to both of these matters. A properly prepared set of trial notes will enable the trial counsel to present his case in a logical manner and without inadvertent omissions of evidence pertaining to material issues in the case. See appendix III.

Section III. DUTIES DURING TRIAL

38. PRECONVENING PROCEDURE

*a. **Use of trial guide.*** At the trial, the trial counsel should always use a procedural guide for trials before general courts-martial. See appendix 8*a* of the Manual. For special court-martial trials, see DA Pam. 27–15, The Special Court-Martial President, or AFM 110–10, Special Court-Martial Procedure Guide. If such a guide is used, counsel will have no difficulty in complying with the necessary formalities of any proceeding before a court-martial. Prior to trial, the trial counsel should read through the trial guide and lightly check or underscore the parts of the guide that are applicable to the case.

*b. **Swearing the personnel of the court.*** After the court is ordered to be convened, the law officer, members, and counsel of the court are sworn. It has been held that failure to swear the law officer is a "substantial error of procedure" which requires disapproval of the findings and sentence and the ordering of a rehearing. This emphasizes the importance of following the provisions of the procedural guide.

*c. **Mass-swearing procedure.*** Paragraph 112*c* and appendix 8*a* of the Manual authorize a procedure whereby the personnel of the court may be sworn in the presence of more than one accused. The amount of time actually saved by this procedure is small, and its use creates a high possibility of error in the proceedings. Accordingly, it should not be used except by experienced trial counsel and then only after consultation with the staff judge advocate of the command.

39. CHALLENGES

*a. **General.*** After the court is convened, the trial counsel will advise the court of the general nature of the charges. This advice should be sufficiently detailed so that members of the court and the law officer can identify the case and determine whether they have had any previous disqualifying connection with it. Ordinarily, trial counsel will state the general nature of the charges and the name of the accuser, the investigating officer, the officer or officers forwarding the charges to the convening authority, and the name of any court member or law officer who has participated in any prior proceedings. He will then disclose in open court every ground for challenge believed by him to exist in the case. A safe rule for him to follow is this: If the name of a member or the law officer is mentioned in the file—except

in the appointing orders—the trial counsel should disclose that fact. The trial counsel will then call upon the law officer and court members to state any facts which they believe may be a ground for challenge against them. After any disclosures have been made, the trial counsel will be ready to exercise his right to challenge for cause.

The members and the law officer of a general court-martial may be challenged by the accused and the trial counsel for cause stated in court. Each accused and the trial counsel are entitled to exercise one peremptory challenge, but the law officer may not be challenged except for cause. Ordinarily, the prosecution will make challenges for cause and any peremptory challenge, in that order, before the defense makes its challenges. As each challenge is made it should be disposed of by the court before any further challenges are made. All challenges should be made before arraignment, but the court may permit a challenge for cause at any stage of the proceedings. When the court is reduced below a quorum, or when the number of enlisted personnel on the court is reduced below one-third (in those cases where the accused has requested that enlisted personnel be included on the court), or when a challenge to the law officer is sustained, the court will be adjourned and the trial counsel will immediately report the matter to the convening authority.

*b. **For cause.*** A challenge for cause is an assertion by either the prosecution or the defense that, because of the existence of certain facts, a person appointed as a member of the court or as the law officer should not be permitted to act as a court member or as law officer with respect to the proceedings in which the challenge is made. Among the grounds of challenges for cause are those listed in paragraph 62*f* of the Manual. As it is to the interest of the prosecution to have the court legally constituted, the trial counsel should challenge promptly all persons appointed as court members or a law officer if any disclosure shows that such persons are subject to challenge for cause upon any of the first eight grounds stated in paragraph 62*f* of the Manual. Except to achieve a legally constituted court, the trial counsel normally will find few occasions to exercise a challenge for cause. Nevertheless, if he has reason to believe that a member is hostile to the prosecution or to the prosecution's theory of the case, he should not hesitate to exercise the right to challenge such member for cause.

*c. **Action upon challenges for cause.*** All challenges for cause must be voted upon by the court. Before the court votes, both sides must be given an opportunity to introduce evidence and to make appropriate argument. The burden of maintaining a challenge rests upon the challenging party. If the challenger so desires, he may question the challenged person under oath as to the subject matter of the challenge. Ordinarily the person against whom a challenge for cause has been made will take no part in the hearing upon such challenge

except when called upon to testify or to make a statement as to his competency. However, the law officer (or the president of a special court-martial) will continue to rule upon interlocutory questions arising during the hearings even though the challenge is directed against him and he is testifying under oath. In the latter event, the ruling should be prefaced by a statement such as, "As law officer (president, subject to objection by any member) I rule that . . . ." For limitations on the inquiry as to the eligibility of the law officer, see paragraph 62*g* of the Manual.

When the hearing on a challenge for cause has been completed and the law officer has furnished the court with such advice on the law and procedure for voting as he deems desirable, the court will close to deliberate and vote in closed session on whether to sustain the challenge. The law officer and the challenged member, if any, will be excluded from the closed session. A majority vote is controlling on whether the challenge should be sustained or not sustained. A tie vote will disqualify the person challenged. After the court has finally voted, it will open and announce whether the challenge is sustained. If the challenge is sustained, the person challenged will be excused and participate no further in the trial.

*d. **Peremptory.*** A peremptory challenge does not require that any reason or cause therefor exist or be stated. While the Government and each accused are entitled to one peremptory challenge, it is exercised less frequently by the trial counsel. One such occasion might arise when the trial counsel has unsuccessfully challenged a member for cause. If the trial counsel believes that he may have antagonized a member by an unsuccessful challenge for cause, or believes that his challenge for cause was improperly denied, it would be reasonable for the trial counsel to challenge such member peremptorily. A peremptory challenge cannot be used against the law officer of a general court-martial. When a member of a court-martial is challenged peremptorily, trial counsel should make certain the record of trial reflects that the challenged member withdrew from the court. If the challenged member in fact withdrew, but the record does not reflect that fact, a certificate of correction will be required.

40. ARRAIGNMENT

The arraignment consists of reading the charges and specifications to the accused and asking him how he pleads. It takes place immediately after the disposition of challenges. When the trial counsel is ready to proceed with the arraignment, he should furnish each member of the court, the law officer, and the defense counsel with a copy of the charges and specifications upon which the accused is to be tried. He should exercise care to assure that these copies do not include charges and specifications which have been withdrawn or dis-

missed (MCM, 56*d*). Trial counsel must carefully avoid informing the court in any manner that other charges were at one time pending against the accused. Thereafter, it is customary for the trial counsel to suggest that, with the consent of the accused, the reading of the charges and specifications be omitted. The accused usually waives the reading of the charges, and the trial counsel merely summarizes the matter contained on the third page of the charge sheet to indicate to the court and the accused that the charges were properly signed, sworn to by an officer of the armed forces authorized to administer oaths, and referred to the court for trial. The trial counsel then announces the name and grade of the convening authority who referred the charges for trial, asks the accused how he pleads, and advises him of his right to make proper motions prior to pleading. See paragraph 65 of the Manual.

41. OPENING STATEMENT

The trial counsel has the right to make an opening statement immediately prior to the introduction of prosecution evidence. The purpose of the opening statement is to explain to the court-martial the issues to be tried. Trial counsel has a right to state in his opening the facts which he intends to prove. He may not, however, discuss any facts which he cannot prove by admissible evidence. Trial counsel has discretion to ascertain whether an opening statement is necessary. In simple cases, opening statements generally are not necessary. If, however, the case is complicated and involves an unusual factual situation, many charges and specifications, or a difficult question of law, such a statement may be helpful to the court. Trial counsel should prepare a detailed outline of such an opening statement so that it may be concisely and clearly presented to the court.

42. OUT-OF-COURT HEARINGS—GENERAL COURTS-MARTIAL

a. ***When held.*** In a general court-martial trial, if it appears to the law officer that an offer of proof or preliminary evidence or argument with respect to the admissibility of offered evidence may contain matter prejudicial to the rights of the Government or the accused, he may direct that the members of the court be excluded during the presentation of such offer of proof, preliminary evidence, or argument (MCM 57*g*(2)). The request for an out-of-court hearing usually is made by counsel at a conference held in open court but out of the hearing of the members of the court. Such a conference is called a "side-bar" conference. The side-bar conference is attended by counsel for both sides, the accused, and the law officer, who confer in low voices. After the request for an out-of-court hearing is made, the law officer may call upon counsel for both sides to express their views as to the necessity for the out-of-court hearing.

The accused, upon request, has an absolute right to an out-of-court hearing at a general court-martial concerning the admissibility of his pretrial statement or the admissibility of evidence obtained by search and seizure or wiretapping. A failure to accord the accused this right may constitute reversible error.

b. ***Recording.*** An out-of-court hearing may consist solely of offers of proof or arguments; in other cases, it may include the taking of testimony and the consideration of documentary evidence. If the proceedings include the presentation of preliminary evidence, the Manual requires that they must be fully recorded and transcribed (MCM, 57*g*(2)). Similarly, if the proceedings involve an offer of proof by the defense, they will be fully recorded and transcribed. If the proceedings involve only arguments or offers of proof by the prosecution, there is no Manual requirement that they be recorded; recording, however, is the better practice and should be uniformly followed.

c. ***Duties of counsel with respect to the record.*** When a side-bar conference or an out-of-court hearing is held, counsel must take proper action to insure that the record of trial will reflect all matters which should be reviewed by the appellate agencies. They must also present in open court any evidence that is to be considered by the court in the performance of its functions. Consideration of the time factor involved in reviewing records of trial, a large number of which now contain extensive out-of-court hearings or side-bar conferences, suggests that such proceedings should be recorded in proper sequence in the record of trial proper rather than appended as appellate exhibits. Accordingly, records of trial should be prepared in such a manner that proceedings in out-of-court hearings and side-bar conferences appear in the body of the record as they occur. In order to insure that appellate authorities may clearly distinguish between those portions of the record which include such proceedings and those which set forth the normal trial activities, the heading "OUT-OF-COURT HEARING" or "SIDE-BAR CONFERENCE" as may be appropriate, should be inserted immediately preceding the report of such transactions and the parenthetical phrase "(END OF HEARING)" or "(END OF CONFERENCE)" should be inserted at the termination thereof.

43. QUESTIONS OF LAW

a. ***Preparation of legal brief.*** If a complicated legal question is expected to arise at the trial, counsel usually should prepare a legal brief on the question. Then, when the question arises at the trial, by using this brief he can present readily to the law officer (president of a special court-martial) a concise argument as to the solution of the question. A legal brief prepared for use at the trial need not be formal in nature. To be of assistance, however, it should include, in orderly fashion, (1) a summary of the facts pertinent to the question,

(2) a statement of the legal question created by the facts, (3) a summary of the legal authorities that are applicable, and (4) a summary of the argument showing how the law should be applied to the facts.

*b. **Giving the law officer advance notice of legal questions.*** To give the law officer an opportunity to conduct his own legal research into any complicated legal problem likely to arise at the trial, it is permissible, but not mandatory, for counsel to advise the law officer of such a problem in advance of trial. Counsel may pinpoint the legal question involved, but will not mention the merits of the case. The law officer may be advised of the problem orally or by memorandum. If counsel chooses the former method, he must make certain that opposing counsel is present during the time the law officer is orally advised of the problem. If the latter method is used, opposing counsel must be furnished a copy of the memorandum.

*c. **Arguments on questions of law.*** The court will give counsel a reasonable opportunity to present arguments upon questions of law that arise during the trial. When foreseeable legal questions arise, counsel should base his argument upon his legal brief. See *a* above. When unexpected legal questions arise, counsel may present an immediate extemporaneous argument, or, if the legal question is of a complicated nature, he may request a recess for the purpose of researching the question prior to presenting his argument.

An argument on a question of law properly may include the citation and reading of legal authorities, including pertinent decisions and opinions of civil and military judicial tribunals. An argument on a question of law in a special court-martial is made in open court. An argument on a question of law in a general court-martial may be made either in open court or at an out-of-court hearing, or both, as determined by the law officer. When an argument is made in open court, however, factual comparisons should be avoided. If the subject matter of the argument is prejudicial to the accused, the defense is usually entitled, in a general court-martial, to an out-of-court hearing as a matter of right. In this connection, see 42. If the argument relates to a motion for a finding of not guilty or a question of the sanity of the accused (Art. 51*b*), it will be made in open court, as the members of the court ultimately may be requested to decide these questions.

