, however, will waive any defect in this regard. It is imperative that counsel not rely on his opponent's waiver of a valid objection; he must always be prepared to prove his own case. When it is claimed that the location of the witness is unknown, there must be evidence of due diligence on the part of the party seeking to admit the deposition into evidence to determine the whereabouts of the witness. This requires prior planning and must be done considerably before trial. Just prior to the inception of trial is too late to permit exhaustion of the ordinary methods of acquiring information concerning the witness' location. Such methods include writing to the witness, phone calls, and inquiries of local commanders or police.

The party offering the deposition, however, is not required to prove the deponent's precise whereabouts on the day of the hearing. Proof of the deponent's residence, if it is the requisite distance away, is generally sufficient to render the deposition admissible. Additionally, counsel may wish to make use of inferences such as that of continuation of residence or that a person who was given a mileage allowance to travel to his place of enlistment has returned to that place. In the latter case, it must also be shown that the witness has departed the station. If nonamenability to process is relied on as the foundation for admission of the deposition, the inability or refusal of the witness to attend the trial must also be shown.

Counsel should be aware that the law officer (president of a special court-martial) may in his discretion relax the rules of evidence to the extent of receiving affidavits, certificates and other writings of similar apparent authenticity for the purpose of establishing the unavailability of a witness. Also, stipulations may be admitted to save time and expense where neither side cares to make an issue of a witness' absence.

b. ***Procedure followed.*** When a deposition is offered, the law officer (president of a special court) will examine it before it is admitted. If the deposition contains questionable matter, or is objected to by counsel for either side, an out-of-court hearing as to admissibility should be held by the law officer. The president of a special court-martial may not hold an out-of-court hearing.

c. ***Objections.*** As the deposition is read to the court, each side may renew objections which were made at the time the interrogatories were recorded or submitted for approval. Each side may also object to the testimony in the same manner as if the witnesses were testifying in person. A failure to object at the oral examination of a deponent or when the interrogatories were prepared is considered a waiver of those errors which could have been removed or corrected by the opponent if a timely objection had been made.

25. STIPULATIONS

A stipulation is an agreement between the trial counsel and the defense counsel made with the consent of the accused. It is an agreement between opposing counsel as to the existence or nonexistence of a fact, to the testimony of an absent witness, or to the contents of a document. It may be either oral or written and is used to expedite the trial when there is agreement between opposing counsel as to the matters stipulated and the actual proof thereof is considered dispensable. For example, the parties may stipulate that if a certain witness were present he would testify to certain facts. The stipulated testimony of a witness is subject to contradiction and impeachment the same as if the witness were testifying in person, and it is subject to all rules of evidence.

The court need not accept a stipulation and is not bound by it even if it is received in evidence. See appendix VIII for examples of stipulations.

26. JUDICIAL NOTICE

Courts-martial are authorized to take judicial notice of certain facts, without the necessity of proof by the formal presentation of evidence. The principal matters which courts-martial may notice are set forth in paragraph 147*a* of the Manual. This listing, however, is not all inclusive. Appendix IX sets out an example of a request for the court to take judicial notice.

27. OFFER OF PROOF

a. General. When the law officer (president of a special court-martial) refuses to permit defense counsel to introduce testimony or real evidence in behalf of the accused, defense counsel may make a concise verbal statement for the record setting forth the substance of the expected testimony or a description of the item of real evidence. The offer of proof is made for the purpose of assisting reviewing agencies in determining whether the action of the law officer (president of a special court-martial) was proper in excluding the evidence in question; it is not to be considered by the court as proof of the matters contained therein. An offer of proof is properly made after an objection to evidence offered by the accused has been sustained. (See appendix X for an example of an offer of proof.)

b. Documents. When a document is excluded as not being admissible in evidence, the document, or a suitable copy or extract copy thereof will be appended to the record of trial as an exhibit for the consideration of the reviewing authorities upon the request of the party offering it or upon direction of the law officer.

