
MILITARY JUSTICE HANDBOOK

TRIAL GUIDE FOR THE SPECIAL COURT-MARTIAL



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MILITARY JUSTICE HANDBOOK

TRIAL GUIDE FOR THE SPECIAL COURT-MARTIAL

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*This pamphlet supersedes DA Pam 27-15, 30 June 1965, including all changes.

KEY TO REFERENCES

<i>Reference</i>	<i>In open text</i>	<i>In parentheses or similar context</i>
Manual for Courts-Martial, United States, 1969 (Revised edition)	the Manual	(MCM)
An Article of the Uniform Code of Military Justice	Article 38	(Art 38)
A paragraph of the Manual	Paragraph 46 of the Manual.	(MCM 46)
An appendix of the Manual	Appendix 8 of the Manual.	(MCM, app 8)
An appendix of this guide	Appendix C	(App C)
A paragraph of this guide	Paragraph 12	(para 12)

TRIAL GUIDE FOR THE SPECIAL COURT-MARTIAL

SECTION I

PRACTICE AND PROCEDURE

1. Purpose and Scope

a. This pamphlet is intended as a practical trial guide for military judges, presidents, and counsel of special courts-martial. It contains information relating to the duties of these individuals, with particular emphasis on the functions and duties of the president of the court-martial when no military judge has been detailed to the court.

b. It is not the purpose of this guide to answer all questions of procedure or substance which may arise during the trial of a special court-martial. Some of the more commonly encountered procedural and evidentiary problems are discussed in this pamphlet in a very general way and should be of assistance in answering many of the questions presented in the typical special court-martial. It is a truism of the law, however, that each case is decided on its own particular facts. Therefore, when doubtful questions of law and procedure arise during the course of a trial, it may be necessary to obtain comprehensive legal authority. It is initially the responsibility of trial and defense counsel to present the legal authorities they are relying on to support their respective positions. If during the course of a trial a question of law arises that needs further legal clarification, counsel should be given an opportunity to research and present their positions. In appropriate cases, non-lawyer counsel should be encouraged to seek assistance from the judge advocate office of the command. When the military judge, or president in cases where there is no military judge, is satisfied that counsel have adequately presented the pertinent legal authorities, it is then his sole responsibility to rule, subject to the considerations discussed in paragraph 3. In this connection, the president of a special court-martial without a military judge is cautioned to remember that the role of counsel in a case is that of an advocate whose duty is to present the facts and law of the case most favorable to his side. Therefore, counsel, regardless of his expertise, should not be looked to as an infallible source of what the law is on a given question.

2. References

a. The basic provisions of the law relating to court-martial practice and procedure are in the Uniform Code of Military Justice and the Manual for Courts-Martial, 1969 (Revised edition). No court member other than the president, when there is no military judge, may use or have access to the Manual for Courts-Martial or any other legal authority during the course of the trial. The president and court members may not use or have access to the Manual or other legal authorities during closed session. As this pamphlet is only a trial guide, the president of a special court-martial without a military judge may refer to it during closed session to ascertain the proper procedures to be utilized concerning such matters as voting.

b. Procedures applicable to the trial of persons protected by the Geneva Conventions Relative to the Treatment of Prisoners of War are in AR 27-10 and DA Pamphlet 27-9, *The Military Judge*.

3. Functions and Duties of Court-Martial Personnel

a. *Military Judge.*

(1) When detailed, a military judge of a special court-martial has the same duties and authorities that apply to a military judge of a general court-martial (MCM 39). The military judge is the presiding officer at all open sessions of the court. He is responsible for a fair and orderly hearing. He has a duty to insure that the proceedings are conducted with dignity and that counsel perform their duties properly. He sets the time for the court to assemble after consultation with the president.

(2) The military judge rules finally on all interlocutory questions, whether of law or fact, including motions for a finding of not guilty. He also rules finally on challenges. If there is a factual issue concerning the accused's mental responsibility for the alleged offense, he rules subject to objection by the court members. If there is a factual issue concerning the accused's mental capacity to stand trial, he rules finally. His ruling is also final on motions for a finding of not guilty unless such motion is based upon the accused's mental responsibility. A military judge sitting alone will determine all questions including guilt or innocence and if the accused is found guilty impose an appropriate sentence (MCM 4, 39b, app 8e and f).

b. President of a Special Court-Martial.

(1) *General.* The senior court member present at a trial, whether or not he is the senior member detailed to the court, is president of the court for the trial of that case. The duties of the president vary substantially, depending on whether a military judge has been detailed to the court.

(2) *The President With a Military Judge.* When a military judge has been detailed to the court-martial the president's duties are limited. He prescribes the uniform to be worn. The military judge is the presiding officer and administers oaths to counsel as required. In open session the president's duties and powers are generally those of a member of the court. The president presides over closed sessions of the court and speaks for the court in conferring with the military judge, but he shall not interfere with the rulings of the military judge which affect the legality of the proceedings (MCM 40b). The military judge rules finally on all questions of law and fact except as indicated in paragraph 3a.

(3) *The President Without a Military Judge.* The president of a special court-martial without a military judge is the presiding officer of the court and is responsible for the fair and orderly conduct of the proceedings in accordance with the law in all cases referred to the court. He prescribes the uniform to be worn and in conjunction with the trial counsel sets the time of trial. He recesses or adjourns the court as appropriate. He has a duty to insure that trials are conducted with appropriate decorum and dignity. He rules on all interlocutory questions other than challenges, that arise during the trial. His rulings on questions of law, other than motions for a finding of not guilty, are final. His rulings on interlocutory questions of fact and motions for a finding of not guilty are subject to objection by any court member. A ruling is interlocutory unless it would terminate the case by deciding guilt or innocence. If an issue arises whether question before the court is one of law or fact, the president's determination is conclusive (MCM 57).

(a) *Determinations concerning questions of fact or law.* Questions of law and questions of fact must be distinguished because the president's ruling is final regarding the former and subject to objection by any court member regarding the latter. In general, a question of fact raises an issue concerning what occurred, while a question of law raises an issue of what the law is concerning that which occurred. Thus, questions concerning the admissibility of evidence, instructions, competency of witnesses, continuances, and propriety of argument by counsel are normally questions of law upon which the president rules finally. For example, if a document is offered into evidence as an official record there is normally no factual dispute concerning what the record is or purports to be. The only questions raised are whether the record is official within the meaning of the rules of evidence and whether it is relevant to the case. Both of these determinations are questions of law since they involve no dispute of facts; therefore, the president's ruling on admissibility would be final. What weight, if any, is given to the record and whether its contents are accepted as true are, of course, questions of fact that the court considers in its deliberations on the findings. But there are situations where admissibility of evidence may involve a factual dispute. For example, while the admissibility of a morning report normally presents no factual dispute (it is either properly authenticated and prepared or it is not), the ruling could be factual if the defense put forward evidence that someone other than the custodian of the records actually signed the custodian's name to the extract. Assum-

ing a contest arose, there would be a factual dispute concerning who signed the extract. In this situation the president's ruling must be made subject to objection by any court member. Rulings regarding motions may also be legal or factual. Again, the distinction may be understood by considering whether the ruling is based on deciding what happened (factual) or determining the legal effect of what happened (legal). If both sides agree to the facts, then the ruling is one of law, there being no factual determination involved. For example, if a motion to dismiss is made for lack of speedy trial and both sides agree to the chronology of elapsed time, then there is no factual issue to be resolved and the ruling would be one of law.

(b) Rulings involving fact and law.

1. A ruling may sometimes require both a factual and a legal determination. For example, an objection to a purported business entry (MCM 144) may allege that it was made not as a business entry but solely for prosecution and that it was not relevant. The question of who prepared it and the reason for its preparation, if in dispute, is clearly a factual question, while the relevancy of the document is a matter of law. The president should, to the extent possible, separate the factual issue and rule on it, subject to objection by any court member, while reserving to himself the ruling on the legal question. Thus, in the foregoing example, the president should first determine relevancy since a ruling that the document was irrelevant would render the other issue moot. But, to continue the example, if he determined that the document was relevant, he would then rule subject to objection on the factual dispute concerning its preparation.

2. Another example of a ruling involving a factual and a legal determination is one relating to the admissibility of an accused's out-of-court statement. If there is a dispute regarding whether any Article 31 advice was given, then the question is one of fact. But suppose that the defense contends that no advice was given but, even if the alleged advice was given, it was inadequate to comply with Article 31. A ruling concerning whether a warning was given would be subject to objection. On the other hand, a ruling on the adequacy of the warning that was given is one of law.

3. If the president determines that a factual issue and a legal issue are so intertwined that they cannot be separated, then the ruling should be made subject to the objection of any member. However, if there is a question whether the issue to be resolved is one of law or one of fact, the president's determination is conclusive.

(c) Other rulings. The president rules subject to objection by any court member on:

1. Motions for a finding of not guilty, and
2. Any question concerning the factual issue of the accused's mental responsibility.
3. The court votes on challenges for cause as prescribed in paragraph 14. However, if one of the first eight grounds listed in paragraph 62 of the Manual is established and the fact is not disputed, then the president must excuse the disqualified member immediately.
4. A request by the defense to the court that a witness be subpoenaed to testify at the trial is normally a question of law to be ruled upon finally by the president. Paragraph 115 of the Manual provides that such a request should be granted if the testimony of the witness is necessary and material. If such a request had been made to the convening authority prior to assembly and denied, the president is not bound by that decision. He must exercise his independent discretion on the request.

(d) Hearings out of the presence of the other members. During trial the president will conduct a hearing with counsel and the accused outside the presence of the other court members to consider instructions. At the request of either side he should conduct a hearing outside the presence of the other court members on those other questions of law upon which he rules finally, for example, whether an Article 31 warning as given was adequate. If an out-of-court hearing is held on the providency of a plea of guilty, the president will not inquire into any punishment limitation incorporated in any pre-trial agreement made with the convening authority.

At his discretion, the president may hold consultations on other such questions upon which he rules finally. The president will not conduct a hearing outside the presence of the court on any question upon which he must rule subject to objection by any court member. All rulings will be made in open court. The president will not consider any evidence or other information received during out-of-court hearing on the issue of guilt or innocence of the accused or on the sentence. He may not inform the other members of the court concerning any such information he received. Before conducting any out-of-court hearings he will advise the other members of the court of the purpose of the hearings and the limitations on the use of the information so acquired.

c. *Counsel.* The duties and responsibilities of counsel are set forth in chapter IX of the Manual and DA Pamphlet 27-10, *The Trial and Defense Counsel*. Prior to trial the accused must be afforded an opportunity to request legally qualified counsel. See figure 2-1, paragraph 2-13, AR 27-10. If, after proper advice the accused elects not to be represented by legally qualified counsel and such counsel is not detailed for him, the military judge, or if none, the president, must determine that this election was voluntarily and knowingly made. See section III. If during this inquiry, the accused requests counsel, the trial counsel must immediately notify the convening authority of the request. A continuance must be granted until legally qualified counsel, if obtainable, is detailed and has sufficient time to prepare the case. In those areas where certificates of non-obtainability of counsel are authorized (para 2-14 AR 27-10) the military judge, or if none, the president, will proceed with trial in the absence of qualified counsel only after such certificate is submitted to the court (MCM 6c). The certificate will be attached to the record as an appellate exhibit. In addition to a right to request legally qualified detailed counsel, the accused also has a right to retain civilian counsel at his own expense and to be represented by individual military counsel if reasonably available (MCM 48). Detailed defense counsel must advise the accused of these rights prior to trial. The accused must also be advised of these rights and questioned about his understanding of them at trial. If the case has been referred to a court to which a military judge has been detailed, defense counsel will advise the accused that, prior to assembly, he may request that he be tried by the military judge alone. If the accused desires to request trial by the military judge alone, the defense counsel will prepare a written request (MCM, app 8e) to be signed by the accused and himself and forward it through the trial counsel to the military judge for decision.