44. INSTRUCTIONS

*a. **General.*** The chief purpose of instructions to members of the court is to provide a framework of law to which the court can relate its determinations of fact in the case and, applying the standards of proof given them in the concluding charge, reach a final conclusion as to the guilt or innocence of the accused. Proper instructions should briefly and precisely inform the court of the article or articles of the Code which are alleged to have been violated by the accused; what members must find as a matter of fact in order to conclude that such

article or articles have been violated; the relationship of defenses to the determination of those matters of fact; and the standards to be applied in reaching their ultimate conclusion. In a case in which the law officer (president of a special court-martial) has any doubts as to the elements of a principal offense charged or of a lesser included offense which has been put in issue by the evidence, the definition of a legal term, or the law applicable to an affirmative defense which has been put in issue by the evidence, he may request counsel for both sides to furnish him information in this regard. Such a request usually should be made at some time prior to the making of the final arguments in the case. This permits the law officer (president of a special court-martial), after considering the views of counsel, to advise counsel in advance of final arguments what instructions he intends to give the court. In a special court-martial trial, counsel, upon request, will present in open court their views as to the elements of the offense. In a general court-martial trial, the information should be submitted to the law officer at a side-bar or out-of-court conference. A counsel who has properly prepared his case for trial and has made a careful appraisal of the probative effect of the expected evidence will have no difficulty in presenting the desired information promptly; he will have determined the elements of each principal offense charged, as well as the elements of each lesser included offense which he anticipates will be in issue under the evidence.

For assistance in drafting instructions, see DA Pam 27–9, The Law Officer, or AFM 110–5, Court-Martial Instructions Guide, as appropriate. The trial counsel may include with his trial notes those instructions which he believes the law officer (president of a special court-martial) should give to the court. These instructions will not be a part of the trial notes proper. They should be prepared in triplicate so that copies may be furnished to the law officer (president of a special court-martial) and counsel for the accused.

*b. **Proposing instructions: general court-martial***

(1) *General.* The law officer may or may not ask counsel for proposed instructions. Counsel, however, are not prohibited from proposing instructions to the law officer even though the latter has made no request therefor. Generally speaking, counsel should propose instructions on any matter which is legally relevant and which will assist the court in fitting the evidence to his legal theory of the case. Exactly what instructions will be proposed in a particular case will depend upon the facts and law of that case. Instructions proposed by counsel will be presented in writing, with a copy to opposing counsel, prior to the final arguments. Each proposed instruction should indicate by whom it was submitted and should be marked for identification and attached to the rec-

ord of trial as an appellate exhibit. After considering the proposed instructions and the arguments of counsel thereon, the law officer will advise counsel, upon request, of the additional instructions which he intends to give the court.

(2) *Trial counsel's proposed instructions.* Generally, trial counsel should propose an instruction on the elements of the offenses charged and on any lesser included offenses embraced within the evidence. This practice will tend to assist the law officer in giving complete instructions. When the trial counsel anticipates that the defense will propose an instruction on a particular point of law, he may also prepare an instruction on the same point, or prepare argument opposing or modifying such proposed instructions. This practice will assist the law officer in evaluating properly the instructions proposed by the defense. Trial counsel should consider that the defense counsel may include a proposed instruction on the elements of the offense charged and on any lesser included offense that probably will be in issue. Also the defense counsel may include an instruction on a defense which he intends to establish, e.g., self-defense, mistake of fact, or intoxication if in issue. Where the good character of the accused has been placed in evidence by character witnesses, it would be appropriate for the defense to propose an instruction on character evidence.

(3) *Manner of preparation.* Ordinarily, counsel can determine in advance of trial whether additional instructions (other than those required by Art. 51*c*) will be necessary or desirable. Before trial, he can prepare with due care and pertinent citations those additional instructions which will be consistent with his theory of the case. These proposals, with copies for opposing counsel, should be available for presentation to the law officer during a recess or at an out-of-court conference. If counsel believes that a particular instruction should be given to the court but he does not have a prepared instruction available to submit to the law officer, he may request a recess for a sufficient time to enable him to prepare the proposed additional instruction. If his request for a recess is denied, he may request orally that an instruction along certain lines be given. Another occasion for an oral request might arise when the law officer, in advising counsel before final arguments of the instructions he intends to give the court, does not mention an instruction which counsel believes should be given.

c. ***Proposing instructions: special court-martial.*** The rules with respect to proposing instructions to the president of a special

court-martial are substantially the same as those set forth in *b* above. Inasmuch as the president of a special court-martial usually is not a lawyer, it is important that counsel be prepared to submit proposed instructions covering the elements of each offense, defenses, and definitions of words having special legal connotation. These proposed instructions usually are presented in writing in open court, with a copy to opposing counsel.

Preparation of a memorandum containing proposed instructions will involve the following two steps: (1) Prior to trial, the trial counsel should prepare a draft memorandum containing instructions on the elements of every principal offense charged, the elements of every lesser included offense which might be in issue, the law applicable to every defense which may possibly be in issue, and the definitions of terms employed in the instructions which have special legal connotation. (2) After both sides have rested, the trial counsel should check through the memorandum and strike out all inapplicable instructions, such as instructions on charges or specifications which were withdrawn or dismissed, instructions on lesser included offenses and defenses not in issue, and instructions on the definitions of terms employed in instructions which have been deleted. After these two steps have been completed, the memorandum of instructions will be ready for delivery to the president of the special court-martial. Before the draft of instructions is delivered to the president, the defense counsel should be furnished a copy or be afforded an opportunity to examine it. In cases in which a memorandum of instructions is delivered to the president, it should be appended to the record of trial for the information of the convening and supervisory authority.

45. DRAFTING INSTRUCTIONS ON THE ELEMENTS OF AN OFFENSE

The elements of most offenses are listed and discussed in chapter XXVIII of the Manual. However, statements contained therein are necessarily couched in broad general terms to cover all offenses violative of a particular article of the Code, or violative of a particular section or other subdivision of an article of the Code. Consequently, while the Manual should aid counsel in drafting his proposed instructions on the elements of the offense, he should not rely on a mere reading of pertinent portions of the Manual. Reference should be made to DA Pam 27–9, The Law Officer or AFM 110–5, Court-Martial Instructions Guide, as appropriate, for assistance in drafting instructions. Appendix I of The Law Officer pamphlet contains the elements of each of the offenses for which appendix 6*c* of the Manual contains a model specification. Appendix I is numerically keyed to the model specifications to provide a convenient means of reference to the elements of such offenses. In general, it states the elements of those offenses more specifically than does the Manual. Counsel should ex-

perience little difficulty in preparing an outline of the essential elements of each offense charged and of each lesser included offense in issue. In many cases, it will be necessary only that he modify the specimen instructions to conform with the allegations contained in the specification by the deletion or insertion of appropriate language. For specifications drafted in accordance with appendix 6 of the Manual, the form instructions are keyed to show where the deletions and insertions are to be made. For example, if the accused is charged with sleeping on post as a sentinel at Fort Bliss, Texas, on or about 27 October 1961, an instruction on the elements of the offense (modeled after an instruction in DA Pam 27–9) would be—

(1) That the accused was (~~posted~~) (on post) as a (sentinel) (~~lookout~~), (*as alleged*); and

(2) That, at Fort Bliss, Texas, on or about 27 October 1961, the accused [was found (~~drunk~~) (sleeping) while on his post]. [~~left his post before being regularly relieved~~].

The elements of complicated or unusual offenses for which no form instruction appears in DA Pam 27–9 or AFM 110–5 may be ascertained by making an analysis of the essential allegations in the specification, as determined by reference to pertinent legal authorities and the rules for drafting specifications contained in paragraph 28 of the Manual. If the offense is charged under Article 133, the following should be included as the final element of the offense:

That, under the circumstances, the accused's act or omission was unbecoming an officer and a gentleman.

If the offense appears to come under the first or second clause of Article 134, the following should be included as the final element of the offense:

That, under the circumstances, the conduct of the accused was prejudicial to good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

46. LESSER INCLUDED OFFENSES

a. ***General.*** In determining whether a lesser offense is included in the offense charged, counsel should initially refer to paragraph 158 of the Manual and the Table of Commonly Included Offenses in appendix 12 of the Manual. However, even if an offense is not listed in the Table, it may be a lesser included offense under the allegations and proof of the particular case.

b. ***Specific rules and examples.*** The following rules and examples may prove helpful to counsel in determining whether a lesser included offense is in issue:

(1) A lesser included offense may be in issue in the case because of the presence in the record of evidence which, if believed, would reasonably tend to establish that the lesser included

offense, and not the principal offense charged, was committed. For example, in a premeditated murder case in which the prosecution's evidence established every element of the offense charged, but in which the accused testified that, just before he shot the victim, the latter struck him a hard blow on the cheek with his fist, inflicting serious injury, and called him a foul name, the lesser included offense of voluntary manslaughter would be in issue; for, if the court does not disbelieve the accused, it might find that under the circumstances the striking constituted adequate provocation and that the killing was committed by the accused while he was in the heat of sudden passion caused by the adequate provocation. However, if the accused has testified only that the victim has called him a foul name—omitting the testimony as to the striking—voluntary manslaughter would not be in issue, as the testimony of the accused, even if believed, would fall short of showing adequate provocation.

(2) A lesser included offense may also be in issue if the uncontradicted evidence in the case, although clearly sufficient to establish guilt of a lesser included offense, might be considered as falling short of establishing beyond a reasonable doubt every element of the principal offense charged. In other words, the evidence adduced, although uncontradicted, may fail to overcome the presumption of innocence as to one of the essential elements of the offense charged.

(3) Unless the rules stated in (1) or (2) above are applicable, the fact that the defense presents evidence contradicting some of the prosecution's evidence does not necessarily mean that a lesser included offense is in issue. For example, in a murder case, if the prosecution presented uncontradicted evidence of all the essential elements of the principal offense charged, and this evidence does not raise any lesser offense, but the defense presented evidence to the effect that the accused was elsewhere at the time the offense was shown to have been committed, a lesser included offense would not be in issue. In fact, under these circumstances, instructing the court as to the elements of one or more lesser included offenses might constitute legal error, as the only issue before the court is that of guilt or innocence of the principal offense charged.

47. WHEN DEFENSES ARE IN ISSUE

Prior to trial, the trial counsel should study the expected testimony and other evidence to determine what affirmative defenses, if any, might be placed in issue. A defense will be in issue whenever there is some evidence, whether introduced by the prosecution, the defense,

or the court, from which there might be drawn a reasonable inference which, if believed by the court, would constitute a defense. For example, the evidence in a murder case showed that the accused killed the bartender in a public beer tavern by shooting him with a pistol, immediately after the victim, incensed by the accused's insulting remarks, had thrown him to the floor in the corner. The accused then shot and killed the victim, while the latter was hovering over him with a broken beer bottle in his hand. Under this evidence self-defense would be in issue, for the evidence reasonably tends to establish all of the ingredients of that defense.

On the other hand, a defense will not be in issue if the evidence tending to establish it is so incomplete, weak, or doubtful that no reasonable mind would draw from it an inference which would support the defense.

If the evidence in the above case had shown that the accused shot and killed the bartender, immediately after the latter had shoved the accused through the door of the tavern to the sidewalk outside with a warning not to come back, and that the shot was fired as the victim was walking back into the interior of the tavern, this evidence would fall short of placing self-defense in issue.

If the evidence raises a reasonable inference which would constitute a defense if accepted by the court, the defense should be considered to be in issue even though in the particular case it may be unlikely that the court actually will give it such weight as to require a finding of not guilty.

Consider the case where the prosecution's evidence in an aggravated assault case showed that the accused and the victim were fellow soldiers on bivouac with their company. After the two had engaged in a heated argument, the victim struck the accused with his fist and a fight ensued, during which the victim was knocked to the ground. The accused then grabbed a hand ax and, using both hands, struck the victim a hard blow across the right wrist with the sharp edge of the ax, fracturing several wrist bones and necessitating the amputation of the victim's right hand. The evidence for the defense showed that at the time of the blow with the ax the victim lay on his stomach with his right arm outstretched in the direction of his steel helmet, which had fallen to the ground with him. The accused testified that he believed that the victim intended to pick up the helmet and hit him with it. Although it is doubtful that this evidence (even if believed and considered in its aspect most favorable to the accused) would lead the court to acquit the accused of aggravated assault, it is sufficient to raise, and put into issue, self-defense.

48. ADDITIONAL INSTRUCTIONS

The law officer may request counsel for both sides to submit proposed instructions in addition to those pertaining to the elements of the principal offense charged and the elements of each lesser included

offense that may be in issue. These additional instructions usually will involve a particular issue that has been raised by the evidence and must be decided by the court in order for it to determine the guilt or innocence of the accused. They may include instructions on defenses (for example, self-defense, entrapment, alibi, etc.), definitions of words of legal art (for example, definition of "movement" in missing movement), and instructions as to the effect of the law officer's rulings during the trial (for example, the effect of a ruling admitting a confession in evidence or of a ruling denying a motion for a finding of not guilty).