28. PROOF OF VALUE OF PROPERTY

In certain cases involving offenses against property, such as larceny or wrongful disposition, it is necessary to prove that the property had some value or, in some cases, that it had a particular value. The amount of punishment for many of these offenses depends on whether the property was of a value less than $20, more than $20 but less than $50, or more than $50. Generally, the value of property for purposes of these offenses is the legitimate market value of the item at the time and place of the offense. Methods of proving the value of property are discussed in paragraph 200*a* of the Manual.

Chapter 3

THE TRIAL COUNSEL

Section I. INTRODUCTION

29. DUTIES AND RESPONSIBILITIES—GENERAL

It is the duty of the trial counsel to prosecute in the name of the United States those cases referred to him for trial. Trial counsel, therefore, is a representative of the United States. An impressive record of convictions is not necessary. It is his primary duty to see that justice is done. To this end, it is his duty to see that all of the relevant and admissible facts available are presented to the court in such a manner as to enable it to reach a proper conclusion and avoid a miscarriage of justice. He must not be a party to any course of action tending to suppress the truth concerning the matter before the court—whether favorable to the prosecution or the defense.

When charges are referred to him for trial, he will see that they are tried promptly before the court indicated in the indorsement referring the charges for trial. Unecessary delay in the disposition of any case must be avoided or it may result in dismissal of the charges on the basis that accused's right to a speedy trial has been denied. Ordinarily, the trial counsel will be given wide latitude in the manner in which he accomplishes his mission. In general, he is free to prepare each case as he deems proper and to bring to trial in the most expeditious order the cases which he has on hand. The following material suggests the procedure to be followed by the trial counsel after a case has been referred to him for trial.

Section II. DUTIES PRIOR TO TRIAL

30. EXAMINATION OF CHARGE SHEET

After the trial counsel has received the charge sheet and allied papers, he should examine them carefully. As a preliminary matter, the trial counsel should check the charges and allied papers to assure that the file is complete. He must ascertain from the indorsement on the charge sheet and the order appointing the court whether the charges are in the hands of the trial counsel of the proper court. By examining the charges and allied papers he can determine whether any member of the prosecution or defense is disqualified because of

prior participation in the same case. If so, the disqualified member may not sit in the case, and the matter should be reported to the staff judge advocate or to the convening authority of a special court. See 2.

The trial counsel then should check to make certain that the data on the charge sheet is free from errors of substance or form. He should compare the name and description of the accused in each specification with the corresponding data on page one of the charge sheet; and whether the charges and specifications in the charge sheet accord with the pertinent forms set forth in appendix 6*c* of the Manual or in other authoritative publications.

Trial counsel should note any discrepancies in the orders appointing the court. He should examine the orders appointing all courts to which the case has been referred, the charge sheet, and the accompanying papers to determine whether the law officer and counsel for the prosecution and the defense have the necessary legal qualifications and whether any facts appear which disqualify the law officer or any of the counsel from acting in the case. If, with respect to the qualifications of the law officer or counsel, the court is not legally constituted, the trial counsel will notify the staff judge advocate or representative of the convening authority of a special court. See 2.

If the trial counsel discovers a minor error in the charge sheet, for example a misspelled word, a transposition of words, or an error of similar nature, he should correct it and initial the charge sheet adjacent to the correction. Thus, if he finds that the accused is described by one name on page one of the charge sheet and by another name in the specification, the trial counsel should reconcile and correct this discrepancy after conducting any necessary inquiry. Errors of a substantial nature in the charges and specifications, in the orders appointing the court, or in the accompanying papers should be reported immediately to the staff judge advocate of the GCM convening authority or to the representative of the special court-martial convening authority. For example, a specification which varies materially from the approved form in appendix 6 of the Manual should be called to the attention of the above authorities immediately, so that the specification may be amended if necessary and required additional pretrial procedures, to include additional investigation, conducted.