4. Evidence

The rules of evidence are in chapter XXVII of the Manual. The answer to problems concerning evidence can usually be found in that chapter provided that counsel and the presiding officer are careful to delineate the issue so that the proper rule or rules of laws are isolated. When a question arises as to the admissibility of evidence, the military judge, or if none, the president should require counsel making the objection to state the grounds for the objection. For example, it is improper for counsel to merely state "I object" without stating specifically his grounds for objection. Similarly, counsel offering evidence should be required to state specifically the rule of evidence he is relying on to support admissibility. Thus, if a document is offered in evidence and it is hearsay, then counsel must rely on one or more of the exceptions of the hearsay rule (MCM 139) in order to establish admissibility.

5. Motions to Grant Appropriate Relief or to Dismiss

a. *Motions to Grant Appropriate Relief.* The military judge, or if none, the president, rules on motions subject to the considerations stated in paragraph 3. Motions for appropriate relief are not directed to final termination of the proceedings, but are directed to an alleged defect in the case that impedes the accused in preparing for trial or in presenting his case. For example, a specification that is indefinite or ambiguous as to time and place might give rise to a motion for appropriate relief. If granted, it would not terminate the proceeding, but would necessitate an amendment of the specification to make it more definite and certain. It is important that

counsel state precisely the defect he is objecting to and the relief he wants. For an enumeration of some of these motions, together with a discussion of the relief required, see MCM 69.

b. *Motions to Dismiss*. Motions to dismiss are directed to matters which forbid trial. A motion to dismiss is not properly concerned with the merits of the case, that is, the question of guilt or innocence. These motions include denial of speedy trial, statute of limitations, former jeopardy, *res judicata* and lack of jurisdiction. For a discussion of the general principles applicable to motions to dismiss, see MCM 68 and 215. Again, it is important that counsel specifically delineate the grounds for their motions and the provision of the Manual or the cases relied on to support their positions.

6. Instructions to the Court

a. *General*. All instructions to the court must be given by the military judge, or if none, the president, in open session in the presence of the accused and counsel for both sides.

b. *Preliminary Instructions*. At the opening of the first case tried by the court, after the court is assembled, the military judge, or if none, the president, should read in open court the preliminary instructions contained in this trial guide. The fact that this instruction was given should be shown in the record of trial. At the opening of each case thereafter tried by the same court, these preliminary instructions should again be given in open court, unless the defense agrees to dispense with such a reading and no new members are in the court. It will be sufficient to present the instructions to the members of the court in writing so long as the first paragraph of the instruction is read in open court.

c. *Instructions on Findings*. Before the court closes to vote on its findings, the military judge, or if none, the president, must instruct the court on the elements of each offense to which a plea of not guilty stands and of each lesser included offense in issue, on affirmative defenses in issue (MCM, chap XXIX), and on the meaning of words of legal connotation. He must also instruct the court on the burden of proof, the presumption of innocence, and reasonable doubt. There are other instructions which must be given upon request of the accused if they are reasonably raised by the evidence, such as the effect to be given character evidence, and alibi. Detailed information to assist in preparing such instructions and in the performance of other court duties by the presiding officer is contained in DA Pam 27-9, *The Military Judge*.

d. *Instructions on Sentencing*. If the accused is found guilty, the military judge, or if none, the president, must, before the court closes give an instruction on the maximum sentence which may be imposed. In every case he will instruct the court on the maximum sentence which it, as a special court-martial, may adjudge, even though the Table of Maximum Punishments (MCM 127c) allows a more severe punishment for such an offense if tried before a general court-martial. He will also instruct the court concerning matters in aggravation, mitigation, or extenuation that have been introduced into evidence and the consideration such evidence should be given in arriving at an appropriate sentence.

7. Use of Findings and Sentence Worksheets

A Findings Worksheet (app A) and a Sentence Worksheet (app B) will be utilized by the court in closed session in order to record its findings and sentence and to assist in placing the findings or sentence in proper form. The form or forms used will be appended to the record of trial as appellate exhibits. The court may not request the military judge or any other person to appear before it in closed session to assist in putting the findings or sentence in proper form or otherwise to assist the court.

8. Use of Trial Procedure Guide

Section III is a procedural guide designed for use by military judges, presidents, and counsel of special courts-martial in carrying out their responsibilities and functions in the courtroom. It consists of an outline of procedure and includes information and references in a form suitable

for use during trial proceedings. If carefully followed, the guide will aid in avoiding procedural errors and in facilitating trial proceedings.

9. Attendance of Members

All appointed court members are expected to be present when the court assembles for the trial of a case. Before assembly of the court the convening authority may add to or excuse members from the court at his discretion (para 37a, MCM, 1969 (Rev)). After assembly of the court the convening authority may excuse a member only for good cause. If the court is at any time reduced in number below a quorum (three members), the court will adjourn and refer the matter to the convening authority. Similar action is required when, before the assembly of the court the accused has requested that enlisted persons serve on the court and the number of enlisted persons sitting on the court is, for any reason, reduced below one-third of the actual court membership. If a new member is added to the court after the trial has commenced, the trial will proceed as if no evidence had been previously introduced unless the alternative requirement provided in the Manual is met (MCM 41f).

10. Oaths

Personnel of the court must be sworn, but regulations (chap 5, AR 27-10) permit such oaths to be taken by certified counsel and the military judge on a one-time basis. The convening orders as to those personnel will reflect that they have been sworn and no other oath need be given. Members of the court and non-certified counsel will take an oath in every case unless, at the convening authority's discretion, they have been administered an oath for all the cases which are referred to the court convened by the order detailing them as members or as counsel.

11. Bad Conduct Discharges and Reporters

A bad conduct discharge may not be adjudged by a special court-martial in the Army unless:

- (1) A military judge was detailed;
- (2) Counsel qualified under article 27 (b) was detailed to represent the accused; and
- (3) A reporter was detailed and made a verbatim record of the proceedings.

A reporter may not be detailed to a special court-martial unless the court is convened by a general court-martial convening authority.

A record of trial by special court-martial in which a bad conduct discharge is adjudged will be prepared, authenticated, and processed as prescribed in paragraph 88a of the Manual.

If a reporter is not detailed, a clerk may make notes of these proceedings to enable trial counsel to prepare a summarized record of trial.

SECTION II

VOTING PROCEDURE IN SPECIAL COURTS-MARTIAL

12. Purpose of Section

The purpose of this section is to prescribe the procedures to be used when the members of the court must vote. These procedures are described in section I and illustrated in section III.

a. Special Court-Martial With a Military Judge. When detailed, the military judge will instruct the members of the court on voting procedures. He may wish to use, with appropriate modifications, the instructions contained in paragraphs 15, 16, and 17.

b. Special Court-Martial Without a Military Judge. As discussed earlier, the president rules finally on matters such as declaring recesses and adjournments during the trial, the contents of the president's instructions to the court of the law applicable to the case, and all questions of law other than motions for a finding of not guilty. All other matters must be decided by the president subject to objection by any court member. If there is an objection to the president's rulings other than as stated above, or if the issue is one that is to be determined by a vote of the members of the court-martial, then the vote must be taken in the manner described below.

13. Voting on Interlocutory Questions of Fact

Voting an interlocutory question of fact, for example, motions for appropriate relief, motions to dismiss, and admissibility of evidence when based on issues of fact:

a. When Vote Taken. The president rules initially subject to objection by any member of the court. If no member objects to the ruling of the president, it becomes the ruling of the court. If any member objects, the court is closed and the question is decided by vote of the entire court including the president.

b. Method of Voting. In closed session, orally, beginning with the junior in rank.

c. Number of Votes Required. These questions are decided by a majority vote. A tie vote is a determination in favor of the accused without regard to which side raised the issue.

14. Voting on Challenges for Cause

a. When Vote Taken. All challenges for cause, other than the first eight grounds listed in paragraph 62f of the Manual when established and undisputed, are determined by vote. The president votes as any other member unless he is the challenged member. Only one member may be challenged for cause at a time.

b. Method of Voting. In closed session, by secret written ballot, the challenged member being excluded. The ballot may be in the form "Sustained" or "Not Sustained." The junior member counts the votes, and the president checks the count and immediately announces the result of the ballot to the members.

c. Number of Votes Required. A majority of the ballots cast by the members present at the time the vote is taken decides the question of sustaining or not sustaining the challenge. A tie vote on the challenge disqualifies the member challenged. When only three members of the court are present and one is challenged, the remaining two may vote on the challenge.

15. Motions for a Finding of Not Guilty and Other Motions or Rulings Relating to the Sanity of the Accused

a. When Vote Taken. The president rules initially subject to objection by any member of the court. If no member objects to the president's determination, the ruling becomes the ruling of the court. If any member objects, the court is closed and the question is decided by vote.

b. Method of Voting. In closed session, orally, beginning with the junior in rank.

c. *Number of Votes Required.* These questions are determined by a majority vote. A tie vote is a determination *against* the accused.

16. Voting on the Findings

a. *Method of Voting.* If a plea of guilty to any offense is accepted, a finding of guilty is entered without vote. Other findings are made in closed session by secret written ballot. The order in which the several charges and specifications are to be voted on will be determined by the president, subject to objection by any member of the court, except that voting on the one or more specifications under a charge precedes voting on that charge. The members normally vote upon a specification or charge by marking on the ballots: "Guilty"; "Not Guilty"; "Guilty except the words _____ (substituting therefor the words _____)"; or, with respect to a charge, "Not Guilty, but guilty of a violation of Article _____." The junior member collects and counts the votes, and the president checks the count and immediately announces the result of the ballot to the members.

b. *Number of Votes Required.* A conviction of an offense by special court-martial requires the concurrence of two-thirds of the members present at the time the vote is taken. If, in computing the number of votes required, a fraction results, such fraction is counted as one. Thus, if five members are to vote, a requirement that two-thirds concur is not met unless four concur. A finding of not guilty results as to any specification or charge if no other valid finding is reached thereon.

c. *Reconsideration of Findings.*

(1) *When reconsideration allowed.* A court may reconsider any finding before it is announced in open court. A court may reconsider any finding of guilty on its own motion at any time before it has announced the sentence in open court.