Counsel should include with his trial notes any additional instructions he believes will aid the court in making its findings, including instructions on issues likely to be raised by the defense. See DA Pam 27–9 or AFM 110–5. These additional instructions should be prepared even though counsel does not anticipate that the law officer (president of a special court-martial) will request him to submit additional instructions. The prospect of the court's making a finding correct in law and fact is enhanced by counsel's awareness of all elements of the case.

Whenever trial counsel feels that the instructional requirements in a case cannot be fully satisfied by resort to DA Pam 27–9 or AFM 110–5, he should consult the office of the staff judge advocate for assistance in identification of issues requiring instruction and drafts of instructions found necessary. This is particularly desirable in the usual case where the convening authority or supervisory headquarters has not furnished the trial counsel with a memorandum of law, or a draft of suggested instructions. In any event, counsel should always obtain legal advice from the supervisory headquarters whenever in doubt about the law.

49. ABSENCE AND EXCUSAL OF COURT PERSONNEL

a. ***Excusing attendance of members.*** After arraignment, members may be excused only because of physical disability, as a result of a challenge, or by order of the convening authority for good cause. See 84*f* and paragraph 37*b* of the Manual.

b. ***Law officer.*** When it appears from the circumstances that the law officer is physically unable to continue in the case, the trial counsel should notify the president of the court and then report the matter to the staff judge advocate so that the matter may be reported to the convening authority (MCM, 39*d*).

c. ***Court members.*** When the court is reduced below a quorum (five members for a general court-martial, three members for a special court-martial, one-third enlisted members when they have been requested), the court may adjourn. In such event, the law officer (president of a special court-martial) ordinarily will direct the trial

counsel to report the circumstances to the convening authority. The report should include a full statement of the reasons for the absence.

If a member is absent after the arraignment of the accused, the trial counsel is required to report the matter to the court after making an informal inquiry to determine the cause of absence. If the absence reduces the court below a quorum or does not result from a challenge, physical disability, or the order of the convening authority for good cause, the trial may not proceed. The law officer (president of a special court-martial) ordinarily will direct the trial counsel to report the circumstances, including the reasons for the absence, to the convening authority. In this connection, see paragraph 41*d* of the Manual.

d. ***Parties to the trial.*** When the court assembles after recess, adjournment, or closing of the court, the trial counsel shall state in open court whether all parties to the trial who were present when the court recessed, adjourned, or closed are again present. See paragraphs 41 and 61*c*, and appendix 8*a* (p. 515) of the Manual.

50. NEW MEMBERS OR LAW OFFICER APPOINTED TO COURT DURING TRIAL; SWEARING; READING OF RECORD OF TRIAL

When a new law officer or a new member is appointed to the court during the trial of a case, it is the duty of the trial counsel to see that the accused has an opportunity to exercise his right to challenge the newly appointed law officer or member for cause and also to exercise his right to one peremptory challenge as to a court member, if it was not previously utilized at the trial. Thereafter, the new law officer or member must be sworn, the substance of all proceedings made known to him, and recorded testimony of each witness previously examined read to him in open court to acquaint him with what has taken place in the proceedings. See paragraphs 42*e* and *f* of the Manual.

51. FINAL ARGUMENTS

a. ***General.*** When the parties have rested and no further evidence is to be offered, counsel for both sides have the opportunity to make final arguments. The prosecution has the right to make the opening argument and, if the defense presents an argument, the closing argument. Trial counsel in the closing argument is generally entitled only to reply to arguments of defense counsel, and he should not introduce any new line of argument.

b. ***Content.*** Trial counsel has the duty of prosecuting a case, and he is permitted to comment on the evidence and any inferences which are reasonably supported by the testimony. The testimony, conduct, motives, and evidence of malice on the part of any witnesses may be commented upon. When evidence has been offered and declared inadmissible, the trial counsel must not refer to such evidence in final argument. Additionally, trial counsel may not convey to the court-

martial a false impression or inference as to the character or credibility of a witness when no evidence has been presented to support such argument. In argument, trial counsel may not advance a theory which is based upon an erroneous principle of law. In deliberating and voting upon the findings, the court is guided by the instructions on the law given to it by the law officer (president of a special court-martial). Consequently, when counsel make their final arguments prior to the findings, it is improper for them to read or cite decisions or opinions of civil or military judicial tribunals. For example, if the accused were charged with using disrespectful language toward his superior officer, it would be improper for trial counsel in his argument to invite the court's attention to a decision of a board of review holding that similar langauge has been held desrespectful. Prior to making their final arguments, counsel may request the law officer (president of a special court-martial) to inform them of the instructions he intends to give the court, so that, if appropriate, they may refer to these instructions during their final arguments.

Trial counsel may not comment on the accused's failure to take the stand and testify nor may he in any manner draw attention to the fact that the accused has not testified. In this connection, he should be very careful not to make any comment on the failure of the defense to present evidence on a certain point which might be construed as a comment on the failure of the accused to testify. Trial counsel must not refer in his argument to any matter which was not admitted in evidence at the trial. Furthermore, if evidence was admitted at the trial for a limited purpose only, he must limit his comment on that evidence to the purpose for which it was admitted. For example, if an out of court statement (normally hearsay) was admitted as a fresh complaint, i.e., to establish that the statement was made rather than to show the truth of the matter stated, trial counsel must not argue that the statement proves the facts contained therein. Likewise, trial counsel may not comment on evidence which was offered and excluded or thereafter withdrawn. He should always be careful not to assert before the court his personal belief as to the innocence or guilt of the accused.

52. PRESENTENCING PROCEDURE

a. General. After findings of guilty have been announced, the trial counsel will read to the court the personal data concerning the accused and the data as to restraint, if any, set forth on the first page of the charge sheet. This information should be carefully examined prior to trial and coordinated with defense counsel to insure accuracy.

In this way, objection to the personal data and data as to restraint by the defense at the trial can be largely avoided. For the procedure to be followed where there is such an objection, see appendix 8*a* of the Manual at page 508.

b. ***Previous convictions.*** The trial counsel will next introduce evidence of admissible previous convictions of the accused. To be admissible, the previous convictions must relate to offenses committed during a current enlistment, appointment, or other engagement or obligation for service of the accused, and during the three years next preceding the commission of any offense of which the accused stands convicted. See paragraph 68*d* and 75*b* (2) of the Manual. Ordinarily, the evidence of previous convictions is contained in DD Form 493 (Extract of Military Records of Previous Convictions). This evidence must be introduced, subject to the usual rules of evidence, just as any other item of evidence. If DD Form 493 is correctly completed by the official custodian of the accused's military personnel records, it is admissible under the official records exception to the hearsay rule. See paragraph 143 of the Manual. If DD Form 493 is to be used to prove the accused's previous convictions, trial counsel should carefully examine the document prior to trial to assure that it has been accurately completed and that it is properly authenticated. For an illustration of how to introduce a document such as DD Form 493, see 21, appendix VI, and the reverse side of DD Form 493.

c. ***Matters in aggravation.*** During the presentencing procedure, and in the absence of a plea of guilty, the prosecution may bring out matters in aggravation only to rebut matters in extenuation or mitigation presented by the defense. If, however, the findings of the court are predicated on a plea of guilty, trial counsel may introduce evidence showing aggravating circumstances after the findings are announced. "Aggravating circumstances" include only those matters which would have been admissible on the merits of the case. They do not include acts of misconduct, reputation, or character.

53. ARGUMENT ON SENTENCE

a. ***General.*** Counsel for either side has the right to make a separate argument on the sentence. The argument must be based on the matters introduced at trial, and it cannot go beyond the bounds of fair comment. In essence, counsel for each side argue their view of matters related to the question of an appropriate sentence.

b. ***Argument by trial counsel.*** It must again be emphasized that at the trial the trial counsel represents the United States and his function is to present the evidence fairly. He must not inject command influence into the sentencing procedure. For instance, an argument by trial counsel that the court had the duty to discharge accused because those who brought and referred the charges to trial thought that he should be punitively discharged would be an improper argument. Furthermore, counsel may not refer to any policy directives found in the Manual (e.g., MCM, 88*h*, which states that thieves should not be retained in the service; MCM, 76*j* which states that in-

adequate sentences bring the armed services in disrepute). Trial counsel must also refrain in negotiated guilty plea cases from any mention of the fact that the plea has been negotiated and from mentioning the maximum sentence which the convening authority has agreed to approve.[1] In a rehearing trial counsel will inform the court of the maximum imposable sentence (the sentence which was imposed by the original court-martial); but he cannot state that the case under consideration is a rehearing. He is permitted to be critical of an accused provided such remarks are based on the evidence or may be reasonably inferred therefrom.

*c. **Argument by a trial counsel before a special court-martial.*** Trial counsel, when arguing for a maximum sentence at a special court-martial, is not permitted to refer to the maximum penalty authorized by the Table of Maximum Punishments for the offenses committed by the accused if that maximum exceeds the jurisdictional limitation of a special court-martial. Furthermore, trial counsel may not argue that by referring an accused's case to a special court-martial the convening authority has already minimized the imposable confinement and that the accused is not entitled, in light of the nature of his crimes, to any further reduction.

54. MAINTENANCE OF RECORD OF TRIAL

*a. **Responsibility.*** On behalf of the court, the trial counsel supervises the keeping of the record of the proceedings. If a reporter is present, the trial counsel will maintain close liaison with the reporter at all times during the trial to make sure that the record accurately reflects everything that takes place in open court. In a general court-martial trial, it is the law officer's responsibility to see that the reporter properly records out-of-court conferences and any conference between the law officer and the court in closed session with respect to the form of the findings.

As all records of trials by special and general courts-martial are reviewed by one or more appellate agencies, it is important that the trial counsel attach as much importance to the maintenance of the record as he does to the presentation of the case to the court.

*b. **Summarized record of special court-martial.*** If a reporter is not present at a trial by special court-martial, the trial counsel will take appropriate action to assure that he will be able to prepare a summarized record of trial at the conclusion of the case. He should take notes during the trial or have the assistant trial counsel or a clerk take such notes. A simple method of maintaining notes for use in preparing the summarized record of trial is for the trial counsel to amend his trial notes during the course of the trial so that they reflect the true proceedings. If available, a stenographer who is not sworn as a court

[1] Not applicable to Air Force cases as pretrial agreements are not in accord with Air Force procedure.

reporter should be used to assist the trial counsel to prepare and record a summarized record of trial.

55. EXAMINATION OF THE RECORD OF TRIAL BY THE DEFENSE

In unusually long cases where several reporters have been sworn, it is sometimes possible to commence the transcription of the record prior to completion of the trial. In such cases, it is proper for the trial counsel to allow the defense counsel a reasonable opportunity to examine the record of trial as it is being transcribed. However, the defense counsel should not be permitted to harass or delay the reporter by unreasonable demands in this respect.

56. IRREGULARITIES AND ILLEGALITIES IN PROCEEDINGS

In the interest of having a trial that is free from error, the trial counsel should invite the court's attention to any irregularities or illegalities arising during the proceedings. Thus, the trial counsel should object to a question by the court that will call for incompetent testimony even though it is damaging only to the accused. He should object to any improper procedure.

57. COURT TO CONSIDER ONLY MATTERS IN EVIDENCE; PRECAUTIONS TO BE TAKEN

If he has in his possession any papers that pertain to the case but which are not in evidence, the trial counsel should take every precaution to insure that they will not inadvertently be examined by any member of the court (MCM, 44 *g*). At the time a documentary exhibit is introduced in evidence, the trial counsel should make certain that only the papers which constitute the exhibit are offered in evidence. In cases which are before the court on rehearing, it is proper for the trial counsel to permit the law officer (president of a special court-martial) to examine that part of the record of any prior proceedings which relates to errors committed at the former proceedings when necessary to enable him to decide upon the admissibility of offered evidence or other questions of law involved (MCM, 81*c*).

Section IV. DUTIES AFTER TRIAL

58. REPORT OF RESULT OF TRIAL

Upon final adjournment of the court after the trial of a case, the trial counsel must notify the accused's immediate commanding officer of the result of the trial. This notification shall be in writing and shall include any findings reached and any sentence imposed by the court. The report will enable the commanding officer to release the accused from confinement, arrest, or restriction in the event of an

acquittal or to take other appropriate action in the event of conviction. A copy of the notification should be sent to the convening authority for his information and, if the accused is in confinement, to the commanding officer responsible for the confinement facility. The form of this report should be prepared and partially completed in advance of trial. At the conclusion of the trial, the trial counsel readily can fill in the necessary additional date and dispatch the report immediately. (See app. XI.)