The trial counsel should then examine the record of previous convictions for completeness, admissibility, and freedom from errors of form and substance. He should secure a new "Extract of Military Records of Previous Convictions" where there are any previous convictions which would not be admissible in the case. See 52*b*.

31. SERVICE OF CHARGES

When the charge sheet is in proper form either as received or after minor corrections have been made, the trial counsel will cause a dupli-

cate copy of it to be served on the accused immediately. Prompt service of the charges is important since the accused must be given a reasonable period of time in which to prepare his defense. Service of charges is accomplished by the trial counsel or one of his assistants personally delivering to the accused a copy of the charges and specifications upon which he is to be brought to trial, identifying himself to the accused, and reading to him the contents of the charge sheet. He should advise the accused of the name of the appointed defense counsel and inform him that the latter will communicate with him in the near future concerning the case. He then completes and signs the statement of service on page three of the original charge sheet.

After a copy of the charge sheet has been served on the accused, the appointed defense counsel should be notified that charges have been served on the accused and should be furnished with duplicate copies of the charge sheet and all accompanying papers. In the event that duplicate copies of all papers are not available, the trial counsel should so advise the defense counsel and permit the defense counsel to examine the original papers in the case file. Whenever copies of accompanying papers are withheld or their examination by the defense denied by order of the convening authority, the defense counsel should be so informed.

32. INITIAL PREPARATION FOR TRIAL

a. General. After serving the charges on the accused, the trial counsel should determine from defense counsel whether the data shown on the first page of the charge sheet is correct. He should then study the charges and specifications contained in the charge sheet and become familiar with the basic elements of proof required for each offense charged. In most cases, this information can be found under the discussion of the offenses in the Manual and DA Pam 27–9, The Law Officer, or AFM 110–5, Court-Martial Instructions Guide. He then is ready to plan the prosecution's case, that is, he can determine exactly how he is going to prove that the accused committed each of the offenses charged. The trial counsel should indicate by appropriate notation in his trial notes (app. III(A)) under each element of the offense the evidence which he intends to introduce in support of that element. Except to the extent that this burden may be relieved by a plea of guilty, the burden is on the trial counsel to present competent evidence showing beyond a reasonable doubt that—

(1) The offense was committed;
(2) The accused committed it; and
(3) The accused had the requisite criminal intent (if an essential element of the offense).

Trial counsel must also be prepared to be able to establish jurisdiction over the accused and the offense in the event that an attack on such jurisdiction is reasonably expected.

*b. **The adequate preparation of a case.*** Counsel should enter the trial of a case only after proper preparation and knowledge of the facts and law applicable to the case. This encompasses among other things a plan for thorough presentation of the facts. The proper preparation for the presentation of the facts includes—a detailed outlining of the essential elements of each offense charged; a careful investigation of the facts surrounding each offense charged to include interview of all available witnesses both for prosecution and the defense; and analyzing and anticipating the opposition case.

Knowledge of the law of the case to be tried includes—

(1) Consulting any discussion of the offenses alleged which may be found in the Manual, making sure that later case law has not overruled or modified such discussion, or consulting other appropriate authorities in the event the offense is not one discussed in the Manual.

(2) Becoming familiar with the elements of proof of each offense alleged and lesser included offenses (DA Pam 27–9, The Law Officer; AFM 110–5, Court-Martial Instructions Guide).

(3) Anticipation of defenses and the law relative to each (e.g., intoxication, lack of intent, mistake, unlawful search and seizure, etc.).

(4) Familiarization with the rules of evidence (ch. XXVII, MCM) and with relevant case law pertaining to points of evidence which may be raised.

It is the responsibility of trial counsel to anticipate and be fully prepared to meet the objections which the defense might raise in a motion to dismiss or in a motion for appropriate relief. He must be prepared to introduce pertinent evidence and to present arguments to the law officer. See example in paragraph A, appendix IV. Trial counsel, however, should not contest a valid defense objection raised by appropriate motion. See example in paragraph B, appendix IV.