(2) *Number of votes required for reconsideration.* Within the time limitations set forth in (1) above, any member may request that another ballot be taken on any finding. If any member makes such a request, the members of the court vote, in closed session, by secret written ballot, and the question as to whether to take another ballot is decided as follows:

(a) if the request relates to a preceding ballot which resulted in a finding of not guilty, another ballot will be taken only if a majority of the members present vote in favor of another ballot;

(b) if the request relates to a preceding ballot which resulted in a finding of guilty, another ballot will be taken if more than one-third of the members present vote in favor of another ballot.

(3) *Reconsideration of a finding of guilty of a lesser included offense.* With respect to the procedural rules set forth in (1) and (2) above, a reconsideration of a finding of guilty of a lesser included offense with a view to arriving at a finding of guilty of the offense charge or of any offense greater than that found is treated in the same manner as a reconsideration of a finding of not guilty.

17. Voting on the Sentence

a. *Method of Voting.* In closed session by secret written ballot. After discussion has been completed, any member who desires to propose a sentence will write his proposal on a slip of paper. The junior member collects the proposed sentences and submits them to the president, who selects the lightest proposed sentence and conducts the voting by secret written ballot. The junior member collects and counts the votes after each ballot. The president checks the count and immediately announces the result of the ballot to the members of the court. If two-thirds of the members concur, this becomes the sentence of the court. If there is not two-thirds concurrence, a vote is conducted on the next higher sentence. Voting continues in the same manner until the required concurrence is reached. If all proposed sentences are voted upon and none adopted, further discussion may be had. Any new sentences proposed, together with those sentences previously proposed and retained, are put to vote beginning with the lightest. If the required propor-

tion of the court members are conscientiously unable to reach agreement on a sentence and the president is convinced that further deliberation and discussion would be fruitless, this fact shall be announced in open session and a mistrial declared.

b. *Number of Votes Required.* A special court-martial sentence requires the concurrence of two-thirds of the members present at the time the vote is taken. If, in computing the number of votes required, a fraction results, such fraction is counted as one. Thus, if five members are to vote, a requirement that two-thirds concur is not met unless four concur.

c. *Reconsideration of Sentence.*

(1) *When reconsideration allowed.* A court may reconsider a sentence on its own motion at any time before the record of trial has been authenticated and transmitted to the convening authority, except that the court may not reconsider the sentence with a view to *increasing its severity* after the sentence has been announced in open court. All personnel of the court who voted must be present if the court is reconvened to reconsider a sentence which has been announced in open court.

(2) *Number of votes required for reconsideration.* Within the limitations as to time set forth in (1) above, any member may request that another ballot be taken on the sentence. If any member makes such a request, the members of the court vote by secret written ballot and the question as to whether to take another ballot is decided as follows:

(a) if the request is made with a view to increasing the severity of the sentence, another ballot will be taken only if a majority of the members present vote in favor thereof;

(b) if the request is made with a view to decreasing the severity of the sentence, another ballot will be taken if more than one-third of the members present vote in favor thereof.

SECTION III

TRIAL PROCEDURE FOR SPECIAL COURTS-MARTIAL

18. Purpose and Scope

This section contains separate guides for special courts-martial without a military judge and special courts-martial with a military judge.

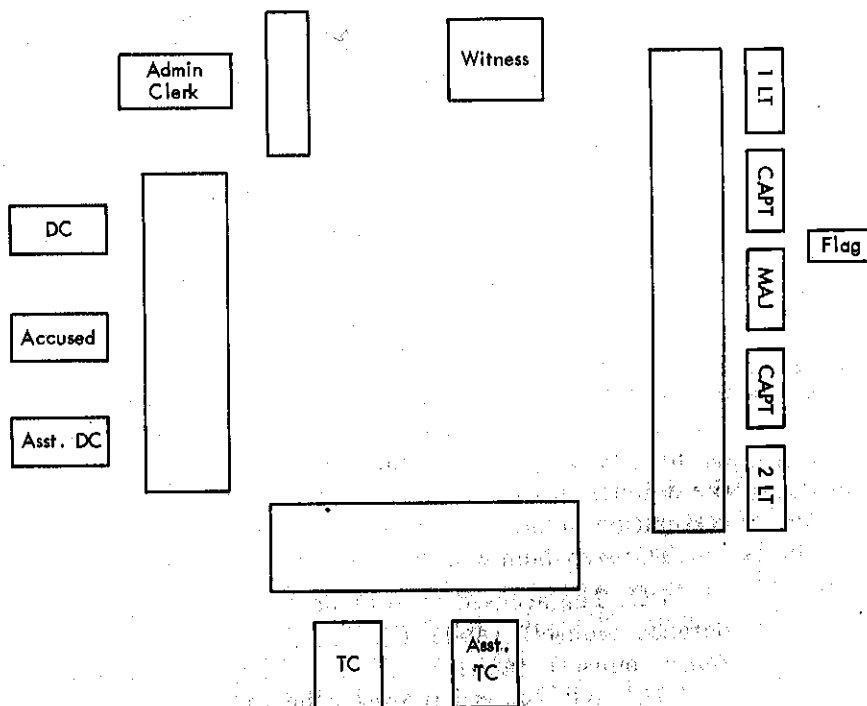
19. Special Court-Martial Without a Military Judge

Informal inquiry

Note. Prior to calling the court to order, the president should examine the convening order, determine that the accused and a quorum are present, including at least one-third enlisted persons if they have been requested (MCM 86c(2)), and that the detailed trial and defense counsel are apparently qualified, as prescribed by Article 27(c) and paragraph 48 of the Manual. See MCM 61a. He should also verify the qualifications of an individual counsel. Witnesses should be excluded from the courtroom except when they testify (MCM 58f).

Seating

Note. The members are seated alternately to the right and left of the president according to rank (MCM 61b). An acceptable seating arrangement appears below:



Record of trial

Note. The trial counsel keeps a record of the hour and date of each opening and closing of the court, whether for recess, adjournment or otherwise, for insertion in the record. See MCM 83b. Although court reporters are not authorized to be detailed to special courts-martial unless convened by a general court-martial convening authority, the trial counsel may have a clerk present in the courtroom to take notes for use in preparation of the record of trial. See MCM, appendix 10b.

Court called to order Convening orders

PRES: The court will come to order.

TC: The court is convened by ("Court-Martial Convening Order Number 2, Headquarters, _____, dated _____, as amend by Court-Martial Convening Order Number 3, same Headquarters, dated _____

_____."), a copy of which has been furnished to the president, each member of the court, counsel, and the accused. A copy of the convening orders will be inserted at this point in the record.

TC: (The following corrections are noted in the convening orders: _____.)

Note. Only minor changes such as typographical errors or changes of grade due to promotion since the issuance of the orders can be made in this manner. Any correction affecting the identity of the party concerned must be made by an amending order.

Persons present

TC: The following persons named in the convening orders are present:

Persons absent

TC: The following persons named in the convening orders are absent:

Presence of accused

TC: The prosecution is ready to proceed with the trial in the case of the United States against (name, grade and organization of each accused), who (is) (are) present in court.

Presence of other accused

Note: MCM 112c and chapter 5, AR 27-10 provide that personnel of the court need not be sworn in the presence of the accused. If any accused are present solely to permit swearing in their presence of personnel of the court who are required to act under oath and were not previously sworn, the TC will make the following announcement: "In addition, the following accused persons, who will be excused after the oaths have been administered to those personnel of the court who are required to act under oath, are present: _____."

Qualifications of prosecution

TC: The legal qualifications of all members of the prosecution are correctly stated in the convening orders (except that _____). No member of the prosecution named in the convening orders has acted as investigating officer, military judge, court member, or a member of the defense in this case, or as counsel for the accused at a pretrial investigation or other proceedings involving the same general matter.

TC: By whom will the accused be defended?

Introduction of defense counsel

DC: The accused is to be defended by (_____, the detailed defense counsel) (and) (_____, the detailed assistant defense counsel) (and) (_____, individual counsel).

TC: Will counsel representing the accused state whether the legal qualifications of the detailed members of the defense are correctly stated in the convening orders (and will individual counsel state his legal qualifications?

Qualifications of defense counsel

DC: The legal qualifications of all detailed members of the defense are correctly stated in the convening orders (except that _____). The accused has been advised of his rights to counsel established by Article 38 of the Code and paragraph 48 of the Manual for Courts-Martial.

Qualifications of individual counsel

IC: I am (a member of the bar of _____) (certified by The Judge Advocate General of the _____ under Article 27(b)) (without legal training or qualifications) (_____).

Right to qualified counsel
and Article 38 rights

Note. At this time the accused will be questioned by the president about his understanding of the various rights to counsel under the Uniform Code of Military Justice. If the accused is *not* represented by legally qualified counsel certified by The Judge Advocate General of an armed force (Article 27(b)) the president will conduct the interrogation immediately following this note. If the accused is represented by legally qualified counsel certified by The Judge Advocate General of an armed force the president will proceed to the interrogation beginning at "Explanation to Accused of Article 38 Rights." If the accused in response to any question concerning his understanding of any of his rights responds that he does not understand the president will explain further so that the accused fully understands his rights.

PRES: (to DC) Has the accused been advised of his right to be represented by legally qualified counsel?

DC: Yes (no), sir. The advice and the accused's response has been shown to the TC and is presented to you for examination (fig. 2-1, para 2-13, AR27-10).

Note. If the document indicates that the accused does not desire such counsel, the president will continue:

PRES: The document will be appended to the record as Appellate Exhibit ____.

PRES: (to accused) ____, you have the legal right to be defended by a legally qualified counsel—a lawyer—at no expense to you. If you choose to be defended by a lawyer your detailed defense counsel may be relieved by the convening authority. Do you understand this right?

ACCUSED: Yes (no), sir.

Note. If the accused answers in the affirmative, the president continues:

PRES: Understanding this right, do you want to be defended by a military lawyer at no expense to you?

ACCUSED: Yes (no), sir.

Note. If the accused desires legally qualified counsel, the court will recess and the TC will notify the convening authority. If upon reconvening, legally qualified counsel has not been detailed, but a certificate of nonavailability of counsel has been received, it will be attached to the record as an appellate exhibit. See MCM 6c and chapter 2, AR 27-10. If the accused does not desire such counsel, the trial will proceed.

Explanation to Accused
of Article 38 Rights

Note. If the accused is *not* represented by individual civilian counsel the president will conduct the following interrogation; if the accused is represented by such counsel the president will proceed to "Right to Associate Counsel."

PRES: (to accused) ____, you have a right to be defended by a civilian lawyer provided by you at no expense to the government in addition to detailed defense counsel. Do you understand this right?

ACCUSED: Yes (no), sir.

Individual Military
Counsel

Note. If the accused is *not* represented by individual military counsel the president will conduct the following interrogation; if the accused is represented by such counsel the president will proceed to "Right to Associate Counsel."