59. PREPARATION, AUTHENTICATION, AND DISPOSITION OF THE RECORD

a. ***General.*** The rules governing the preparation, authentication, and disposition of records of trial are set forth in paragraphs 82 and 83 and appendixes 9 and 10 of the Manual. It is the responsibility of the trial counsel to see that the record is accurate, that it is prepared in the proper form, that the required number of copies are made, and that the preparation thereof is not delayed. See 54.

b. ***Preparing verbatim records.*** Complete instructions for the preparation of a verbatim record of trial are contained in paragraph 82 and appendix 9 of the Manual. DD Form 490 (Verbatim Record of Trial), if available, should be used in preparing such a record. A verbatim record will be prepared in all general court-martial cases and, if a reporter was authorized, in all special court-martial cases in which a bad conduct discharge is adjudged.

c. ***Summarized record.*** Complete instructions for the preparation of a summarized record of trial are contained in paragraph 83*b* and appendix 10 of the Manual. If available, DD Form 491 (Summarized Record of Trial), should be used in preparing such a record. A summarized record will be prepared in special court-martial cases unless a reporter is present and authorized.

d. ***Authentication.*** The rules governing the authentication of records of trials by general and special courts-martial are contained in paragraphs 82*f* and 83*c*, respectively, of the Manual. See appendix 9*b* (p. 528) of the Manual for forms of authentication. These forms must be followed strictly. For example, when a person authenticates a record of trial for another person, one of the reasons listed in the authentication form must be used. Notations such as "TDY," "Maneuvers," etc., are not acceptable. If, because of temporary duty or maneuvers, the president was absent at the time of authentication, the reason should be stated under the signature of the authenticating officer as follows: ". . . a member in lieu of the president because of his absence." Under no circumstances, however, may anyone authenticate the record of trial in a case unless he actually was *present and participating in an official capacity* at the *conclusion* of the proceedings. No person may sign a record in more than one capacity. For

example, if both the law officer and the president of a general court-martial are unable to authenticate the record, it will be signed by two members of the court rather than by one member signing for both the law officer and the president.

e. Disposition. The rules governing the disposition of records of trial by general and special courts-martial are contained in paragraph 82*g* of the Manual. Trial counsel should pay particular attention to completion of a Court-Martial Data Sheet (DD Form 494). It is important that the trial counsel expedite the preparation and authentication of each record of trial in order that he or his representative can promptly serve a copy on the accused and deliver the original to the convening authority. If the accused has been transferred or has moved to another station prior to the time he has been served with a copy of the record, the trial counsel will mail the accused's copy to him, get his receipt therefor, and forward the receipt to the convening authority. However, the delivery of the record to the convening authority should not be delayed pending the return of this receipt. A certificate of the manner in which delivery has been attempted, together with a statement that the receipt will be forwarded as soon as it is received, may be inserted in the record in lieu of the accused's receipt.

60. WEEKLY REPORT OF TRIAL COUNSEL

Unless otherwise directed by the convening authority, the trial counsel is required to make a weekly report to the convening authority of the status of cases on hand. See paragraph 44*e* of the Manual. (See app. XIII for a suggested form of a weekly report of trial counsel.)

Chapter 4

THE DEFENSE COUNSEL

Section I. INTRODUCTION

61. DUTIES AND RESPONSIBILITIES

a. ***Scope of chapter.*** This chapter contains a detailed analysis of the duties of the defense counsel and a number of suggestions as to how these duties may be performed. This chapter should be considered together with chapters 1, 2, and 3.

b. ***General.*** The primary duty of the defense counsel is to guard the interests of the accused by all honorable and legitimate means known to the law. It is his duty to undertake the defense regardless of his personal opinion of the guilt or innocence of the accused; to disclose to the accused any interest he may have in connection with the case, any ground of possible disqualification, or any other matter that might influence the accused in the selection of counsel; to represent the accused with undivided fidelity; and not to divulge his secrets or violate his confidence.

c. ***Utilizing services of the assistant defense counsel.*** In preparing and presenting a case, the defense counsel should utilize the services of the assistant defense counsel whenever possible. The assistant defense counsel can be of material assistance even though he may not be qualified under Article 27 of the Uniform Code of Military Justice. For example, if he has had previous military justice experience, he may be able to assist with the interview of witnesses before trial, prepare portions of the trial notes, make arrangements for the proper personal appearance of the accused at the trial, take notes and keep an account of the exhibits at the trial, and prepare necessary correspondence. There are two important reasons why the assistant counsel should be utilized to the maximum extent possible: First, effective use of the assistant counsel will enable the defense counsel to devote additional time to the more important aspects of the preparation and trial of the case. Second, it is desirable to train potential defense counsel by on-the-job training as assistant defense counsel.

Section II. DUTIES PRIOR TO TRIAL

62. INITIAL CONSIDERATIONS

*a. **General.*** Upon receipt of notice (usually accompanied by copies of all papers allied to the charges) that he has been appointed to represent an accused, the defense counsel should interview the accused. At this initial interview, the defense counsel will inform the accused that he has been appointed to defend him at the trial, will explain his general duties, and will advise him of his right to select individual counsel, civil or military, of his own choice. See paragraph 46*d* of the Manual.

*b. **Personal interest or bias; inability to represent.*** If the defense counsel has any personal interest, bias, or prejudice concerning the accused or his case, he should inform the accused, who may then wish to obtain other counsel. When the defense counsel lacks the requisite legal qualifications, has previously acted for the prosecution in the same case, or when his personal interest, bias, or prejudice is so strong as to affect his ability to defend the accused in a conscientious, capable, and fair manner, he must request the convening authority to relieve him from duty as defense counsel in that case. He should not, however, request relief for the sole reason that he believes the accused to be guilty.

*c. **Conflicting interests.*** In a joint or common trial each accused normally is entitled to separate appointed defense counsel. If, however, one defense counsel is appointed to defend two or more accused in a joint trial, he should examine the allied papers before consulting with any of the accused to determine if, in his opinion, there is a possibility of conflict in the interests of the accused. If such a possibility is revealed to the defense counsel, he should report it to the convening authority so that separate defense counsel may be appointed for each accused. If after consulting with the accused, the defense counsel perceives a possible conflict of interest, he should so advise the accused and then report to the convening authority whether or not he considers any one of the accused at the trial without either acting on the interests of the remaining accused or giving the appearance thereof. See paragraph 48*c* of the Manual.

*d. **Previous connection.*** The defense counsel must advise the accused of any previous connection with the case and give the accused the choice either of continuing the relationship with him or of securing other counsel. If defense counsel has previously acted for the prosecution, however, he may not act for the defense, even though the accused expressly requests his services (Art. 27*a*). If the defense counsel is an accuser or has acted as a court member, law officer, or investigating officer in the case, he may serve as counsel for the accused only if the latter expressly requests his

services in open court at the beginning of the trial (MCM, 6*a*). If the accused indicates that he wants the defense counsel to defend him despite his prior participation in the case, the defense counsel should have the accused sign a statement to the effect that he is aware of the defense counsel's prior participation in the case but that he expressly requests his services as defense counsel.

e. ***Accused's right to counsel of his own choice.*** The defense counsel will advise the accused of his right to select individual counsel, either civilian or military (Art. 38*b*). If the accused indicates that he desires to accept the services of the appointed defense counsel, the latter immediately will commence the preparation of the case for trial. In those cases in which the accused desires individual civilian or military counsel, the appointed defense counsel will aid the accused in obtaining such counsel. If the accused requests civilian counsel, the appointed defense counsel must advise the accused that such counsel cannot be retained at Government expense. If the accused desires individual military counsel to represent him at the trial, the appointed defense counsel will prepare a written request for the detail of the individual requested. After the request is signed by the accused, it will be forwarded, through the trial counsel, to the convening authority. In any event, unless the appointed defense counsel has acted for the prosecution in the same case, he will continue to represent the accused until other counsel has been secured or until he has been relieved of the duty by proper authority. See paragraph 46*d* of the Manual.

f. ***Confidential relationship between the accused and counsel.*** At the first interview, the accused should be informed of the confidential relationship that exists between himself and the defense counsel—that nothing the accused tells the defense counsel relating to the case will be divulged, no matter how incriminating it may be. If the defense counsel maintains a log or notes of conversations between himself and the accused, they are privileged and should not be appended to the record of trial or otherwise used in such a manner as to violate the attorney-client privilege between the accused and his defense counsel. Knowing of this confidential relationship, the accused can feel free to make a complete disclosure of all of the facts in the case as far as they are known to him. See paragraph 151*b*(2) of the Manual.

g. ***Right to remain silent.*** During the initial interview, the accused should be advised not to talk to anyone about the facts of the alleged offense or offenses except in the presence of and on advice of his defense counsel. It may be desirable fully to acquaint him with his rights under Article 31 to emphasize that the case should not be discussed with anyone other than defense counsel or with his approval.

63. PRELIMINARY PREPARATION OF CASE

a. General. Before the case is discussed further with the accused, the defense counsel should analyze carefully the charges and specifications, the allied papers, and the report of the pretrial investigation. It is essential that the defense counsel consider the facts of the case, the offenses, and the various elements of proof of those offenses and ascertain whether any defenses may be available to the accused. In the absence of such a study, the defense counsel will be unable to properly evaluate the case and plan a defense. For discussions of various offenses under the Uniform Code of Military Justice, see chapter XXVIII of the Manual. For the elements of the offenses, see DA Pam 27–9, The Law Officer, or AFM 110–5, Court-Martial Instructions Guide.

b. Second interview with the accused. When the defense counsel completes his consideration of the foregoing matters, he should interview the accused for the second time. On this occasion, he should endeavor to learn the accused's version of the facts. He also should question the accused about the existence of any defense or objection, such as former punishment, constructive condonation of desertion, promised immunity, and other like matters which might be asserted in bar of trial. See chapter XII of the Manual. As the accused tells his story of the facts surrounding the offense, complete notes should be taken. If the accused's account is unbelievable, improbable, or indicates that he is withholding portions of the story, the defense counsel may inform the accused that proper advice can be given and adequate preparation for the trial can be made only if the accused makes a full and complete disclosure of the facts. Counsel may also advise the accused of his opinion of the effect on the court should the accused's testimony be patently unbelievable, improbable, or evasive.

The accused should then be informed of the witnesses, both for and against him, as shown on page one of the charge sheet (DD Form 458), together with the names of any other witnesses who are mentioned in the allied papers. The statements of these witnesses should be carefully reviewed with the accused, and his comments about the statements of each witness should be noted. The defense counsel also should obtain from the accused the names and addresses of any other witnesses who may be helpful in the presentation of his case and any information concerning the existence and location of any pertinent documentary or real evidence which should be considered for use at the trial.

c. Confessions or admissions of the accused. If the accused has confessed or made an admission concerning his guilt of any offense charged, the defense counsel should inquire into the circumstances surrounding the making of the confession or admission. The accused should be asked to relate in detail what occurred. It is particularly

important that he disclose the identities of the persons who were present immediately before and during the time of his making of the confession or admission. Each of these witnesses should be interviewed to obtain his version of the circumstances surrounding the making of the admission or confession. The purpose of this inquiry is to determine whether the confession or admission 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.

d. ***Interview of witnesses.*** In order that counsel will be able to fully develop his case, it is imperative that a thorough examination of prospective witnesses be undertaken. Not only is this the surest way to guarantee that all possible avenues of defense are uncovered, but it also will protect counsel from the dangers of surprise at the trial. A thoroughly prepared defense counsel will seldom be put in the uncomfortable position of being caught unawares at the trial. In this regard, witnesses for the defense must be interviewed in the same thorough manner as witnesses for the prosecution. The defense counsel must know the limitations of his witnesses, the possible personal interest of each witness in the case, and the nature of previous associations which any witness may have had with the accused or with an alleged victim of the accused's misconduct. Defense witnesses should be interrogated to discover the possibility of any previously undisclosed witnesses.

e. ***Interview of witnesses distant from place of trial.*** If witnesses are located at a considerable distance from the station of the counsel and it is not practicable for him to interview them personally or by telephone, the defense counsel should write to them requesting information as to any facts of the case that are within their knowledge. The information received will permit the counsel to determine whether the witnesses should testify personally at the trial, whether a deposition should be taken, or whether, with the consent of the accused, a stipulation as to the testimony of the witnesses should be entered into between the prosecution and the defense.

f. ***Insanity of the accused.*** The issue of insanity ordinarily should not be used as a surprise maneuver in court-martial practice. The defense normally will gain nothing by raising the issue of insanity for the first time at the trial. If that is done, the court ordinarily will adjourn pending a complete report on the accused's mental condition. Consequently, if it appears to the defense counsel that there is reason to believe that the accused lacks the mental capacity to stand trial (MCM, 120*c*) or lacked mental responsibility at the time of the alleged offense (MCM, 120*b*), he should report his belief and the reasons therefor, through the trial counsel, to the convening authority, so that

an inquiry into the accused's mental condition may be conducted before trial.