38. MATTERS AFFECTING DESIRABILITY OF PROCEEDING WITH TRIAL

*a. **General.*** When the trial counsel is preparing a case for trial, he may discover information that causes him to conclude that trial of the case is inadvisable. Such information may have been unknown to the convening authority at the time he referred the case for trial and, therefore, should be brought to his attention with an appropriate recommendation (MCM, 44*f*(5)). Some matters which affect the desirability of proceeding with the trial of a case are—insanity of the accused at the time of the offense, at the time of the investigation, or at

the time the case is ready to be tried (MCM, 120–124); repudiation by a material witness of his original version of the manner in which an offense occurred; or evidence of an offense not charged.

In his preparation of a case, the trial counsel may discover new and substantial evidence favorable to the accused which apparently was unknown to the convening authority when the case was referred for trial. When this occurs, the matter should be reported immediately by the trial counsel to the convening authority, or to the staff judge advocate in cases which have been referred to a general court-martial for trial.

The same procedure should be followed when it is discovered that a vital prosecution witness has disappeared, will not be available at the trial, or has repudiated his previously given testimony.

Any substantial variance between the allegations in the specifications and the proof also should be reported. For example, if, in a wrongful appropriation case, the trial counsel concludes that he can prove the wrongful taking, obtaining, or withholding of only four of nine items alleged, he should report that fact to the convening authority so that the specification can be amended to conform to the expected proof; otherwise, the court may be faced with the technical problem of finding the accused guilty by exceptions and substitutions.

*b. **Action when the accused is believed to be insane.*** If the trial counsel becomes aware of facts indicating that the accused lacked the required mental responsibility at the time the offense was committed (MCM, 120*b*) or that he lacks sufficient mental capacity to comprehend the nature of the charges against him and intelligently to cooperate in, or to conduct, his own defense (MCM, 120*c*), the trial counsel should bring the matter to the attention of the convening authority, stating the reasons for his views and his recommendation as to the action that should be taken. For example, the trial counsel might recommend that a board of officers be convened to make an inquiry into the mental condition of the accused. See paragraphs 120 to 124 of the Manual for a general discussion of the subject of insanity.

In addition, if the case was referred for trial by general court-martial and it appears that Article 32 was not substantially complied with and that the accused may be prejudiced thereby, an immediate report of the matter should be made to the convening authority. MCM, 44*f*(5).

When matters such as the foregoing are referred to the convening authority, the trial counsel may make such recommendations as he deems proper. Thus, when the circumstances require it, he should not hesitate to recommend that all or certain charges or specifications be withdrawn, dismissed, or amended. Only the convening authority, however, can withdraw a charge or specification from trial.

84. ADMINISTRATIVE DUTIES

a. General. Although the trial counsel is responsible for the execution of the administrative duties discussed in this paragraph, he may delegate their execution to an assistant trial counsel or to a clerk provided by the convening authority. The trial counsel must make the necessary physical arrangements for the trial. It is his duty to locate an appropriate and convenient place to be used as a courtroom. He should see that suitable furniture is provided, as well as other necessary items such as stationery and pencils. Prior to the opening of court, he should prepare a typewritten copy of the charges and specifications on which the accused will be arraigned for each member of the court, the law officer, and the accused.

*b. **Furnishing law officer with charges and specifications; findings and sentence work sheets.*** Trial counsel in a general court-martial case should furnish the law officer with a copy of the charges and specifications as soon as copies are made. This will enable the law officer to analyze the charges and specifications in advance of trial and to prepare tentative instructions. This practice should not be followed in special court-martial cases, as the president of the court should not be given a copy of the charges and specifications prior to arraignment. In this connection, see paragraph 56*d* of the Manual. Also see DA Pam 27–9, The Law Officer, or AFM 110–5, Court-Martial Instructions Guide, as appropriate, for examples of findings and sentence work sheets for use by the court which should be procured by trial counsel prior to trial.