PRES (to accused): ____, you also have the right to be defended by military counsel, lawyer or non-lawyer, of your own choice if reasonably available in addition to detailed defense counsel. Do you understand this right?

ACCUSED: Yes (no), sir.

Right to Associate
Counsel

PRES: If you are defended at this trial by a civilian lawyer or by military counsel of your own choice, (name of detailed defense counsel and assistant, if any) will act as associate counsel, if you wish, or (he) (they) may be excused with your consent. Do you understand this right?

ACCUSED: Yes, (no), sir.

PRES: (If detailed counsel is absent) (Name of absent counsel) is not present in court. You are entitled to be defended by each and every defense counsel or assistant defense counsel named on the convening order. Do you understand this right?

ACCUSED: Yes (No), sir.

PRES: Do you want (name of absent counsel) excused?

ACCUSED: Yes (no), sir.

Note. If the accused is not represented by individual civilian counsel or is not represented by individual military counsel or if the accused has not excused an absent counsel the president will ask the following:

PRES: Do you wish to exercise your right to (individual counsel) (military counsel of your choice) or (your right to be defended by each counsel named on the convening order)?

ACCUSED: _____

Note. If the accused wishes to exercise his right to individual civilian counsel, military counsel, or to the presence of a detailed counsel who is absent, the court will adjourn for a reasonable time to enable him to obtain such counsel.

TC: Has any member of the defense (including individual counsel) acted as the accuser, a member of the prosecution, investigating officer, military judge, or member of the court, in this case?

DC: (No counsel for the defense has so acted.) (_____, a member of the defense, has acted as _____.)

Note. If a member of the defense has participated in the same case as a member of the prosecution, he will be excused immediately (MCM 61f(4)). In other cases, the president will advise the accused.

PRES: _____ (the regularly detailed defense counsel) (_____), previously acted as _____ in this case. He may not now defend you unless requested by you. Do you want his services in this case?

ACCUSED: I do (not).

Note. If he does so request, the proceedings continue. If he does not request the services of the counsel, the president will excuse him. If this deprives the accused of counsel having the requisite legal qualifications, and the accused desires the services of such a counsel, the president will adjourn the court and report the matter to the convening authority (MCM 61f(4)).

Note. Any counsel not desired by the accused may be excused by the president if the accused states: "I do not want the regularly detailed defense counsel (and) (assistant defense counsel) to act in this case."

PRES: It appears that counsel for both sides have the requisite qualifications.

Note. When the accused is an enlisted man, the trial counsel will state (MCM 61h):

TC: I have (not) received a request in writing that the membership of the court include enlisted persons.

PRES (to accused): You have the right to have at least one-third of the membership of this court composed of enlisted persons. Do you desire that enlisted persons be detailed to this court?

ACCUSED: Yes (No), sir.

Note. If the accused has made or now makes such a written request, the trial counsel states:

TC: The accused has made such a request which is herewith submitted to the court.

PRES: This request will be attached to the convening orders which are to be inserted in the record.

Prior participation in the case by defense counsel

Explanation to accused

Action when counsel not desired

Excusing counsel not desired

Request for enlisted membership

Explanation to accused

Preliminary instructions

Note. Thereafter, if the required number of qualified enlisted members are present, the trial may proceed. If not, or if at any time during the trial the requirements as to enlisted members are not met, the president will adjourn the court and direct the trial counsel to refer the matter to the convening authority for appropriate action. When enlisted members have been requested, they should not, if it can be avoided, be junior to the accused in rank or grade and must number at least one-third of the total membership of the court at all times.

PRES: (to court members). I shall now instruct generally on the duties of the court. It is our duty, as members of this court, and our duty alone, to determine the guilt or innocence of the accused as to the charges upon which he will be arraigned and, if the accused is found guilty, to determine an appropriate sentence. Neither the fact that charges have been preferred against the accused nor the fact that such charges have been referred to this court is any evidence of his guilt. With respect to any offense to which there is a plea of not guilty, the determination of the court as to guilt or innocence must be based upon the entire evidence in the case and can only be arrived at after resolving all material issues of fact and applying the rules of law to those facts. Thus, as to any such offense, it is important to keep an open mind until all the evidence and applicable law have been presented.

In the course of the trial, it may be necessary to recess or adjourn the court. During any such recess or adjournment, you must avoid communicating with counsel, the accused, witnesses, or other persons, including the other members, concerning the trial.

It is my duty as president of the court to instruct you on the law applicable to the case. In this connection, the court is advised that no member of the court other than the president may use or have access to the Manual for Courts-Martial or other legal authorities during the course of the trial and that I may use or have access to the Manual or other legal authorities only in open session. DA Pamphlet 27-15 is not legal authority and may be used by me in open or closed sessions. Instructions to the court on legal questions will be presented only by me in open session. If, while the court is in closed session, I find that it will be necessary to refer to legal authorities, I will open the court prior to making any such reference.

As president of the court, I will rule in open session upon all interlocutory questions, other than challenges, arising during the trial. My ruling upon any question of law, other than a motion for a finding of not guilty, is final. However, my ruling on interlocutory questions of fact are subject to objection by any member of the court. Upon such an objection, the matter will be determined by vote in closed session.

As I have previously stated, you must keep an open mind during the course of the trial. In particular, no member must ever depart from an impartial, judicial role in asking questions of a witness. The examination of witnesses is primarily the duty and function of counsel, and any member desiring to question a witness must first obtain my permission. I may if I so desire, require the member to submit his question to me either orally or in writing so that a ruling may be made as to the propriety of the question or course of questioning.

Note. This instruction should be read to the court from this pamphlet and the record will reflect that such instruction was given. The president may not simply refer to this instruction as having been given to those same court members in another or related case. See MCM 58b. After a court has received this instruction, it may, ex-

cept for the first paragraph thereof, in the absence of objection by the accused or his counsel, be presented to the members of the court in writing and the record will so reflect. The first paragraph of these instructions must be read to the members by the president in open session in every case.

PRES: The trial will proceed.

TC: (The members of the court will be sworn. All persons rise.) All members of the court have previously been sworn.)

Note. The oath may be omitted if all members have been previously sworn, in accordance with chapter 5, AR 27-10. Otherwise, all persons stand while the oath is administered to the members of the court and counsel. Each member raises his right hand and the TC administers the following oath:

TC: Each of you do swear (or affirm) that you will faithfully perform all the duties incumbent upon you as a member of this court; that you will faithfully and impartially try, according to the evidence, your conscience, and the laws applicable to trials by courts-martial, the case of (the accused now before this court) (any accused brought before you); and that you will not disclose or discover the vote or opinion of any particular member of the court upon a challenge or upon the findings or sentence unless required to do so before a court of justice in due course of law. (So help you God.)

EACH MEMBER OF THE COURT: I do.

Note. Unless the members of the prosecution have been previously sworn (para 5-5, AR 27-10), the president will administer the following oath:

PRES (to trial counsel): You, (name(s) of counsel) do swear (or affirm) that you will faithfully perform the duties of counsel (in the case now in hearing) (in any case in which you are detailed to act as the same). (So help you God.)

TC (ASST TC): I do.

Note. Unless the members of the defense have been previously sworn (Para 5-4, AR 27-10), the president will administer the following oath:

PRES (to defense counsel): You (name(s) of counsel) do swear (or affirm) that you will faithfully perform the duties of counsel (and individual counsel) (in the case now in hearing) (in any case in which you are detailed to act as the same). (So help you God.)

***DC** (ASST DC and IC): I do.

Note. All persons except the TC are then seated.

PRES: The court is assembled.

Note. If it appears that any witnesses in the case are present in the courtroom or any accused are present solely to permit swearing in their presence of any personnel of the court, the president will insure that they withdraw from the courtroom.

Note. The TC now states the general nature of the charges and discloses every ground for challenge believed by him to exist in the case (MCM 62b). When any charge or specification has been withdrawn, the TC should insure that the court is not made aware that the withdrawn charge or specification was ever preferred. See MCM 56d.

TC: The general nature of the charges in this case is (absence without leave in violation of Article 86) (assault upon _____ in violation of Article 128) (_____); the charges were preferred by (accuser, page 3 of charge sheet); forwarded with recommendations as to disposition by (all persons who forwarded the charges) (and) (investigated by _____). No member of the court will be a witness for the prosecution.

**After this response, "DC" refers to the counsel who is conducting the defense.*

Members sworn

Prosecution sworn

Defense sworn

Disclosing grounds for challenge

Nature of charges

Grounds disclosed by records

Grounds disclosed by enlisted members

Grounds disclosed by members

Challenges procedure

Prosecution challenges

Defense challenges

Arraignment
—distribution of charges and specifications

TC: The records of this case disclose [no grounds for challenge] [grounds for the challenge of _____ for the following reasons: he (is the accuser) (was the investigating officer) (forwarded the charges with recommendation as to disposition) (has previously participated in the case as _____) (is an enlisted member of the same unit as the accused) (_____)].

TC: (Records indicate that the accused is a member of _____. If any enlisted member of the court is now a member of the same company, battery, troop or corresponding unit, it is requested that he so state.)

TC (to court members): If any member of the court is aware of any matters which he believes may be a ground for challenge by either side against him, he should now state the general nature of the matter. He should not state specific facts which might tend to disqualify other members who hear them.

Note. If disclosed grounds for challenge are undisputed and are within the first eight grounds enumerated in paragraph 62f of the Manual, the president must excuse the member immediately.

Note. Before exercising their right to challenge for cause, the TC and DC may question the members of the court, either individually or as a group, to determine the existence of facts which may be the basis for a challenge. See MCM 62b and 62f. It is optional with the counsel conducting the inquiry whether a member being questioned shall be required to answer under oath. See MCM 114g for the form of the oath. The voting procedure as to challenges for cause is set forth in paragraph 14.

Note. If the DC consents, the TC should present to the members before challenges copies of only the charges and specifications upon which the accused is to be arraigned.

Note. Challenges for cause should be made immediately following assembly of the court, but a challenge for cause may be presented at any stage of the proceedings. Challenges for cause may again be presented, even though once overruled, if made on good cause, as newly discovered evidence (MCM 62d).

TC: The prosecution (has no) challenges for cause (_____ on the ground _____).

TC: The prosecution (has no) preemptory challenge (desires to challenge preemptorily _____).

Note. No reason is stated for preemptory challenges. Any member challenged preemptorily is excused immediately. TC is entitled to one preemptory challenge.

TC: Does (any of) the accused desire to challenge any member of the court for cause?

Note. When there is more than one accused, the challenges of each for cause are ordinarily disposed of before their preemptory challenges are made.

DC: No. (The accused challenges _____ for cause on the ground _____.)

TC: Does (any of) the accused wish to exercise his right to one preemptory challenge against any member?

Note. Each accused is entitled to one preemptory challenge.

DC: The accused, _____, (has no) preemptory challenges (_____ preemptorily).

PRES: The accused will now be arraigned.