It may be presumed initially that accused is sane at the time of trial and was sane at the time of the alleged offense. This assumption remains valid until, from the evidence, a reasonable doubt of accused's sanity appears. When, however, any competent evidence tending to show that the accused is insane has been introduced, the sanity of the accused is placed into issue. In their consideration of this issue the court may consider the presumption of sanity, all evidence before it, the justifiable inferences to be drawn therefrom in the light of common sense, and the general human experience in matters of this kind.

A mere assertion by a lay witness that accused is insane is not necessarily sufficient to impose any burden of inquiry on the court, but the action and demeanor of the accused in court or the assertion from a reliable source that the accused is believed to lack mental capacity or was mentally irresponsible may be a sufficient reason for directing such an inquiry. When mental responsibility and mental capacity are put in issue, or either of the two questions is raised, the burden is on the prosecution to establish the accused's sanity beyond a reasonable doubt.

64. ADVISING THE ACCUSED OF HIS RIGHTS UNDER THE UNIFORM CODE

a. ***General.*** An accused has certain fundamental rights under the Uniform Code of Military Justice. These rights are discussed in *b* through *f* below. It is the duty of the defense counsel to explain each of these rights to the accused at the appropriate time and to advise him with respect to the exercise of his rights.

b. ***Accused's right to have enlisted persons on the court.*** If accused is an enlisted person, he should be advised of his right to request the presence of enlisted personnel on the court appointed to try the charges against him. Whether an accused should be advised by his defense counsel to request enlisted members on the court will depend upon an appraisal of all the facts and circumstances bearing on this question. If the accused decides that he wants enlisted persons on the court, a written request signed by him should be forwarded immediately by the defense counsel, through the trial counsel, to the convening authority. In this connection, see Article 25 and paragraph 48*e* of the Manual.

c. ***Rights to challenge.*** The accused has the right to challenge the law officer and each member of the court for cause on any of the applicable grounds enumerated in paragraph 62*f* of the Manual. The accused also has the right to exercise one peremptory challenge against any member of the court, but the law officer shall not be challenged except for cause (MCM, 62). See 39.

The defense counsel should ask the accused to examine the orders appointing the court to ascertain whether he knows of any facts which may constitute a ground of challenge for cause against any of the persons listed. Interrogation of the accused by the defense counsel concerning any objection the accused may have to each of the persons listed may bring out facts constituting proper grounds of challenge for cause. When a proper ground exists, it should be noted by the defense counsel so that it will not be overlooked at the trial. If the accused objects to a member as to whom no ground for challenge exists, that member ordinarily should be challenged peremptorily. In this respect, however, the defense counsel should bear in mind that a challenge for cause may not be sustained by the court, and it may be advisable to use the peremptory challenge against a member who has been challenged unsuccessfully for cause. Although all challenges ordinarily must be made before arraignment, challenges for cause may be made after arraignment if the ground for such challenge was unknown to the defense prior to the arraignment. Challenges are discussed at length in paragraph 62 and appendix 8*a* of the Manual. See also 39.

d. ***Right to assert defenses and objections.*** The defense counsel should explain to the accused his right to assert any proper defense or objection, such as the statute of limitations in an appropriate case. See paragraphs 48*f*, 68*c*, and 74*h* of the Manual. For a discussion of defenses and objections which may be raised by motion, see paragraph 67 of the Manual.

e. ***Rights as to pleas; pretrial agreements.*** The accused has the absolute right to plead not guilty and thus require the prosecution to prove his guilt beyond a reasonable doubt. For a discussion of the various pleas, see 71. Before the trial, however, counsel should consider all of the facts and circumstances surrounding the case with the view of determining whether it is appropriate and desirable for the accused to enter a plea of guilty. If the case against the accused is clear, it may be that a plea of guilty, coupled with evidence in extenuation and mitigation and/or with a pretrial agreement with the convening authority, will serve the best interests of the accused.[3] The plea of guilty may cause the court to adjudge a lighter sentence and, in the absence of a pretrial agreement with the convening authority, influence the latter to reduce the sentence or to suspend the execution of all or a part of it.

Pretrial agreements with the convening authority are of various types, the more common of which are the following: (1) where it is agreed that the offense charged will be reduced to a lesser offense to which the accused will plead guilty and then will submit to the judgment of the court as to the appropriate punishment; (2) where it is agreed that if the accused pleads guilty and is sentenced by the court,

[3] Pretrial agreements are not in accord with Air Force procedure.

the convening authority will approve a sentence not in excess of that agreed upon by the parties concerned; and (3) where it is agreed that if the accused pleads guilty to certain specifications, the convening authority will withdraw the remaining specifications. A pretrial agreement has the effect of obviating the necessity on the part of the Government of preparing and introducing evidence on the issue of guilt or innocence and of permitting the accused to know in advance of trial one or more of the following: (1) that he will be found guilty of an offense of a less serious nature than that initially charged; (2) the maximum punishment that will be approved by the convening authority for the offense to which the accused agrees to plead guilty; (3) that he will be found guilty of fewer offenses than originally charged. Thus, in an appropriate case, a pretrial agreement may benefit the accused by resulting in punishment less than that which might be adjudged in the event of trial on a plea of not guilty. The accused should be advised that while the convening authority may be willing to make such an agreement in a proper case, the offer to enter such an agreement must be initiated by the accused.

After he has explained to the accused the meaning and effect of a plea of guilty and has advised him with respect to pretrial agreements, the defense counsel may make such recommendations to the accused as appear to be reasonable and proper in view of all the facts and circumstances surrounding the case. While the defense counsel should not urge the accused to attempt to procure a pretrial agreement or to plead guilty without such an agreement, a full performance by the defense counsel of his duty to safeguard the interests of the accused may, in a particular case, require him to recommend that one or the other of such courses of action be taken. However, in no instance should an accused who indicates that he believes himself innocent of the offenses charged be permitted to enter a plea of guilty thereto.

If it is the desire of the accused that the defense counsel attempt to procure an agreement with the convening authority, the defense counsel is obliged to see that the accused's wishes are conveyed to the convening authority. When the convening authority exercises general court-martial jurisdiction, the desire of the accused to enter into a pretrial agreement involving a plea of guilty usually will be made known to the staff judge advocate who will take proper action and notify the defense counsel of the convening authority's decision. The accused should be apprised fully of the reaction of the convening authority to any proposals made on behalf of the accused. The defense counsel should not permit the accused to submit any proposal until all the terms of the proposed agreement have been fully explained to the accused and the latter has made an informed and unqualified request that such proposal be prepared and submitted. The

defense counsel must abide by the final decision of the accused in the matter of pleas.

f. Rights of the accused as a witness.

(1) *General.* Prior to the trial, the defense counsel should advise the accused of his right, in an appropriate instance, to testify for a limited purpose upon certain interlocutory questions, his right (as to each offense charged) to remain silent or to testify under oath in his own behalf, and his right, if he is convicted, to testify and to make an unsworn statement as to matters in extenuation or mitigation prior to being sentenced. Explanations of these rights will be found in appendix 8*a* of the Manual. For a discussion of the alternatives open to the accused, see paragraphs 75*c*, 140*a*, 148*e*, and 149*b* of the Manual.

Counsel should consider the various courses of action open to the accused before advising him how to exercise his rights as a witness. Each case should be considered individually. What may be advisable in the case of one accused may not serve the best interests of another. If an accused is charged with several offenses, consideration should be given to the advisability of testifying as to one or more, but not to all, of the offenses. A tentative decision that the accused will or will not testify should be made prior to trial, but the final decision should be made only when the time arrives for the accused to make his choice in court. It may be necessary to change the tentative decision because the expected testimony of a witness may not have been weighed properly before trial or may not have developed as expected.

(2) *Testifying for a limited purpose.* There are a number of occasions in trials by courts-martial where it may prove advantageous for the accused to testify on matters not bearing on the issue of his guilt or innocence of any offense for which he is being tried. Most frequently, such limited testimony is useful in contesting the admission of a particular item of prosecution evidence. For example, such testimony may be offered to show that a confession or admission was not voluntarily made or that a search or seizure was unlawful. In such cases, if the accused testifies on direct examination only as to matters not bearing on his guilt or innocence of any offense of which he is being tried, he may not be cross-examined on the issue of his guilt or innocence. His cross-examination will be limited to the issues concerning which he has testified and to his credibility. Thus, if it is decided that the accused will testify for a limited purpose, the defense counsel must instruct the accused carefully as to the scope of the testimony

he may give on the direct examination without subjecting himself to cross-examination on the question of guilt or innocence. In rare cases, the testimony of the accused, although intended to bear only upon matters not touching upon his guilt or innocence, will be so closely connected with the issue of his guilt or innocence that the accused will have great difficulty in limiting his direct testimony to matters other than his guilt or innocence. In determining whether to testify for a limited purpose in such a case, the accused must weigh the probable value of his limited testimony against the probable injury that will result if he opens up the cross-examination to matters affecting his guilt or innocence.

(3) *Testifying on the general issue.* Before advising the accused whether he should testify on the general issue of his guilt or innocence of a particular offense, the defense counsel should consider such factors as the expected evidence against the accused, his mental capabilities, his personal appearance and general demeanor, and whether his testimony would materially aid the defense, would accomplish nothing, or would adversely affect the defense. The accused should be informed of the probable extent to which he will be cross-examined in the event he testifies. He should be warned that it will be harmful to his case if he is discovered "stretching the truth." He should know the penalties for falsification in judicial proceedings (Art. 131). If it appears to the defense counsel that the accused can contribute evidence in support of his defense to a particular offense charged, he may be advised to testify as to that offense. A decision to testify is clearly indicated when the prosecution is able to establish only a *prima facie* case and the accused is able to refute a part or all of the testimony against him in a convincing manner. However, if the accused is the type of individual who may become confused when examined, an erroneous impression may be created in the minds of the members of the court by his testimony and demeanor. In cases in which the accused will take the stand to testify, it should be made clear to him that he will be most effective if he tells a straightforward and honest story when he testifies. To this end, the defense counsel can aid the accused by a patient and thorough pretrial review of the testimony he will give on direct examination. During this interview, the defense counsel should follow the proposed direct examination by an exhaustive cross-examination of the same kind the accused probably will receive if he takes the witness stand. This pretrial preparation of the accused should be conducted, not for the purpose of coloring the ac-

cused's testimony, but to insure that such testimony is presented clearly, concisely, and logically to the court. The exhaustive pretrial cross-examination is desirable in every case, for it often determines whether the accused should take the witness stand.

(4) *Right to remain silent.* If his pretrial consideration of the evidence, together with his pretrial interview of the accused, has convinced the defense counsel that any testimony which the accused could give would damage the defense, the defense counsel and accused should again discuss his right to remain silent. If the defense counsel is convinced that the accused's potential testimony would be damaging, the accused should be advised that the court might reach the same conclusion after hearing his testimony. Should the accused testify before findings, there is always the possibility that by an admission made on direct or cross-examination he may supply a missing item of proof which the prosecution could not otherwise have placed before the court.

The accused, rather than the defense counsel, must make the final decision as to whether he will testify or remain silent.

(5) *Matters in extenuation and mitigation.* If findings of guilty have been reached and formally announced, the defense has the opportunity to present matters in extenuation and mitigation of any offense of which the accused has been found guilty. See paragraphs 75*c* (3) and (4) of the Manual for a detailed discussion of extenuating and mitigating circumstances. In many cases, especially those in which the accused has pleaded guilty, the defense counsel can render his most valuable service to the accused at this stage of the trial. There should never be an occasion, however, for presenting at this time matters which amount to legal justification or excuse for an offense, as such matters should have been presented prior to the findings if the defense counsel has properly discharged his responsibilities to the accused. Matters in extenuation and mitigation may be introduced into evidence in the regular manner or by means of affidavits or other written statements. See paragraph 146*b* of the Manual. The accused may testify under oath, make an unsworn statement, or do both, but he may not file an affidavit executed by himself. The unsworn statement may be made by the accused personally or through his counsel, or it may be presented in part by the accused and in part by his counsel. The statement may be oral, in writing, or both. The prosecution will not be permitted to cross-examine the accused on an

unsworn statement, but it may rebut by evidence any assertions of fact contained in the statement. See paragraph 75*c*(2) of the Manual. When the accused testifies or makes an unsworn statement in extenuation or mitigation, he does not risk the possibility that he may supply an item of proof missing from the prosecution's case, for his testimony or unsworn statement may not be considered by reviewing authorities in determining whether the findings of guilty are correct.