In trials by general courts-martial, the trial counsel should insure that no member of the court has access to the Manual or other legal authorities during the trial. In trials by special court-martial, he similarly must insure that no member of the court except the president has access to legal authorities during open sessions of the court, and that it is not used at all during closed sessions. Normally, this may be accomplished by a preliminary check of the courtroom and by removing all copies of the Manual whenever the court is closed.

*c. **Time of trial; notification of personnel.*** When charges are referred to the trial counsel for trial, it is his duty to see that they are brought to trial as promptly as possible.

The trial counsel should coordinate with the president of the court in fixing the time and place of trial and to learn the wishes of the president concerning the uniform to be worn. A court-martial should not meet at unusual hours except under extraordinary circumstances. As a practical matter, the trial counsel must coordinate the desires of the defense counsel, the law officer, and the president in fixing a trial date which will be acceptable to the president, feasible, and otherwise mutually agreeable. While both sides must be allowed a reasonable time to prepare for trial, it usually is possible to arrange a date for

trial even though either or both counsel have not fully prepared their cases if it appears that such preparation will be completed before the date set. If either side will require an unusually long period of time to prepare for trial, the trial counsel should report the matter to the convening authority, setting forth the reasons for the delay. The defense counsel may request a postponement of the time for assembly of the court in order to secure the attendance of a witness, to take depositions, or for any other proper reason (77*e*). The trial counsel should require that each request on accused's behalf for any delay or continuance be in writing and attached to the record of trial so that accused cannot thereafter claim that he was prejudiced by the delay or that the trial counsel was negligent in failing to bring the case to trial promptly. When the date of trial is finally agreed upon, the trial counsel must notify the members of the court and the other parties to the trial of the time and place of trial and the uniform to be worn. The notice may be written or oral, depending upon the circumstances. Generally, a telephone call followed by a written memorandum is the best procedure.

*d. **Attendance of the accused.*** Arrangements should be made to insure the presence of the accused at the trial. If he is not in confinement, notice to the commanding officer of the accused is all that is necessary; however, if the accused is in confinement, the officer in charge of the confinement facility should be notified. Although the practice varies in different commands, the commanding officer of the accused usually arranges for the appearance of the accused and can provide whatever physical restraint may be deemed proper. The trial counsel should inform the officer who is responsible for the attendance of the accused as to the uniform which has been prescribed for the court. An accused officer, warrant officer, or enlisted person will wear the insignia of his rank or grade and may wear any decorations, ribbons, or emblems to which he is entitled.

*e. **Constitution of the court.*** Prior to the assembly of the court for the trial of a particular case, the trial counsel should take steps to assure that the trial will not be interrupted because of the improper constitution of the court. He should insure that all members not properly excused by the convening authority, including enlisted members, will be present so that the court will not be reduced below a quorum in the event some of the members are excused by challenge. If excusals will affect the legal constitution of the court, the trial counsel will make an immediate report of such absences to the convening authority.

*f. **Request for enlisted personnel on court.*** If an enlisted accused desires enlisted persons on the court which will try his case, it is the duty of the defense counsel to submit to the convening authority a written request for such members signed by the accused. Such re-

usually are submitted through the trial counsel (Art. 25*c*). ... in order to avoid any delay which might be caused by a last-... request, the trial counsel should ask the defense counsel to ... him as soon as possible whether the accused desires enlisted ... on the court. A prompt request will make it possible for the ... counsel to take timely action to have the requisite number of enlisted persons appointed to the court and present for the trial. An accused who has previously requested enlisted personnel on the court-martial should be permitted to tender a written withdrawal of such request prior to trial. If a specific withdrawal of a prior written request has not been made, an accused should not be allowed merely to waive the presence of enlisted personnel, as an unrevoked request implements a statutory requirement as to the composition of the court-martial, and it is not within the province of accused to waive such requirement. However, he may, after the court-martial is called to order and prior to arraignment, insert into the formal proceedings a withdrawal of his request. The record should clearly show that accused was fully advised of his rights and was in no way misled into withdrawing his request merely for the convenience of the Government.