Note. The TC will now present to the members of the court copies of only those charges and specifications upon which the accused is to be arraigned, unless distributed earlier with the consent of DC.

TC: All parties to the trial have been furnished with a copy of the charges. Does the accused desire that they be read?

DC: The accused waives the reading of charges (desires that the charges be read).

Note. If the accused desires that the charges be read, the TC now reads the charges and specifications on which the accused is to be tried, with the name and description of the accuser, the affidavit, and the reference for trial. They are copied verbatim into the record at this point, regardless of whether the accused waives the actual reading of the charges and specifications. If the accused waives the reading of the charges, the proceedings continue:

PRES: The reading of the charges may be omitted.

TC: The charges are signed by _____, a person subject to the code, as accuser; are properly sworn to before a commissioned officer of the armed forces authorized to administer oaths; and are properly referred to this court for trial by _____, the convening authority.

TC: The charges were served on the accused by (me) (_____) (on _____, 19 ____).

Note. Unless the date of service is at least 3 days prior to the date of trial, except in time of war, the accused may object to this defect in service (Art 35). See MCM 58c. If he does so, the court must grant a continuance at this point.

PRES (to accused): _____, How do you plead? Before receiving your pleas, I advise you that any motions to dismiss any charge or to grant other relief should be made at this time.

Note. The arraignment is complete when the accused is asked how he pleads. Neither the pleas nor motions are part of the arraignment (MCM 65a).

Note. Motions for appropriate relief are waived if they are not made prior to plea (MCM 67b and 69a). Motions to dismiss should ordinarily be made before a plea is entered (MCM 67a and 68a). Proceedings and actions on motions will be reflected in the record. Any explanation by the president of the accused's right to move that a charge be dismissed because barred by the statute of limitations (MCM 58b) and the accused's response thereto will be recorded.

DC: The defense (has no motions to be made) (moves that specification _____, charge _____, be dismissed because _____) (moves that _____).

Note. Depending upon the nature of the motion, rulings of the president may be either final or subject to objection by members of the court. This matter is explained in paragraphs 3b(3) and 5. If the question is one of law, and the president conducts proceedings outside the presence of the other members of the court he will announce:

PRES: I will now conduct proceedings outside the presence of the other members of the court on this issue. I cannot and will not consider evidence received or information acquired during these proceedings on the issue of the guilt or innocence of the accused or in the determination of an appropriate sentence if that stage is reached. I cannot inform the other members of the court of this information and will disregard any such information in my personal deliberations on the findings and sentence.

Note. A similar instruction should be given on all occasions where the president conducts proceedings outside the presence of the other members.

PRES: (Subject to objection by any member of the court.) The motion is (denied) (granted). (The accused will not be required to plead to Specification _____, Charge _____.)

Note. If charges are amended on motion or otherwise, or after a motion to sever is granted in the case of accused jointly charged, the amendment will be formally stated for the record. See MCM 69b and 69d.

—waiver of reading charges

—charges and specifications read

—notice of service

—end of arraignment

Motions

Motions to dismiss and to grant other relief

Ruling on motion

Amendment of charges

Note. When no motions are made or when DC indicates that he has no further motions, the disposition of pleas will follow. In joint and common trials each accused pleads separately.

Pleas of accused

DC: The accused, _____, pleads: To all Specifications and Charges (Not guilty) (Guilty)

or

—guilty to one specification

To Specification 1 of the Charge: Guilty
To Specification 2 of the Charge: Not guilty
To the Charge: Guilty

or

—with exceptions and substitutions

To Specification _____, Charge _____:
Guilty, except the words "_____" and "_____" (, substituting therefor, respectively, the words "_____" and "_____" to the excepted words, not guilty, to the substituted words, guilty).
To Charge _____: (Guilty) (Not guilty, but guilty of a violation of Article _____).

Note. If the accused refuses to plead, a plea of not guilty will be entered by the president for him. If an accused pleads guilty to any offense, the president will advise him on the meaning and effect of his plea. (MCM 70b). See paragraph 3b(3)(d). This explanation will be given in open court even if the president has inquired into the providence of the plea outside the hearing of the other members of the court.

Explanation to accused of guilty plea

PRES (to accused): Have you had enough time to consult with your counsel regarding your plea(s) in this case?

ACCUSED: Yes (no), sir.

Note. If the accused has refused to consult with his counsel, the guilty plea should not be received. If the accused states that he needs more time, time will be made available for consultation.

Note. If the accused pleads guilty to an lesser included offense against which the statute of limitations has apparently run, the president should insure that the accused is aware of his right to interpose the statute in bar of trial as to that offense. See MCM 53h and 58c.

Explanation to accused of effect of guilty plea

PRES (to accused): _____, you have pleaded guilty to (Specification _____, Charge _____) (the lesser included offense of _____) (all the specifications and charges). By so doing, you have admitted every act or omission and every element alleged with respect to the offense (offenses) to which you have pleaded guilty. The elements of the offenses to which you have pleaded guilty are (president reads from appropriate proof paragraph of DA Pam 27-10 (The Military Judge)). Your plea subjects you to (a) finding(s) of guilty without further proof of (that) (those offense(s), in which event you may be sentenced by the court to the maximum punishment authorized for (it) (them). The maximum authorized punishment for the offense(s) to which you have pleaded guilty is _____.

Note. The president will not recite a sentence that is greater than confinement at hard labor for 6 months, forfeiture of two-thirds pay per month for 6 months and reduction to the lowest enlisted grade. In officer cases, see MCM 126d.

PRES: You are legally entitled to plead not guilty and place the burden upon the prosecution of proving your guilt of (that) (those) offense(s). Your plea will not be accepted unless it appears that you understand its meaning and effect and that you are voluntarily pleading guilty because you are convinced that you are in fact guilty. If you are not convinced that you are in fact guilty, you should not allow any other considerations to influence you.

PRES: Do you understand this explanation of the meaning and effect of your plea of guilty?

ACCUSED: Yes (no), sir.

PRES: Are you convinced that you are in fact guilty?

ACCUSED: Yes (no), sir.

PRES: Understanding these matters, do you still plead guilty?

ACCUSED: Yes, sir. (I desire to plead _____.)

PRES: [The plea(s) of guilty will be accepted.] [The plea(s) of guilty (to _____) will not be accepted (because _____).]

Note. If a plea of guilty has been entered and it appears later that the plea was improvident or otherwise improperly entered, the president should give the accused the opportunity to withdraw his plea of guilty. See MCM 70b for other situations that may warrant withdrawal of an accepted guilty plea.

Findings of guilty

Note. If the accused has pleaded *not guilty*, the presentation of evidence on the merits of the case normally follows at this time.

If the accused has pleaded *guilty to any lesser included offense*, no finding is entered at this time. The trial proceeds and evidence is presented.

If the accused has pleaded *guilty to all or some of the charges and specifications* no further proof of the offense to which the plea relates need be introduced by the prosecution. If the president accepts the plea of guilty, findings will be entered immediately without vote. Findings are entered when the president announces that the accused has been found guilty in accordance with his plea. In this event, the president will state:

PRES: _____ It is my duty as president of the court to inform you that, in accordance with your plea of guilty, this court finds you [for all the specifications and charges]: [_____]: Guilty.

Presentation of prosecution case

TC: The prosecution has (no) (an) opening statement.

Note. No opening statement is required, but one should be made when it will clarify the procedure to be followed by the TC. See MCM 44f(3) and 44g(2).

Introduction of witness

TC: The prosecution calls as a witness _____.

Note. When the witness is sworn, he raises his right hand, and the TC administers the oath.

Use of interpreter

Note. At the beginning of testimony given through an interpreter, the record will indicate that an interpreter was used and was sworn or had been previously sworn. See MCM 50b concerning duties and 114a for form of oath.

Oath of witness

TC (to witness): You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. (So help you God.)

WITNESS: I do.

Note. A witness may be sworn by the oath indicated or by any oath recognized by his religion, or by such acts or ceremony as he declares binding on his conscience (MCM 112d). As to competency of witnesses, see MCM 148.

Note. The witness now takes his seat in the witness chair. Usually, the first two questions asked every witness are formal and are asked by the TC, whether the witness is called by him, the defense, or the court.

Formal questions

TC (to witness): State your full name (grade, organization, and armed force) (occupation and residence).

WITNESS: _____.

TC (to witness): Do you know the accused; if so, what is his name, and point to him?

WITNESS: _____.

TC: (Let the record reflect that the witness pointed to the accused.)

Direct examination

Note. The TC conducts direct examination. A summary of questions and answers are preserved for preparation of the record of trial. At the conclusion of direct examination, the TC announces:

TC: The prosecution has no further questions.

Cross-examination

Note. After the prosecution has concluded the direct examination of a witness, the DC may cross-examine the witness. See MCM 149b(1).

DC: The defense has no (further) questions.

Redirect and recross-examination

Note. If the defense cross-examines the witness, the TC may conduct redirect examination; after he has concluded, the DC may conduct a recross-examination (MCM 149b(2)). When both the TC and DC have concluded their questions, the TC asks the court:

TC: Are there any questions by the court?

Examination by the court

Note. Any member desiring to question the witness must first secure permission from the president. The president may require the member to submit his question to him either orally or in writing so that a ruling may be made as to the propriety of the question. In questioning witnesses, including an accused who has become a witness, the court and its members must be careful not to depart from an impartial role (MCM 149b(3)). The president may permit the TC or DC to ask further questions after examination by the court. The president may limit or reject superfluous interrogation. However, if new matter, not properly the subject of cross-examination of the witness on his previous testimony, is elicited by questions of the court or its members, both counsel will be permitted to examine the witness upon the new matters. When questioning of the witness is concluded, the president announces:

PRES: The witness is excused (subject to recall).

Excusing witness

Note. Unless expressly excused from further attendance during the trial, all witnesses will remain subject to call or recall until the trial has been concluded. At the discretion of the president, or upon motion of counsel, the witness may be instructed as follows (MCM 149b(4)).

Warning witness

PRES: You are instructed not to discuss your testimony in this case with anyone except the counsel or the accused. You will not allow any witness in this case to talk to you about the testimony he has given or which he intends to give. If anyone, other than counsel or the accused, attempts to talk to you about your testimony in this case, you should make the circumstances known to the counsel for the side originally calling you as a witness.

Note. Following are examples relating to procedural matters applicable to presentation of the case by the prosecution and the defense. Other matters pertaining to presentation of the case by the defense follow these examples.

Oral stipulation

TC: With the consent of the accused, the prosecution and defense stipulate _____.

Note. Prior to acceptance of any stipulation, the president should determine that the accused joins in the stipulation (MCM 154b).

PRES: The stipulation is (not) accepted.

Recall

Note. When a witness is recalled, the TC reminds the witness, after he appears before the court:

TC: You are reminded that you are still under oath.

Objections

TC: What was the accused carrying?

DC: Objection. Any answer to that question is immaterial.