The defense counsel should explain to the accused his rights in this respect, and plans should be made for presenting matters in extenuation and mitigation, if any, in the event of a conviction. No matter how diligent the defense counsel has been in protecting the accused's rights prior to findings of guilty, he will have failed to fulfill his duty, not only to the accused but to the court as well, if he does not present all available and admissible matter in mitigation and extenuation. In every case, therefore, the defense counsel should determine whether extenuating and mitigating circumstances exist and, if so, how they best may be presented to the court. After considering the accused's veracity, capabilities, appearance, and attitude, the defense counsel should recommend to the accused whether he should take the witness stand and testify under oath, make an unsworn statement personally or through counsel, or remain silent.

65. FINAL PREPARATION OF CASE FOR TRIAL

a. General. The essential elements of the offenses charged should be studied carefully once more to determine the proof necessary to establish each offense. The defense counsel must determine at this point what his "theory" of defense will be, bearing in mind the right of the accused to make the final decision in this matter. This "theory" will be reflected in his opening statement, his cross-examination of opposing witnesses, his presentation of the defense case, and in his closing argument. It will involve a determination of what defense witnesses are to be called, the order in which they will appear, and the matters about which they should testify. Based on the pretrial interviews, a tentative decision must be made as to which prosecution witness or witnesses will be cross-examined. In addition, the defense counsel should decide tentatively whether any motions are to be made, whether the case is sufficiently complex to warrant an opening statement, and whether a final argument appears to be advisable.

b. Selection of defenses.

(1) *General considerations.* It may appear from the facts surrounding an offense charged that more than one possible

defense exists. If so, the defense counsel, subject to the approval of the accused, must determine whether any one defense should be used to the exclusion of others, keeping in mind that the interests of the accused may be served better if the defense is concentrated on the weakest point of the prosecution's case. A haphazard attack against every point of the prosecution's evidence sometimes serves to obscure a strong and legitimate defense. Thus, in a case involving the theft of a motor vehicle, if the prosecution's evidence clearly establishes the wrongful taking, the value, and the ownership of the vehicle, but the evidence showing the intent permanently to deprive the owner of his property is rather weak, it probably would be better for the defense counsel to attack the evidence as to the accused's intent and let the other prosecution testimony go unquestioned. A particularly convincing argument might be made in such a case if the defense counsel can say in his final argument:

> The defense admits that the accused took the car, that it was the property of John Doe, and that it has a value of more than $50. We don't question those facts, and we never sought to deny them. We contend, however, that the accused did not have any intent permanently to deprive the owner of his property. Our contention is clearly established by the testimony of * * *, etc.

(2) *Identity of the accused.* If proof of the identity of the accused as the perpetrator of the offense will depend upon open-court identification and it appears that the witnesses may have difficulty in identifying the accused, the defense counsel might plan to have other persons similar to the accused in appearance sit beside him at the counsel table so that the open-court identification will not be based on the fact that the accused is the only enlisted person in the courtroom. The court will readily permit this practice upon the request of the defense counsel.

As an alternative, if the spectators at the trial are dressed in the same fashion as the accused, the defense counsel may request that the accused be permitted to sit with the spectators during the open-court identification proceedings. If the witnesses have had one or more opportunities to identify the accused prior to trial (for example, at the time of the formal investigation of the charges), it is not likely that they will experience any difficulty in identifying the accused in the courtroom. In such a case, it is better for the defense not to utilize one of the foregoing procedures, as an identification made under such conditions is extremely convincing.

(3) *Evidence of the accused's character.* Although the defense may not introduce evidence of the character of the accused

for truthfulness in order to enhance his credibility as a witness unless the prosecution attempts to impeach him, it may always offer evidence of the accused's general good character and military record to show the probability that he is innocent. Evidence of this nature is particularly valuable if the accused is charged with an offense requiring proof of a specific intent, such as in the example given in (1) above (MCM, 138*f*). In determining whether evidence tending to show that the accused has a good character should be presented, consideration must be given to the possibility that the prosecution may introduce evidence in rebuttal, tending to show that the accused has a bad character. See 10.

*c. **Securing attendance of witnesses.*** At the earliest possible moment prior to the trial, the defense counsel should advise the trial counsel of the names and addresses of the witnesses he desires to have subpoenaed to testify at the trial. See 35. If the trial counsel contends that the testimony requested of a witness by the defense counsel is not material or necessary or that a deposition would serve fully the purpose and at the same time preserve the rights of the accused, the question of whether the witness should be subpoenaed to appear personally may be referred to the convening authority or to the court, depending on whether it is raised prior to or at the trial (MCM, 115*a*). As a general rule, however, the trial counsel and the defense counsel, in the spirit of mutual cooperation, usually will be able to resolve any difficulties they may encounter in this regard without resort to a decision by either the convening authority or the court. See 35*e*.

*d. **Depositions.*** If a material defense witness is not expected to appear and testify in person, the defense counsel should arrange for the taking of a deposition. In this connection, see 22.

*e. **Continuances.*** If for reasonable cause the defense counsel will not be ready to try the case on the date set for the trial or is unable to proceed during the course of the trial, he should request a continuance. If the court is in session, the request for continuance should be made to the court. If the court is not in session and the defense counsel desires a substantial delay in the trial of the case, he should present a written request, signed by the accused or himself, through the trial counsel, to the convening authority. The request should include the reasons for the continuance and should state the date when the defense counsel believes he will be ready to proceed with the trial. A sufficient reason for the granting of a delay or continuance may be the illness or temporary unavailability of a material witness, the need to take a deposition, or that additional time is required for the preparation of the case in view of its complicated nature. As a practical matter, the trial counsel and the defense counsel usually can agree upon

a mutually satisfactory date of trial. For a discussion of the subject of continuances, see paragraph 58 of the Manual.

*f. **Trial notes.***

(1) *General.* The defense counsel now will be ready to prepare his trial notes. These are nothing more than a simple outline of his plan of procedure. In these notes, the defense counsel should outline in proper sequence those things he will do as the trial progresses, as far as it is possible for him to anticipate them prior to trial. For example, when the defense counsel interviews the witnesses for the prosecution, he will have tentatively concluded which witnesses should be cross-examined and, to some extent at least, will have decided the subject of such cross-examination. Consequently, the trial notes should contain the name of the witnesses, what, in general, their testimony on direct examination will be, and a brief resume of the proposed subject of cross-examination.

(2) *Challenges.* The trial notes should indicate whether any challenges, either for cause or peremptory, are to be made. If no challenges are planned, this fact should be indicated. On the other hand, if it has been decided to assert a challenge for cause, the notes should show the name of the individual affected and the ground upon which the challenge will be based. An outline of the subject matter of the anticipated challenge should be inserted in the trial notes under the name of the individual affected. A member against whom it is anticipated a challenge for cause will be made may be placed under oath during the examination. See paragraph 62*b* of the Manual. See also appendix 8*a* of the Manual at page 506. However, it is not necessary to place the member under oath.

When it is deemed advisable to challenge a particular member peremptorily, his name should be included under this general heading in the trial notes.

(3) *Motions to dismiss.* The trial notes should indicate any motions that the defense counsel has decided to make. For example, investigation may have revealed that the accused has been punished under Article 15 for a minor offense charged. It, therefore, would be appropriate for the defense counsel to move for a dismissal of the affected charge and specification on the ground of former punishment (MCM, 68*g*). The motion should be written out in full and incorporated in the trial notes so that it can be stated clearly to the court at the proper time.

Appropriate references to the Manual for Courts-Martial or other legal authority in support of the particular motion should be incorporated in the trial notes for ease of reference

when presenting the proposition to the court. The evidence which the defense counsel intends to offer in support of the motion should be outlined. For a discussion of motions to dismiss, see pargaraphs 67 and 68 of the Manual.

(4) *Pleas.* The next step in the trial notes concerns pleas. At this point, the trial notes will indicate for each charge and specification contained on the charge sheet whether the accused will plead not guilty, guilty, or guilty of a lesser included offense. When the accused intends to plead guilty to a lesser included offense, the defense counsel should prepare the proposed plea in writing and insert it in full in his notes so that it may be read accurately into the record at the arraignment.

(5) *Prosecution witnesses.* The trial notes should contain the names of all prosecution witnesses, and a summary of their expected testimony. The weak points in the expected testimony should be noted, and any proposed cross-examination on such points should be outlined.

(6) *Motion for finding of not guilty.* If it appears from the defense counsel's pretrial investigation of the case that the prosecution's evidence may fall short of establishing a *prima facie* case against the accused, the defense counsel should consider making a motion for a finding of not guilty. Although this decision must of necessity be contingent upon the evidence actually placed before the court at the trial, the defense counsel should prepare a proposed motion for use at the trial. Legal authorities in support of the motion also should be noted. See paragraph 71*a* of the Manual.

(7) *Opening statement.* For a discussion of this matter, see 41. If the defense counsel decides to make an opening statement, it should be incorporated verbatim or outlined in sufficient detail in the trial notes to facilitate its presentation to the court.

(8) *Witnesses and documentary evidence for the defense.* The defense counsel should list in his trial notes the names of all defense witnesses; he should also list any documentary evidence applicable to the case. Witnesses should be listed in the order in which they will testify, and reference to documentary evidence should be made at the point where it is planned to identify and introduce it in evidence.

The testimony of each witness should be outlined in narrative form so that the counsel easily may interrogate the witness and be certain that essential portions of the testimony are not inadvertently omitted. When it is desired to lay a foundation by means of the testimony of a particular witness

for the subsequent introduction of documentary evidence, a reference should be inserted in the notes as a reminder to have the exhibit marked for identification.

If the accused is to take the witness stand to testify, either generally or only for a limited purpose, the testimony he will give should be outlined carefully. When the testimony of the accused is to be restricted in scope, the trial notes will provide an effective means of insuring that the accused's testimony does not go beyond the scope contemplated.

(9) *Final argument.* At the time the defense counsel prepares his trial notes, he will have some idea of the strong points of his case and the weak points of the prosecution's case and will be able to outline a tentative final argument. Developments at the trial may require changes in the argument before it is presented, but the tentative argument can be used in most cases as the basis for the revised argument. The counsel should remember, however, that his final decision of whether he will make an argument should await the end of the prosecution's argument or the statement by the prosecution that no argument will be made.

If the defense counsel intends to make an argument on the sentence in the event the court finds the accused guilty, he should include in the trial notes an outline of his proposed remarks.

(10) *Instructions.* See 44. The trial notes should include a statement of the elements of each principal offense charged and of each lesser included offense which it is anticipated will be in issue under the evidence. The trial notes should include a statement of the law applicable to any affirmative defenses which may be in issue and the definitions of words used in the instructions which have special legal connotation. In addition, the trial notes should include any instructions which the defense counsel feels should be given to the court during the presentation of the evidence, as well as any additional instructions which should be included in the final instructions to the court. It is good practice to have the elements of the offenses and any other instructions typed in triplicate on pages separate from the other trial notes so that, if necessary, they may be furnished to the law officer (president of a special court-martial) as proposed instructions. As a practical matter, the defense counsel may confer with the trial counsel in advance of trial to determine there are any instructions both agree should be given to the court. If this practice is followed, the defense counsel often will find it unnecessary to prepare cer-

tain instructions because those the trial counsel will have available as proposals are acceptable.

(11) *Matter in extenuation or mitigation presented after findings of guilty.* If the accused has previous convictions that are not admissible, the defense counsel should notify the trial counsel before trial. In order to avoid prejudice to the accused, the trial counsel should be requested to secure a DD Form 493 that reflects only admissible previous convictions. See paragraph 75*b* of the Manual for a discussion of evidence of previous convictions and rules pertaining to their admissibility.

Any material discrepancies in the personal data of the accused shown on page one of the charge sheet also should be reported to the trial counsel before trial. Such discrepancies should be noted in the trial notes so that they may be brought to the attention of the court if necessary.