Excusing members from attendance. In the event a member of the court asks the trial counsel's permission to be excused from attendance at a particular trial, the trial counsel should advise the member that his request to be excused from attendance must be addressed to the convening authority. The trial counsel has no authority to excuse a member from attendance and such authority may not be delegated to him by the convening authority. In some cases, the trial counsel and the defense counsel can reach an agreement, prior to the convening of the court, that meritorious grounds exist for challenging a particular member of the court for cause. Where such is the case, the trial counsel can save considerable trial time by recommending to the convening authority that the questioned member be excused from attendance at the trial.

Use of reporter. The trial counsel supervises the keeping of the record of the proceedings on behalf of the court. A reporter is required in all general court-martial cases. A reporter is *not* authorized in an Army special court-martial case unless the convening authority has received special authorization from the Secretary of the Army. See AR 22–145. In an Army special court-martial case, therefore, the trial counsel may assume that a reporter is not authorized unless the convening authority, either in the indorsement referring the charges for trial or by some other means, has directed that a reporter be appointed. The foregoing practice is not followed in the Air Force. See AFR 111–8 and AFM 110–8. Without an authorized reporter, a special court-martial cannot adjudge a bad conduct discharge.

*i. **Obtaining reporter.*** In all general court-martial cases (and in special court-martial cases if a reporter is authorized), the trial counsel should consult the staff judge advocate of the command in advance of trial and make arrangements for a reporter. In some instances, however, the trial counsel may be faced with the problem of locating and procuring a court reporter for the trial. Where military personnel or Government employees are not available to act as reporters, the trial counsel may have to secure a civilian reporter from the nearest civilian community to report the trial on a contract basis. See AR 37–106; AFPI 3–204. If the trial counsel cannot obtain the services of a qualified court reporter, he should try to locate a skilled stenographer to act as reporter. In the latter event, it usually will be necessary to slow down considerably the tempo of the proceedings so that the stenographer can record the proceedings accurately and completely.

In any event, unless the trial counsel already is well acquainted with the qualifications of the reporter who has been assigned to report a particular case, he should interview the person assigned as reporter to make sure that the latter is familiar with court-martial procedure. More particularly, the trial counsel should instruct the reporter as to the necessity of reporting the proceedings verbatim. He also should emphasize that the reporter is to interrupt the proceedings at any time when he has not understood what has been said or when he is unable to report the proceedings verbatim. It is essential that cases be reported properly. The trial counsel of a special court-martial who prepares a summarized record of trial may utilize the services of his assistant trial counsel or request assignment of clerical help from the convening authority for this purpose.

35. SECURING ATTENDANCE OF WITNESSES

*a. **General.*** The trial counsel has the power to issue subpoenas to compel witnesses to appear and testify before a court-martial. It is his duty to insure the presence of those witnesses who are necessary to the trial of the issues involved in the case (MCM, 44*f*(2)). Before subpoenaing a witness who is not readily available, the trial counsel should determine whether the expected testimony of the witness can be presented by a stipulation or deposition. Generally speaking, the testimony of a witness who appears in person before a court is more effective than testimony presented by deposition or by stipulation because it usually makes a stronger impression on the court members.

*b. **Advance notification of expected witnesses.*** When the trial counsel first receives the charges in a case, he should immediately check the file to determine what witnesses—defense and prosecution—probably will be needed at the trial. He should communicate with

[illegible], by telephone if possible, and advise them of the probable trial date and that their presence as witnesses probably will be necessary. At the same time, the trial counsel should submit the same information in writing to the commanding officer of any military witness with the request that he notify trial counsel if it becomes necessary for the prospective witness to leave the area prior to the trial date. Additionally, trial counsel should notify defense counsel of the probable witnesses. If the trial counsel follows this procedure, he will avoid unnecessary and embarrassing delays which may result when a witness goes on leave or is transferred before the case can be brought to trial.