—argument

Note. After hearing preliminary argument, if any, the ruling should be made in substantially the following form:

PRES: The objection is (sustained) (over-ruled).

Note. See paragraph 8b(3), concerning rulings by the president.

Striking testimony

Note. Any remarks or testimony ordered stricken are treated as follows:

TC: What color shirt was the accused wearing?

WITNESS: According to what the police officers told me, he was wearing a red shirt.

DC: I move that that answer be stricken as hearsay.

PRES: The answer will be stricken and the court is instructed to disregard it.

Note. The president should give such further instructions in this regard as he deems appropriate. When evidence is admitted only for a limited purpose, the president should give appropriate limiting instructions. See MCM 57a(2), 138g, 140a and 153b(2)(c).

Note. The trial counsel, with the aid of any clerk, is responsible for keeping a list of exhibits marked for identification, and for those finally admitted in evidence. Prosecution exhibits should be *numbered* consecutively; defense exhibits should be *lettered* consecutively. Exhibits should *not* be renumbered or relettered when admitted in evidence, but should be admitted by the same number or letter they bore "for identification," even though there may be omissions in the sequence of numbers or letters of exhibits finally admitted because some exhibits were not admitted. The words "for identification" are lined out when an exhibit is admitted in evidence.

TC: I show you that which has been marked Prosecution Exhibit 1 for identification.

Note. The exhibit is shown to the other counsel who is given an opportunity to examine it.

TC (to witness): Do you recognize it?

WITNESS: I do. It is a billfold I found in the coat the accused was wearing when I searched him.

TC (to witness): How do you recognize it as being the same one?

WITNESS: _____

TC: Prosecution Exhibit 1 for identification is offered in evidence as Prosecution Exhibit 1 [and permission is requested to withdraw it at the conclusion of the trial and substitute a (written description) (photograph) for it.]

DC: (I object because _____.) (No objection.)

Note. An exhibit need not be offered at this time; it may be held for introduction subsequently.

Note. After the offer is made, cross-examination may be conducted by opposing counsel, and other evidence may be offered and arguments made by either side prior to a ruling by the president as to admissibility.

PRES: The objection is ((sustained) (overruled) Prosecution Exhibit 1 for identification is admitted in evidence as Prosecution Exhibit 1 [and a (description) (photograph) may be substituted].)

Note. Unless the testimony of a witness has developed a full and accurate description of an object to be withdrawn later (MCM 54d), counsel should at this time give an oral description of the object for the record. Any description substituted for real evidence should be accepted by both sides. If there is any disagreement, it will be resolved by a ruling of the president. If an exhibit is marked for identification but not admitted in evidence, either it, or a description, true copy, or photograph of it should be appended to the record.

Note. Properly authenticated official records and banking entries are marked for identification and shown to opposing counsel. See MCM 143b(2) and (3) concerning authentication. The offer is made as follows:

TC: Prosecution Exhibit 2 for identification, (a duly authenticated extract copy of the morning report of _____,) (_____) is offered as Prosecution Exhibit 2.

—motion

—ruling

Admission for limited purpose

Exhibits

—marking for identification

—identification

—objection

—ruling

—description of article for the record

—authenticated official records and banking entries

—written stipulations and
other admissible
documentary testimony

—confessions and
admissions

Note. Prior to acceptance of a written stipulation, the president should determine that the accused joins in the stipulation. See MCM 154b. A written stipulation of facts or of the content of a writing are offered and admitted in the normal manner prescribed for prosecution and defense exhibits, and they may be both read and submitted to the members of the court. When testimony in documentary form such as a written stipulation or a deposition is ruled admissible, the document or an appropriate part of it is read in evidence, it is marked as a prosecution or defense exhibit for appending to the record, and the document itself is *not* shown to members of the court, except that the president may inspect the writing to determine the admissibility of its contents (MCM 154b(2)). See MCM 145a concerning depositions.

Note. To be admissible against him, a confession or admission of the accused must be voluntary (MCM 140a). A confession or admission is not voluntary if it was obtained through the use of coercion, unlawful influence, or unlawful inducement. In addition, an accused must be advised of the requirements of Article 31(b) and his right to counsel during the interrogation. Before such a statement may be received in evidence it must affirmatively appear that the accused was warned of the nature of the offense of which he was accused or suspected; that he had the right to remain silent; that any statement he made could be used as evidence against him; that he had the right to consult counsel and have counsel with him during the interrogation; and that counsel could be a civilian lawyer provided by him, a military counsel of his own selection if reasonably available, or a free military lawyer appointed for him. After the above explanation, the accused or suspect should have been asked if he desired counsel. If he answered in the affirmative, the record must show that the interrogation ceased until counsel was obtained. If he answered in the negative, he should have been asked if he desired to make a statement. If he answered in the negative, the record must show that the interrogation ceased. If he affirmatively indicated that he desired to make a statement, the statement is admissible against him. However, the record must show that the accused did not invoke any of these rights at any stage of the interrogation. The following dialogue illustrates the method for showing compliance with the warning requirements:

TC (to witness after introductory questions): Did you say anything to the accused concerning the making of a statement?

WITNESS: Yes, sir, I did.

TC: What did you say?

WITNESS: I explained his rights to him?

TC (to witness): What explanation did you make?

WITNESS: I told him that he was suspected of wrongfully appropriating a one quarter ten four by four truck, U.S. Number _____, belonging to his company, which he used as a mail carrier, on _____, 19 ____, by driving it to Hattiesburg without authority. I then told him he did not have to make any statement at all; that if he did make any statement it could be used as evidence against him in a trial by court-martial; that he had the right to consult counsel and have counsel with him during the interrogation; and that counsel could be civilian counsel provided by him, military counsel of his own selection if reasonably available, or free military counsel appointed for him.

TC (to witness): Did you ask him anything else?

WITNESS: Yes. I asked him if he understood his rights and he stated that he did.

TC (to witness): Did you ask the accused anything concerning counsel?

WITNESS: Yes, sir, I did. I asked him if he wanted to have or consult with counsel.

TC: What was his reply?

WITNESS: He stated that he did not desire counsel.

Note. If the witness states that the accused did request counsel, the prosecution must show that the interrogation ceased until counsel was obtained for the accused.

TC (to witness): What did you do at this point?

WITNESS: I asked him if he wanted to make a statement.

TC: Did he answer the question?

WITNESS: Yes, sir. He said he wanted to talk to me about the incident.

TC (to witness): Did you make any promises or threats or employ any force or violence in connection with the obtaining of a statement?

WITNESS: No, sir, I did not.

TC (to witness): Did the accused make a statement to you?

WITNESS: Yes, sir, he did.

TC (to witness): Describe fully how the statement was obtained.

WITNESS: (_____)

TC (to witness): At any time during the interrogation of the accused, did he indicate that he wished to invoke any of his rights either with regard to the making of any statement or with regard to counsel?

WITNESS: No, sir, he did not.

Note. If the witness indicates that the accused did invoke any of his rights at any stage of the interrogation, the prosecution must show that the interrogation ceased at that time and was not continued until such time as there had been compliance with the request of the accused concerning the rights invoked.

TC (to witness): I hand you Prosecution Exhibit 4 for identification. Do you recognize it?

WITNESS: I do.

TC (to witness): What is it?

WITNESS: It is the written statement which the accused signed on 9 March _____.

TC (to witness): How do you know it is the same statement?

WITNESS: (_____)

TC (after showing statement to DC): Prosecution Exhibit 4 for identification is offered in evidence as Prosecution Exhibit 4.

Note. When a statement of the accused is offered in evidence by the prosecution, the accused has testimonial rights as indicated below and the president will explain them to the accused if he is not represented by legally qualified counsel. See MCM 53h and 149b.

PRES (to accused): _____, the prosecution has offered in evidence a statement allegedly made by you and has introduced evidence to show that it was voluntarily made by you after you had been fully warned of your rights. As the accused in the case, you have the right at this time to introduce any evidence you want to about the circumstances under which the statement was obtained or whether you did or did not make the statement. You also have the right to take the stand at this time as a witness for the limited purpose of testifying as to these matters. If you do that, whatever you say will be considered and weighted as evidence by the court just as is the testimony of other witnesses. You may be cross-examined upon your testimony, but if you limit your testimony to the circumstances surrounding the taking of the statement or whether you did or did not make the statement, you cannot be cross-examined on the question of your guilt or innocence of the offense itself, nor can you be asked on cross-examination whether the statement is true or false. In other words, you can only be cross-examined upon the matters which you testify about and upon your credibility, but not upon anything else.

On the other hand, you need not take the stand at all. You have a perfect right to remain silent, and the fact that you do not take the stand yourself will not be considered as an admission that the statement was voluntary or that you made it, nor can your silence be commented upon in any way by the trial counsel in addressing the court. Do you understand your rights?

ACCUSED: Yes, sir. (_____.)

DC: The defense (has no objection) (objects) to Prosecution Exhibit 4 for identification (on the ground _____). [The defense has evidence to submit pertaining to (the voluntary nature of the accused's statement) (the fact that he did not make the statement) (and) (calls _____ as a witness).]

PRES: [Subject to objection by any member of the court, the objection is (sustained) (overruled).] [The objection is (sustained) (overruled).] (Prosecution Exhibit 4 for identification is admitted in evidence as Prosecution Exhibit 4).

Note. When a confession or admission is admitted in evidence, the president will instruct the court as follows:

PRES (to court members): The members of the court are advised that (my ruling) (the ruling of the court) admitting in evidence Prosecution Exhibit 4 relates only to the question of admissibility. The ruling merely places the statement before the court; it (does not establish the voluntary nature of the statement) (and) (does not establish by him might be used as evidence against him in a trial by court-in his deliberation upon the findings of guilt or innocence, must come to his own conclusion(s) as to (the voluntary nature of the statement) (and) (whether the accused made the statement)). He may accept the statement as evidence against the accused only if he determines that it (was voluntary) (and) (was actually made by the accused). If he does not determine beyond a reasonable doubt that the statement (was voluntary) (and) (was in fact made by the accused), he must disregard the statement entirely as evidence against the accused. Each member is also advised that any evidence adduced as to (the voluntary or involuntary nature of the accused's out-of-court statement) (and) (whether the accused made the statement) should be considered by him in determining the weight to be given to the statement if he is convinced beyond a reasonable doubt that it was (voluntary) (and was) (in fact made by the accused), and that he should give weight to the statement only to the extent that he believes it to be truthful.

(When evidence has been introduced contesting the voluntariness of the statement, the president should tailor his instructions to that evidence. He may use the following instruction as a guide in tailoring his instructions: You are further advised in this connection that this statement of the accused may not be considered to be voluntary (if it was obtained through the use of coercion, unlawful influence, or unlawful inducement, such as _____); ((or) if the accused did not affirmatively waive his rights to remain silent or to have the assistance of counsel after he was first informed of the nature of the offense and advised that he did not have to make any statement regarding the offense of which he was accused or suspected; that any statement made by him might be used as evidence against him in a trial by court-

martial; that he had the right to consult with counsel and have counsel with him during the interrogation; and that counsel could be civilian counsel provided by him, military counsel of his own selection if reasonably available, or military counsel appointed for him); ((or) if any of the accused's rights concerning the making of a statement or the opportunity to consult with or have counsel were not observed upon request by the accused at any stage of the interrogation) (_____).