If the accused is to take the witness stand to testify in his own behalf or for the purpose of making an unsworn statement, a summary of his testimony or statement should be outlined as in the case of other witnesses. In some cases, it may be desirable for the defense counsel to make an unsworn statement on behalf of the accused. In this event, the defense counsel should incorporate in the notes the statement that he will make to the court. See paragraph 75*c*(2) of the Manual.

The defense counsel should secure a detailed summary of the accused's civilian and military history so that such data will be readily available if the accused is found guilty. Often, the only practicable means of presenting this material is through the testimony of the accused or by means of an unsworn statement. It is of utmost importance, particularly for future clemency purposes, that all favorable aspects of this background material be presented to the court. For example, the court may give consideration to the fact that the accused had a long period of front line duty before he misbehaved before the enemy. Also, such information will assist clemency and parole authorities. Therefore, the trial notes should contain a reference to this material, and it should be presented at the proper time. Defense counsel should never underestimate the effect of former good character of the accused or the willingness of a unit commander to take the accused back into the unit.

(12) *Visual aids.* Where the use of visual aids such as charts, maps, or diagrams will be beneficial to the presentation of the case, such material should be prepared prior to trial. The

trial notes should contain a reference to the diagram, map, or chart at the point where it is proposed to identify and introduce it in evidence. In this connection, see 19.

66. INSTRUCTIONS TO ACCUSED.

*a. **Conduct in court.*** Prior to trial, the accused should be instructed carefully by the defense counsel as to the manner in which he should conduct himself during the trial. This instruction is particularly important if the accused is to take the stand to testify or to make an unsworn statement. He should be cautioned to exhibit a respectful attitude toward the court and to maintain a military bearing at all times. It is not difficult to visualize the favorable impression this will create in contrast to that made by an accused who presents a sloppy, indifferent, or insolent attitude toward the court and the proceedings.

*b. **Appearance.*** The defense counsel should assure himself by conferring with the accused, his commanding officer, and/or the confinement officer, if appropriate, that the accused will present a good personal appearance in court. The accused should have a haircut, his brass and shoes should be polished, and his uniform should be pressed. Any decorations or service ribbons which he may have been awarded should be worn at the trial. See paragraph 60 of the Manual.

*c. **Testimony.*** If the accused is to testify, he should be instructed carefully about the proper method of answering questions asked by either the defense counsel, the trial counsel, the law officer, or members of the court. He should be cautioned to "think before he speaks." A slight pause for reflection may prevent a costly misstatement, and when the accused is under cross-examination by the trial counsel or is being examined by the law officer or members of the court, a slight pause will give the defense counsel the opportunity to interpose a timely objection when that action is proper. However, the accused should avoid creating the erroneous impression that he is being prompted by the defense counsel. He is on his own when he is on the witness stand. Care in conducting the pretrial practice cross-examination of the accused will prevent his being surprised by the questions asked him during the trial. In addition to the foregoing instructions, the accused should be impressed with the importance of answering only those questions that are put to him. He should neither volunteer information nor give the court the impression that he is trying to avoid giving full and truthful answers to each question.

*d. **Behavior in court.*** The defense counsel will advise the accused of the manner in which he is to behave in court. For example, the accused should be advised that he will salute the president of the court if he takes the stand as a witness, and that he should stand whenever he is addressed by the court, except when he is on the witness stand.

Section III. DUTIES DURING TRIAL

67. PROCEDURE IN GENERAL

As in the case of the trial counsel, the defense counsel should utilize the procedural guide for trials before general and special courts-martial set forth in appendix 8*a* of the Manual. This will insure compliance with the necessary formalities in a trial by court-martial.

68. CHALLENGES

a. ***General.*** Inasmuch as the prosecution will ordinarily make any challenges for cause and any peremptory challenge in that order before the defense makes its challenge, it is entirely possible that a member objectionable to the defense will be challenged by the prosecution. In the event, however, that such is not the case the defense counsel will assert in open court the grounds for challenge believed by him to exist in the case. If he desires to remove a certain member from the court, he should consider the possibility of successfully challenging him for cause before exercising the peremptory challenge.

b. ***Example.*** At the trial of Private Armstrong on a charge of assault and battery, Captain Hess, a member of the court, was challenged for cause by the defense on the ground that he had a direct personal interest in the result of the trial. Captain Hess was examined under oath by the defense counsel and testified that Sergeant Foster, the alleged victim of the assault, had been serving in a superior manner as his first sergeant for a period of approximately eleven months; that he knew Foster intimately; and that he never had any reason to question his conduct either on or off duty. In answer to questions of trial counsel, Captain Hess testified that he had not discussed the case with Foster; that he had no opinion as to the guilt or innocence of the accused; and that he felt that he could serve fairly and impartially as a member of the court. As no other evidence on the matter was presented, the court was closed to determine the issue. If the challenge for cause was not sustained, defense counsel could then challenge Captain Hess peremptorily.

69. ARRAIGNMENT PROCEDURE

a. ***General.*** This subject is discussed in 40.

b. ***Action taken when charges not timely served.*** In a trial by general court-martial during time of peace the accused cannot be tried over his objection if less than 5 full days (3 days if a special court-martial) have elapsed between the date of service of charges and the date of trial. If such an objection is properly made, the law officer (president of a special court-martial), after ascertaining when the charges were served upon the accused, should continue the case until the 5-day period (or 3-day period) has elapsed or for any longer period of time which the law officer (president of a special court-martial)

deems reasonably necessary for an adequate preparation of the defense. In this connection, defense counsel should inform the law officer when he will be prepared to proceed with the trial.

70. MOTIONS

*a. **Motions raising defenses and objections.*** For a discussion of this subject, see chapter XII of the Manual. Examples of motions are set forth in appendix IV.

*b. **Motion for finding of not guilty.*** Ordinarily, a motion for a finding of not guilty will be made at the close of the prosecution's case. It may be directed to some or all of the charges and specifications. Before a motion for a finding of not guilty is made, the defense counsel should assure himself that a serious question exists as to the sufficiency of the proof presented by the prosecution. If the prosecution has produced substantial evidence which, together with all justifiable inferences stemming therefrom, as well as all applicable presumptions, fairly tends to establish every essential element of an offense charged or included in any specification to which the motion is directed, the motion will not be granted (MCM, 71*a*). Consequently, unless there is a sound basis upon which to question the sufficiency of the evidence presented by the prosecution, the motion should not be made. Another point to consider is that since the defense can be required to specify the particular deficiency in the prosecution's case such a motion may call the attention of the prosecution to matters inadvertently omitted. As the court usually will permit the prosecution to reopen its case, the motion may serve only to assist the prosecution in presenting its full case.

When a motion for a finding of not guilty is made at the end of the prosecution's case and is denied, the defense counsel may present evidence on behalf of the defense. Whether to proceed with the defense case is a question to be resolved only after a thorough consideration of the alternatives. If the defense counsel does present evidence on behalf of the defense, he does so at the risk of curing any defects in the prosecution's case and thereby minimizing or eliminating any possibility that the findings of guilty will be disapproved by the reviewing authorities because of an erroneous ruling on the motion. On the other hand, if no defense evidence is presented and the ruling is sustained by the reviewing authorities, the accused will lose the advantage of whatever favorable evidence may have been available.

*c. **Motions for mistrial.*** Although not expressly provided for by the Code or the Manual, a motion for mistrial has been approved by the Court of Military Appeals for use in court-martial proceedings. It is appropriate when error has been committed which is manifestly prejudicial and cannot be rendered harmless by cautionary instructions. Such error might arise in any of the following situations:

(1) where inadmissible testimony or other evidence of a highly prejudicial nature is presented to the court; (2) where an improper disclosure or comment is made by a member of the court; (3) where counsel, during argument or otherwise, prejudicially exceeds the bounds of fair comment; or (4) where the law officer departs from his role of impartial judge and through partisan comment or questioning unduly influences the members of the court. A motion for mistrial may be made at any time during the trial. It is an interlocutory matter addressed to the sound discretion of the law officer or the special court-martial president. Although declaration of a mistrial does not end proceedings against the accused on the charges involved, it does terminate the immediate proceedings and should be considered only as a last resort. Thus, if the prejudicial effect of an improper comment can be eliminated by an instruction to the court to disregard the comment, a motion for mistrial should be denied. However, when it appears that instructions cannot render the error harmless and that the accused is not being given or cannot be given a fair hearing, the law officer (president of a special court-martial) should entertain a motion for mistrial or declare a mistrial on his own motion.

71. PLEAS.

The accused may plead guilty, not guilty, or not guilty but guilty of a lesser included offense (MCM, 70*a*). A plea of not guilty or guilty will be regarded, in the absence of a motion to grant appropriate relief, as a waiver of any objection which must be raised by such motion before plea, including any objection based on misnomer of the accused whether under an alias or otherwise. By standing mute, an accused does not waive any objections otherwise waived by a plea. Technically, a plea of not guilty amounts to a demand by the accused that the prosecution assume the burden of proving his alleged guilt beyond a reasonable doubt. Legally and morally, an accused has the right to plead not guilty in any case.

The accused may plead guilty to any offense except a capital offense, that is, one for which the court may legally adjudge the punishment of death upon a finding of guilty.[8] After a plea of guilty, the court properly may enter findings of guilty to the charges and specifications as to which the plea is made without the introduction of any proof by the prosecution.[8] Legally, a plea of guilty means that the accused admits every element of the offense to which the plea relates. Therefore, an accused should never plead guilty to an offense unless he actually committed it.

Even though he enters a plea of guilty, the accused may introduce evidence in extenuation and mitigation and the prosecution may in-

[8] It is Air Force policy that the prosecution will establish a prima facie case as to each offense charged regardless of a plea of guilty and notwithstanding a request by the defense that no evidence be presented in view of the guilty plea. See AFM 110-8.

troduce evidence in aggravation before the court closes to consider the sentence. Whenever an accused, at any time during the course of the trial, makes a statement to the court inconsistent with his plea of guilty, the court will make such explanation and statement to the accused as the circumstances may require. If, after such explanation, it appears to the court that the accused in fact entered the plea improvidently or through lack of understanding of its meaning and effect, or if the accused does not voluntarily withdraw his inconsistent statement, the trial will proceed as if he had pleaded not guilty.

72. OPENING STATEMENT

The defense counsel may make an opening statement; normally this will be done at the conclusion of the prosecution's case and before any defense evidence is introduced. The purpose of the opening statement is to explain to the court-martial the issues to be tried. It should encompass a statement of the case and evidence and should emphasize the defense theory of the case. Defense counsel has a right to state in his opening statement the facts which he intends to prove, but he may not discuss any facts which he cannot prove by competent evidence. He has discretion to ascertain whether an opening statement is necessary. If the defense counsel determines that a statement would be helpful to the presentation of his case, he should prepare a detailed outline thereof prior to trial in the interests of clarity and conciseness. See 41.

73. EXAMINATION OF WITNESSES—EVIDENCE

The material found in chapter 2, dealing with the examination of witnesses, the basic rules of evidence, the rules relating to depositions and 42 through 48 concerning instructions, is applicable to defense counsel and should be referred to prior to trial.

74. OBJECTIONS

Objections to evidence offered by the prosecution or by the court should be made with care. Some defense counsel indulge in the practice of interposing incessant objections, many without merit, to questions asked by opposing counsel or the court or to answers given by witnesses. This practice has a tendency to weaken the force of meritorious objections. It also may give the court the impression that the defense counsel is trying to withhold pertinent facts. Many questions and answers may be technically improper; however, if they do not harm the accused's case, the practical thing to do is to make no objection. On the other hand, the defense counsel must be alert to object to all improper matters which are harmful to the accused's interests, especially when the failure to object may amount to a waiver of the accused's rights. Such a waiver will preclude the accused from questioning the legality of the admission of such evidence at the time of the appellate review of his record of trial. In this con-

nection, see the rules stated in various paragraphs of chapter XXVIII of the Manual indicating when a failure to object to offered evidence may be treated as a waiver of the objection. In particular, see paragraph 154*d* of the Manual. The accused's rights on appellate review will be preserved by a timely objection coupled with a statement of the proper grounds for the objection. On many occasions, in addition to making a timely objection, the defense counsel must be prepared to present evidence or legal authorities in support thereof. For example, if the defense counsel objects to the admission of the purported authenticated extract copy of a morning report on the ground that the person who signed the attesting certificate was not the official custodian of the report from which the entry was extracted, the defense counsel must be prepared to show by competent evidence that the person who signed the attesting certificate was not, in fact, the official custodian or his deputy or assistant. In this connection, see paragraph 143 of the Manual.