b. Military witnesses. To secure the attendance of a witness who is in the military service, the trial counsel should notify him informally that his presence at the trial is necessary. The commanding officer of the witness also should be advised of the need for the latter's presence so that the necessary arrangements for his appearance at the proper time may be made. Where travel expense is involved, the commanding officer of the witness should be requested to have necessary travel orders issued citing a fund citation supplied by the comptroller of the convening authority. A witness should, if possible, be notified at least 24 hours in advance of the time it will be necessary for him to start to the place of trial (MCM, 115*b*).

c. Civilian witnesses. Civilian witnesses usually are willing to attend a trial voluntarily when it is clearly understood that their fees and mileage will be paid. Consequently, unless there is reason to believe that the witness will not attend without personal service of a subpoena, all that is necessary is that a subpoena in duplicate be mailed to him with a request that he sign his acceptance of service on the copy and return the signed copy to the trial counsel (MCM, 115*b*), using the inclosed penalty envelope. See appendix 17 of the Manual for the form of subpoena to be used for a civilian witness. In those cases in which it is believed that the witness will be unwilling to attend the trial voluntarily, personal service should be made upon him in the manner indicated in paragraph 115*d* of the Manual. If it is necessary to tender fees and mileage to a witness in advance of his attendance at the trial, the trial counsel should confer with a finance disbursing officer to determine the proper method of obtaining the necessary funds.

d. Defense witnesses. It is the duty of the trial counsel to take timely and appropriate action to secure the attendance of all witnesses requested by the defense whose testimony at the trial is necessary. In order to perform this duty and to avoid the possibility of error, trial counsel should if possible, honor every reasonable request from the defense. If there is a disagreement between the trial counsel and the defense counsel as to whether the testimony of the requested witness

will be necessary, the matter should be referred for decision to the convening authority or to the court, depending upon whether the question is raised prior to or during the trial. In such cases, the defense counsel will submit to the convening authority or the court, as appropriate, a written request for the attendance of the witness, together with a signed statement containing (1) a summary of the testimony expected from the witness, (2) the reasons why the personal appearance of the witness is necessary, and (3) any additional matters showing that the expected testimony is necessary to the ends of justice. Where a requested defense witness is an essential witness, and within the reach of process, his presence at the trial may not be denied to the accused on the basis that the trial counsel is willing to stipulate his testimony or to take his deposition.

f. Vouchers. If the trial counsel prepares the necessary vouchers for fees and mileage of civilian witnesses before trial, the vouchers can be signed by the witnesses as soon as they are excused from further attendance at the trial. This practice minimizes correspondence and delay in paying the witnesses. For instructions as to the proper method of paying court-martial expenses, reference should be made to appropriate departmental regulations (AR 37–106; AFM 177–103). The trial counsel will find it helpful to confer with the local finance officer with respect to the procurement and use of the proper vouchers. In any instance where it is desired to utilize the services of a civilian expert witness the finance officer should be consulted prior to engaging his services.

36. FINAL REVIEW OF CASE

When the trial counsel has carefully investigated the facts surrounding every offense charged, has interviewed all available witnesses both for the prosecution and the defense, has become fully acquainted with the appearance, mannerisms, intelligence, and attitude of each witness, has become familiar with the scene of the crime, if appropriate, and has examined thoroughly the documentary and other evidence, he is ready to consider the best method of placing it before the court. He again should carefully review the essential elements of each offense charged and determine what testimony or other evidence will prove each element. This review will enable him to prepare trial notes for use at the trial.

37. PREPARATION AND USE OF TRIAL NOTES

Trial notes, which are sometimes referred to as a "trial brief" or a "trial memorandum," are nothing more than an outline of the plan to be followed by the trial counsel in presenting his case to the court. As a minimum, the trial notes should include a list of the elements of each offense charged, an outline of the evidence which will be presented to prove these elements, and a concise statement of the law applicable