PRES (continuing): The trial will proceed.

PRES (continuing):
Adjournment or recess

Note. In the event of adjournment (a period extending beyond the same day) or a recess, (MCM 49b(2)) the procedure should be as follows:

PRES: The court will (adjourn) (recess) until _____ hours (_____, 19 ____).

Reassembling

PRES: The court will come to order.

Note. If the place of trial is changed, or the court reassembles at a place other than where it adjourned, the TC will so state for the record. See MCM 54e as to views and inspections.

Accounting for personnel
after adjournment or
recess

TC: All parties to the trial who were present when the court (adjourned) (recessed) are again present in the court (except _____).

Note. The term "parties to the trial" as used above, includes counsel, the accused and members of the court and, when applicable, the interpreter. It also includes a witness who was not excused prior to the adjourning, recessing, or closing of the court. If a member of the court is absent from a session after assembly, the absence must be shown to have been the result of challenge, physical disability, or the order of the convening authority (MCM 41b(4)). The reason for the absence must be reflected in the record even if it resulted from removal by the convening authority (MCM 87b).

Absence of member

TC: _____ is absent because (he is seriously ill) (he has been removed from the court by order of the convening authority for good cause as follows: _____).

New member

TC: Captain _____ is now present and has been detailed to the court by _____.

Note. If such a member was detailed by the same orders as convened the court, it will be so announced. If by an order not previously incorporated in the record, the trial counsel will announce:

TC: A copy of the order detailing Captain _____ will be attached to the orders convening the court and will be inserted in the record.

Note. Procedure for excusing, swearing, and challenging of the new member are as for original members.

—evidence previously
introduced

Note. If a new member joins the court, the trial shall proceed as if no evidence had previously been introduced, unless a stipulation of the evidence previously introduced is read to him in the presence of the accused, counsel, and the other members of the court (MCM 41f).

Prosecution rests

Note. When the prosecution has completed its case:

TC: The prosecution rests.

Motion for a finding of
not guilty

Note. The DC may make any motion for a finding of not guilty at this time or after the defense has rested, or both. The president rules on such a motion subject to objection by any member. See MCM 40b(2), 57c and 71a. After ruling initially, and before asking whether any member objects to the ruling, the president shall instruct the court as to the elements of the offense and any lesser included offenses, the test to be applied in determining whether the motion should be granted, and any other matters which properly warrant instruction at this time. If, thereafter, a member

objects to the president's ruling on the motion, the court will be closed and the question voted on. See MCM 57f and paragraph 15.

Presentation of the
defense case

DC: The defense has (no) (an) opening statement.

Note. The defense presents an opening statement, if desired, and introduces stipulations, witnesses, and material evidence in a manner similar to that followed by the TC, except that the TC administers the oath to all witnesses and asks the first formal questions relating to the witness' identity and occupation or organization. The DC then conducts direct examination. Further examination continues in the normal manner. See MCM 149b.

Accused as a witness

Note. The accused may take the stand as a witness in his own behalf, but only by his own choice. If he elects to remain silent, no comment can be made on his silence. If he testifies about certain specifications only, cross-examination by the TC and court must be limited accordingly. See MCM 138g, 148e, 149b(1), and 150b.

DC: The accused elects to take the stand and testify as a witness in his own behalf. His testimony will (concern all the charges and specifications) (be limited to _____).

—explanation of rights

Note. An accused who is not represented by legally qualified counsel should be advised of his rights to testify. When represented by legally qualified counsel, it may be assumed that the accused has been correctly advised of his rights and it is unnecessary to inquire if he has been so advised or to explain the rights to him. See MCM 53b. If the accused is not represented by legally qualified counsel, the president should advise him as follows:

PRES (to accused): _____, as the accused in this case you have these rights:

First, you may be sworn and take the stand as a witness. If you do that, whatever you say will be considered and weighed as evidence by the court just as is the testimony of other witnesses, and you can be cross-examined on your testimony by the trial counsel and the court. (The following may be used if there is more than one specification: If you testify about less than all of the offenses charged against you and you do not want to or do not testify about the others, then you may be questioned only about those offenses concerning which you do testify. You will not be questioned about any offenses concerning which you do not testify, unless the cross-examination is relevant to an offense concerning which you did testify.)

Second, you may remain silent. That is, say nothing at all. You have a right to do this if you wish, and if you do so the fact that you do not take the witness stand yourself will not count against you in any way with the court. It will not be considered as an admission that you are guilty, nor can it be commented on in any way by the trial counsel in addressing the court.

Take time to consult with your counsel and then advise the court whether you wish to testify or to remain silent.

DC: The accused _____.

Note. If the accused elects to TESTIFY, the TC will administer the oath and ask the following preliminary questions, after which the procedure follows that of other defense witnesses:

TC: State your full name, grade, organization, and Armed Force.

ACCUSED: _____

TC: Are you the accused in this case?

ACCUSED: Yes, sir.

Note. When the defense has completed its case:

DC: The defense rests.

—preliminary questions

Defense rests

Rebuttal

Note. The TC may call or recall witnesses in rebuttal; thereafter the DC may call or recall witnesses in rebuttal. Upon completion of any rebuttal testimony, the TC should announce:

TC: The prosecution has no further evidence to offer. Does the defense have any further evidence to offer?

DC: It does (not).

Recall and reopening case

Note. The president may permit or cause the recall of any witness, including the accused, and the reopening of the case by either or both sides for the introduction of testimony previously omitted (MCM 149a).

Witness called by court

TC: Does the court wish to have any witness called or recalled?

PRES: It does (not).

Note. The right of the members of the court to cause the recall of a witness or to call for additional evidence is subject to an interlocutory ruling by the president as to the propriety thereof (MCM 54b). Normally, the TC will conduct the direct and redirect examination of witnesses called by the court. However, the president may permit court members to question a witness directly at any time after the TC has asked the initial formal questions. See MCM 149b(3) for details concerning the proper examination of a witness by the court and for limitations which may apply.

Proceedings on instructions

PRES: I will now conduct proceedings outside the presence of the other members of the court to discuss with counsel for both sides and the accused appropriate instructions for the court. Information acquired by me during these proceedings will not be used by me in my deliberations on the findings or sentence in the event that stage of the proceedings is reached. This information will not be conveyed to the other members of the court. The court is recessed.

Arguments by counsel

PRES: The court will come to order.

TC: All parties to the trial, etc. The prosecution waives opening argument. ()

Note. The TC has the right to make the opening argument, and if any argument is made on behalf of the defense, the closing argument (MCM 72). Arguments are not required. If there is more than one accused, the counsel for each may make separate argument. After arguments or waiver thereof:

Conclusion of case

PRES: Has the prosecution anything further to offer?

TC: It has (not).

PRES: Has the defense anything further to offer?

DC: It has (not).

PRES: I will now instruct the court as required by paragraph 73 of the Manual:

Instructions

Note. The president will recess the court so that he may have time to prepare instructions and he may request counsel for both sides to furnish him with proposed instructions (MCM 73d). The president will discuss instructions with counsel for both sides and the accused out of the presence of the court and thereafter will instruct the court in open session, in the presence of the accused and counsel for both sides. The instruction will necessarily vary in each case because of the different facts and circumstances involved. The president shall give the mandatory instruction required by paragraph 73 of the Manual and Article 51(c) and any additional instructions required by law in light of the circumstances of the case. For instance, when an issue is raised as to the mental responsibility of the accused, the president will instruct the court as to the requirements of proof in this regard. See MCM 122. Instructions must be given as to the elements of the offense charged in each specification, the elements of each lesser included offense in issue, each affirmative defense reasonably in issue, and terms having a special legal connotation. If there is an accepted plea of guilty to a lesser included offense, the president may invite the attention of the court to the fact that no further proof of the offense to which the plea

relates need be introduced by the prosecution to warrant a finding of guilty of that offense (MCM 73a).

The president will conclude his instructions with the following:

PRES: The court is further advised:

First, that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt;

Second, that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in favor of the accused and he shall be acquitted;

Third, that if there is a reasonable doubt as to the degree of guilt, the findings must be in a lower degree as to which there is no reasonable doubt; and

Fourth, that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the Government.

The final determination as to the weight of the evidence and the credibility of the witnesses in this case rests solely upon the members of the court. You must disregard any comment or statement made by me during the course of the trial which may seem to indicate an opinion as to the guilt or innocence of the accused, for the court members alone have the independent responsibility of deciding this issue. Each member of the court must impartially resolve the ultimate issue as to the guilt or innocence of the accused in accordance with the law, the evidence admitted in court, and his own conscience.

Note. The court should be furnished a findings worksheet which may be completed by the court in closed session by striking out inapplicable language and inserting appropriate words and figures. The findings worksheet (app A) will be appended to the record of trial as an appellate exhibit.

PRES: Does either counsel have any objections to the instructions given?

TC: _____.

DC: _____.

PRES: The court will be closed.

Note. Only the members of the court will be present during deliberation and voting (MCM 74d(1)). If a separate room is provided for deliberation by the members, all members retire to this room. Otherwise, all persons leave the courtroom except the members of the court. Counsel may not consult with the members in closed session. If during their deliberation the members are in doubt as to the applicability of the law or the effect of certain evidence, such as whether they may make a finding of guilty of a specification by substitutions and exceptions, or whether there is any lesser included offense of which they may find the accused guilty, the court may open and request counsel for both sides to present legal authorities on the question. See paragraph 1. The request and replies by counsel will be in open session in the presence of the accused and his counsel. No legal authorities may be used by the court members during the deliberations. This trial guide may be used by the president during the deliberations.

Note. When the court has been closed the members deliberate and vote on the findings. See MCM 74 and paragraph 16 for the method of voting, the number of votes required and the rules applicable to reconsideration of the findings. When there is more than one accused, separate findings will be made as to each accused. During the deliberation and voting on findings, influence or superiority in rank will not be employed in any manner in an attempt to control the independence of members in the exercise of their judgment. No finding should include any indication of the reasons for making it.

Court closed for findings
Closed session

Voting on findings

Findings announced

PRES: The court will come to order.

TC: All parties to the trial who were present when the court closed are now present (except _____).

Note. The accused and his counsel normally report to and stand before the president when the findings are announced.

Note. The president reads the findings from the findings worksheet.

PRES: _____

Presentence procedure

PRES: The court will now hear the personal data concerning the accused shown on the charge sheet, and will receive evidence of previous convictions, if any.

Personal data

TC: The first page of the charge sheet shows the following data concerning the accused: _____

—verified by accused

TC: Does the accused have any objections to the data as read?

DC: (He does not.) (The accused objects to _____.)