75. FINAL ARGUMENT

The defense counsel should always make a final argument when something concrete and of benefit to the defense will be accomplished. Counsel who fails to make an argument in an appropriate case deprives his client of the education, training, and experience of counsel to which the client is entitled. In complicated cases where there is conflicting evidence in the record, counsel may assist the court to resolve doubt or conflict by a brief and forceful argument. Before arguing, counsel should generally make a careful detailed outline of what he plans to say. Some trial counsel deliberately waive the prosecution's opening argument in order to receive the benefit of defense's argument before commenting on the case. If this procedure is followed by the trial counsel, defense counsel may decide not to make any argument to the court and thereby deprive counsel of the opportunity to sum up and emphasize the prosecution's case before the court closes. See 51.

76. PRESENTENCING PROCEDURE

a. ***General.*** When an accused has been found guilty, the procedure outlined in 52 is followed. Regardless of whether any evidence was offered by the defense on the issue of guilt or innocence, the accused may present matter in extenuation or mitigation before the court closes to vote on a sentence. In this connection, the accused may testify under oath or remain silent. Additionally, he may make an unsworn statement, or his counsel or both of them may do so. The making of an unsworn statement does not subject the accused to cross-examination, but the prosecution may present evidence in rebuttal.

b. ***Matters in extenuation and mitigation.*** Matter in extenuation of an offense serves to explain the circumstances surrounding the

commission of the offense and generally would have been properly admissible on the merits of the case.

Matter in mitigation is designed to lessen the punishment which may be imposed for an offense. Accused may show specific acts of good conduct in mitigation; however, the government may then show specific acts of misconduct. Accordingly, defense counsel should consider whether such rebuttal evidence would outweigh the effect of any acts of good conduct which he may introduce. Furthermore, accused may not attack the findings in the presentencing procedure by labeling testimony or evidence as evidence in mitigation. This does not preclude introduction of evidence of circumstances surrounding the offense tending to minimize the degree of criminality.

c. ***Responsibility of defense counsel.*** Defense counsel should be alert to take full advantage of his opportunity to present matter for the court's consideration in reaching an appropriate sentence. The selection of these matters is left entirely to the accused and his counsel. He should, however, always attempt to find some good matters to offer. Thus, counsel may present documents, letters, witness reports, affidavits, and an unsworn statement of the accused. He can write to the parents of accused, requesting that they obtain letters from clergymen and other prominent citizens in accused's hometown community. Affidavits from commanding officers pertaining to accused's good character are also particularly appropriate. He can extract favorable materials from the accused's military records. Failure to do these things may result in a substantial disservice to the accused in a particular case.

Section IV. DUTIES AFTER TRIAL

77. CLEMENCY

After the accused has been found guilty and sentenced, the defense counsel may ascertain the views of the members of the court concerning the submission to the convening authority of a recommendation for clemency. The defense counsel may invite the attention of the members of the court to those matters which appear to warrant a recommendation for clemency and state the specific clemency desired. For example, the court may be asked to recommend to the convening authority that a punitive discharge be suspended.

The recommendation for clemency will never be based upon a doubt as to the guilt of the accused. See paragraphs 48*j* and 77*a* of the Manual. Nor should it be inconsistent with the sentence of the court so as to impeach the sentence.

If any members of the court are agreeable, the defense counsel should prepare a letter of clemency addressed to the convening authority, obtain the signatures of interested members, and submit the

letter to the trial counsel for attachment to the record of trial prior to the time it is forwarded for review. In the event no members of the court desire to recommend clemency in the case, it is proper for the defense counsel to prepare his personal request for clemency and forward it in the manner described above.

78. EXAMINATION OF RECORD OF TRIAL

After the record of trial has been typed and approved by the trial counsel, the defense counsel should be given an opportunity to examine it. The defense counsel should assure himself that the record correctly reflects all of the proceedings before the court. If the defense counsel believes the record correctly reflects the proceedings, he should sign the authentication sheet of the record of trial. If he notes any discrepancies between the record and what actually occurred at the trial, he should call the errors to the attention of the trial counsel. If the defense counsel believes the record does not correctly reflect the proceedings and the trial counsel is unwilling to change the record in accordance with his suggestion, the defense counsel should make a note of the discrepancies so that he can mention them in his appellate brief. (MCM, 48*j*(2)). In this connection, see paragraph 82*e* of the Manual. If the defense counsel is absent and is not able to examine the record of trial, an assistant defense counsel who was present during the proceedings may perform this duty for him.

79. APPELLATE DUTIES

a. General. A defense counsel's duties of representation do not end with the court-martial findings and sentence. He should cooperate in every respect with the accused and appellate defense counsel, if appointed or retained, in protecting the rights of the accused after trial and until completion of the appellate process.

b. Interviewing the accused. After an accused has been found guilty and has been sentenced, the defense counsel should make arrangements to interview him. Often he will find that the accused is discouraged at the result of the trial. The Army, Air Force, and the Federal penal institutions have a real interest in the rapid rehabilitation of a prisoner for restoration to duty or return to civilian life.

The defense counsel can aid materially in many cases in this rehabilitation process by assisting the accused to adjust himself mentally and morally for the future. He should advise the accused of his appellate rights at the proper time (see 79*e*), of the rehabilitation and clemency programs, and of the benefits the accused may achieve by his exemplary behavior while in confinement. Above all, he should try to encourage the accused to face the future realistically. A few words of encouragement and cheer at this time, especially if he is young and inexperienced, may do a great deal to strengthen the ac-

cused's morale and thus enable him to rehabilitate himself rapidly and successfully.

*c. **Disposition of the accused's copy of record of trial.*** The defense counsel always should explain to the accused that he should safeguard the copy of the record of trial which will be furnished him by the trial counsel. Ordinarily, the accused should retain possession of the record until all appellate review processes have been completed so that counsel who are called upon to advise and assist the accused in the exercise of any of his appellate rights may examine the record. Thereafter, the accused should mail the copy to his family or relatives, instructing them to safeguard it for possible use in future legal or administrative proceedings. If the accused retains civilian counsel to represent him during the appellate proceedings, he should forward his copy of the record to such counsel.

*d. **Appellate brief.*** In any case involving a sentence, the defense counsel may forward to the convening authority, for attachment to the record of trial, a brief of such matters as he feels should be considered on behalf of the accused on review. Such a brief should be filed promptly so that it may be considered by the convening authority at the time of his initial review of, and action on, the record of trial. See paragraph 48*j*(2) of the Manual. The contents of this brief may be incorporated in the assignment of errors in any case in which the accused has requested that counsel represent him before a board of review. The brief may include an assignment of errors committed at the trial, matters relating to clemency, or objections to the contents of the record of trial.

*e. **Advising accused of appellate rights.*** The defense counsel is required to advise any accused who has been convicted by a general or special court-martial of his appellate rights. The principal appellate right with which the trial defense counsel is concerned is the accused's right to counsel before a board of review in the event his case is reviewed by a board of review.

Knowledge of the action taken by the convening authority on the findings and sentence of the court-martial is important in the accused's decision to request or forego representation before a board of review, and, therefore, advice given immediately after trial and before the staff judge advocate's review and the convening authority's action can be premature. However, the request for appellate representation before a board of review should be filed within 10 days after the action of the convening authority.

In discussing the accused's right to appellate representation before a board of review, the defense counsel should advise the accused fully and specifically of his rights so that he can make an intelligent decision in regard to the appellate review of his case.

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In all cases, it is for the accused to decide whether appellate representation will be requested. It should be pointed out to the accused that his request for appellate representation may be accompanied by an assignment of errors or other matters which the appellate counsel can urge as grounds for relief. Trial defense counsel should assist him in assignment of such errors.

If the accused requests appellate representation, the trial defense counsel will assist him in preparing the request and an assignment of errors or other matters that are to be urged as grounds for relief. A suggested form of request for appellate defense counsel is set forth in appendix XIII. If such form, executed by the accused, is not available, a certificate by the defense counsel to the effect that he advised the accused of his appellate rights should be attached to the record of trial. To insure that the accused is correctly and completely advised of his rights, most commands require the defense counsel to follow a previously prepared form of advice. See appendix XIV. This form indicates that the accused has been advised of his—

(1) Right to representation before a board of review in the event his case is reviewed by a board of review (Art. 70; MCM, 100, 102);

(2) Right to petition the Court of Military Appeals for a grant of review within 30 days after he has been served with a copy of the decision of the board of review (MCM, 101)—unless the case is reviewed by the board of review pursuant to the direction of The Judge Advocate General (Art. 69);

(3) Right to counsel to assist him in preparing his petition to the Court of Military Appeals and during the review of the case by that court if the petition is granted (MCM, 102); and

(4) Right to petition The Judge Advocate General for a new trial in a proper case (MCM, 109, 110).

If the defense counsel concludes that the proper means of securing redress for the accused is a petition for a new trial, he should assist the accused in the prompt preparation and filing of the petition. He is authorized to communicate directly with The Judge Advocate General concerned to obtain information and forms for use in preparing and filing the petition.

Chapter 5

PRETRIAL INVESTIGATION

80. ARTICLE 32 INVESTIGATION

*a. **General.*** No charge may be referred to a general court-martial for trial unless there has been an investigation in accordance with Article 32. The purpose of such an investigation is to inquire into the truth of the matters asserted in the charges, to check the form of the charges and to secure information upon which to determine what disposition should be made of them. In furtherance of these purposes, the investigating officer is charged with conducting a thorough and impartial investigation. In no sense is he an advocate for the Government; rather, he is to gather and evaluate all available facts in arriving at his recommendations for disposition of the case. He is not limited to an examination of the witnesses and evidence specified in the charge sheet. On the contrary, he is bound to examine witnesses presented on behalf of the accused and, where necessary, to extend independently his inquiry as far as may be necessary to ensure a thorough and fair investigation. All witnesses, other than the accused, must be sworn or affirmed before their testimony may be received. The accused may make a sworn or unsworn statement.

At the conclusion of the investigation, the officer must make a report to the authority who directed the proceedings. This report may be either formal or informal depending on the conclusions reached by the investigator. An informal report may be made where it appears that the case will be disposed of other than by reference to a general court-martial. Such a report may be submitted orally, by memorandum, or other suitable means. A formal report is required to be made on DD Form 457 whenever it appears that the case will be disposed of by reference to a general court-martial.

In view of the responsible function of the investigating officer, he should be a mature officer, preferably of field grade or one with legal training and experience. Further, the impartiality required demands that neither the accuser nor any officer who has a direct interest in the case or who is expected to participate in any capacity upon possible trial of the case be designated to perform this duty.

*b. **Advising the accused.*** At the outset of an investigation the accused must be informed of his rights as specified in paragraph 34*b*

of the Manual, including his right to be represented by legally qualified counsel.

81. DUTIES OF COUNSEL AT INVESTIGATION

*a. **General.*** When an officer is designated to represent an accused at the pretrial investigation of charges, his duties are similar to those of the defense counsel at the trial of the case. He must protect the interests of the accused by all legitimate and honorable means and must respect at all times the confidential relationship that exists between the accused and himself.

At the outset of the investigation, counsel should make certain that the accused understands his rights under Article 31. Additionally, accused should be impressed with the importance of a full disclosure to his counsel of the true facts surrounding the offense charged, for without such a disclosure the counsel can be of little assistance to him. In order that the accused will understand that whatever he may divulge to his counsel will not be repeated to others, the confidential relationship that exists between himself and such counsel should be explained thoroughly to him.

When appropriate, the counsel will cross-examine witnesses who appear before the investigating officer.

*b. **Identity of the accused.*** If the identity of the accused as the perpetrator of an offense depends upon the ability of witnesses to recognize the accused, the pretrial counsel should request that the witnesses be required to identify the accused from a lineup of persons similar in appearance to the accused. Otherwise, the ability of the witness to identify the accused as the offender may be based on the fact that the accused is the only person whose conduct is being investigated.

*c. **Presentation of defense matter.*** After the known evidence has been presented and examined, the accused will be given an opportunity to present matter in his behalf. If he desires, he may make a sworn or unsworn statement as to one or more of the offenses charged; he may request the investigating officer to call reasonably available defense witnesses or to secure documentary evidence favorable to the accused. Exactly how far the pretrial counsel should go in presenting defense matter that is unknown to the investigating officer is a question that can be determined only after a careful consideration of the facts in each case. The pretrial counsel should keep in mind that the recommendations of the investigating officer are advisory only; that a presentation of new defense matter at the investigation will not aid the accused unless such matter will cause the dismissal or reduction of the charges to which the new matter relates, or otherwise result in official action favorable to the accused; that, if the charges are referred to trial and the trial counsel knows in advance what defense evidence will be