Note. If any of the data are in error, corrections should be made. Errors claimed by the accused which the TC is not readily able to verify will, if of minor importance, be noted in the record and no further action taken upon them; if of material importance the president may direct verification of the error claimed before the court proceeds to vote upon the sentence.

Evidence of previous convictions

Note. If the TC has no evidence of admissible previous convictions, he should state:

TC: I have no evidence of previous convictions.

Note. If the TC has evidence of admissible previous convictions, it is offered at this time. Ordinarily, this is done by offering and having admitted in evidence a duly authenticated extract copy of the accused's military personnel record of previous convictions (DD Form 498). Rules for determining admissibility of previous convictions are set out in MCM 75b(2). If the TC has such evidence he announces:

TC: Prosecution exhibit _____ for identification, a duly authenticated (extract) copy of the accused's military personnel record of previous conviction(s) by court-martial, is offered in evidence as Prosecution exhibit _____.

DC: (No objection.) (The accused objects to _____ on the ground that _____.)

PRES: (The objection is overruled and prosecution exhibit _____ for identification is admitted in evidence as prosecution exhibit _____.) (The objection is sustained.)

Matters in aggravation
extenuation, or
mitigation

Note. This is the proper time for the TC to introduce any matter in aggravation, if admissible (MCM 75b(3)), and the DC to introduce matter in extenuation or mitigation and for the accused to make a statement if he desires (MCM 75c). With respect to matters in extenuation and mitigation offered by the defense or rebuttal thereof by the government, the president may relax the rules of evidence to the extent of receiving affidavits, certificates, and other writings of similar apparent authenticity and reliability (MCM 75c(1) and 146b).

Note. It may be assumed that an accused represented by legally qualified counsel has been correctly advised of his rights to testify as set out below. When the accused is not so represented, or when the president considers it necessary, he may give the following explanation:

PRES (to accused): _____ you are advised that you may now present evidence in extenuation or mitigation of the offense(s) of which you stand convicted. You may, if you wish, testify under oath as to these matters, or you may remain silent, in which case the court will not draw any inferences from your silence. In addition, you may, if you wish, make an unsworn statement in mitigation or in extenua-

tion of the offense(s) of which you stand convicted. This unsworn statement is not evidence, and you cannot be cross-examined upon it, but the prosecution may offer evidence to rebut anything contained in the statement. The statement may be oral or in writing, or both. You may make it yourself, or it may be made by your counsel, or by both of you. Consult with your counsel and advise the court what you want to do.

DC: The accused _____.

Arguments

Note. See MCM 75f concerning the scope of permissible argument.

TC: The prosecution (will make an) (waives) opening argument.

DC: The defense (will make a) (waives) final argument.

TC: The prosecution will make (a) (no) closing argument.

PRES: Has the prosecution anything further to offer?

TC: It has (not).

PRES: Has the defense anything further to offer?

DC: It has (not).

Sentence instructions

Note. Before closing the court for deliberation and voting on the sentence, the president shall instruct the court as required by paragraph 76b(1) of the Manual and shall insure that he tailors his instruction as required by that paragraph. See also paragraph 6d. This includes advising the court of the maximum permissible limits of punishment which may be imposed for the offenses of which the accused has been found guilty, but the president will not recite a sentence or refer to a sentence specified by the Table of Maximum Punishments (MCM 127c) that is greater than that the special court-martial is authorized to impose. If the president has any question as to the maximum punishment that may be adjudged in a case, he may request counsel for either or both sides to procure and present pertinent information concerning the matter for his consideration. This information will be given in open session in the presence of the accused and counsel.

Voting on sentence

Note. See MCM 76b(2) and (3) and paragraph 17 concerning the method of voting and number of votes required, and MCM 76d regarding sentence reconsideration. The court will adjudge a single sentence for all the offenses of which the accused was found guilty. A separate sentence must be adjudged for each accused. During the deliberation and voting on the sentence, influence or superiority in rank will not be employed in any manner in an attempt to control the independence of members in the exercise of their judgment.

PRES: The court is advised that the maximum punishment which may be adjudged for the offense(s) of which the accused (_____) has been found guilty is: (Confinement at hard labor for _____ months) (Forfeiture of two-thirds of his pay (per month for _____ months)) and (Reduction to the grade of _____, E-1).

It is the sole responsibility of the members of this court to select an appropriate sentence. The members may consider all matters in extenuation or mitigation as well as those in aggravation, whether introduced before or after findings (and evidence admitted as to the background and character of the accused) (and the reputation or record of the accused) (and the reputation or record of the accused in the service for good conduct, efficiency, fidelity, courage, bravery, and _____).

Note. The court should utilize a sentence worksheet to assist in formulating its sentence. See appendix B. If used, the worksheet will be appended to the record as an appellate exhibit.

Court closed for sentence

PRES: The court will be closed.

Note. Only the members of the court will be present during deliberation and voting (MCM 76b(2)).

Court opens

PRES: The court will come to order.

TC: All parties to the trial who were present when the court closed are now present (except _____).

Note. The accused and his counsel normally report to and stand before the president when the sentence is announced.

Note. The president reads the sentence from the sentence worksheet.

Sentence

PRES: _____.

Improper sentence

Note. An ambiguous or apparently illegal sentence may be called to the attention of the court by the TC. See MCM 76c.

Adjournment

PRES: Has the prosecution any other case to try at this time?

TC: (I have nothing further.) (I have another case to be tried. I request a _____ minute recess.)

PRES: The court will adjourn to meet on future call.

20. Special Court-Martial with a Military Judge

a. Procedure for Article 39(a) Session of a Special Court-Martial

Note. The following procedure should be used before assembly when there is no approved request by the accused for trial by MJ alone. If such request has been received and approved the MJ should use the procedure in paragraph 20b. After service of charges, subject to Article 85, the MJ should call an Article 39(a) session attended by the accused, trial counsel and defense counsel before assembly of the court and without the presence of its members. The MJ should, if appropriate, conduct an Article 39(a) session in all cases, except where an approved request is made for trial by MJ alone, and as a minimum hold the arraignment, receive the pleas, enter findings of guilty upon an accepted plea of guilty. Certain portions of this suggested procedure may be inapplicable in an Article 39(a) session held after assembly (for example, request for trial by MJ alone).

Session called to order

MJ: This Article 39(a) session is called to order.

Note. When a reporter is detailed, he records all proceedings verbatim (MCM 49b, 58d), subject to the exceptions set forth in appendix 9 of the Manual and herein. He is responsible for keeping a record of the hour and date of each opening and closing of the session, whether for recess, adjournment, or otherwise, for insertion in the record. When a verbatim record is not authorized, the TC, with any clerk, is responsible for keeping a summarized record. See MCM, appendix 10a.

Note. The MJ should examine the convening order to ascertain that the TC and DC are apparently qualified.

Convening orders and referral of charges

TC: The court is convened by _____, (as amended by _____), a copy of which has been furnished the military judge, counsel, and the accused, (and to the reporter for insertion at this point in the record.) (and which will be inserted at this point in the record.) The charges have been properly referred to this court for trial and were served on the accused by (me) (_____) on _____.

TC: (The following corrections are noted in the convening orders: _____).

Note. Distribution of the convening orders should be made sufficiently in advance with a request that TC be notified of any errors. Only minor changes such as typographical errors or changes of grade due to promotion since the issuance of the orders can be made at trial. Any correction which affects the identity of the individual concerned must be made by an amending order.

Persons present

TC: The accused and the following persons named in the convening orders are present:

Note. When a reporter has been detailed, the TC will announce:

Reporter detailed

TC: _____ has been detailed reporter for this court (and will now be sworn) (and has previously been sworn).

Reporter sworn

Note. The oath need not be given to the reporter if previously sworn, and the record so reflects (Art 42). A reporter that has not been sworn will stand with right hand raised; the TC, right hand raised, faces the reporter and administrators the oath.

TC: You swear (or affirm) that you will faithfully perform the duties of reporter (to this court) (to any court to which you shall be detailed). (So help you God.)

REPORTER: I do.

Qualifications of prosecution

TC: The legal qualifications and status as to oaths of all members of the prosecution are correctly stated in the convening orders (except that _____).

Prior participation by member of prosecution

TC: No member of the prosecution named in the convening orders has acted as investigating officer, military judge, court member, or a member of the defense in this case, or as counsel for the accused at a pretrial investigation or other proceedings involving the same general matter.

Note. If any member of the prosecution appears to be disqualified, the MJ will take the action indicated in MCM 61e. See MCM 6a.

TC: By whom will the accused be defended?

Introduction of defense counsel

DC: The accused is to be defended by (_____, the detailed defense counsel) (and), (_____, the detailed assistant defense counsel) (and) (_____, individual counsel).

Note. If any detailed member of the defense is absent, the MJ will proceed as follows:

MJ (to accused): It is noted that _____, the detailed (ASST.) DC is absent. This trial will not proceed unless you agree to his absence. Do you agree?

ACCUSED: Yes (No), sir.

Note. If the accused desires the presence of the absent counsel, the court will be adjourned until such counsel is obtained.

Qualifications of defense counsel

TC: Will counsel representing the accused state whether the legal qualifications and status as to oaths of the detailed members of the defense are correctly stated in the convening orders (and will individual counsel state his legal qualifications)?

DC: The legal qualifications and status as to oaths of all detailed members of the defense are correctly stated in the convening orders (except that _____). The accused has been advised of his rights to counsel established by Article 38 of the Code and paragraph 48 of the Manual for Courts-Martial.

Qualifications of individual counsel

IC: I am (a member of the bar of _____) (certified by The Judge Advocate General of the _____ under Article 27(b) and I have (not) been previously sworn.)

Note. If the individual counsel is not qualified under MCM 48a, and a bad conduct discharge is authorized to be adjudged, the MJ will advise the accused:

Unqualified individual counsel

MJ: _____, does not possess the necessary legal qualifications to defend you. You may be defended by the detailed (defense counsel) (and) (assistant defense counsel) who (is) (are) properly qualified, or you may try to obtain another individual counsel who is properly qualified. What do you want?

ACCUSED: I want [to proceed with the detailed (defense counsel) (and) (assistant defense counsel)] [the opportunity to obtain another individual counsel].

Right to qualified counsel
and Article 38 rights

Note. If the accused does not desire to proceed with detailed counsel, the MJ will adjourn the session for a reasonable time to allow the accused the opportunity to obtain another individual counsel. See MCM 58c.

Note. At this time the accused will be questioned by the military judge about his understanding of the various rights to counsel under the Uniform Code of Military Justice. If the accused is not represented by legally qualified counsel certified by The Judge Advocate General of an armed force (Article 27(b)) the military judge will conduct the interrogation immediately following this note. If the accused is represented by legally qualified counsel certified by The Judge Advocate General of an armed force, the military judge will proceed to the interrogation beginning at "Explanation to Accused of Article 38 Rights." If the accused, in response to any question concerning his understanding of any of his rights, responds that he does not understand, the military judge will explain further so that the accused fully understands his right.

MJ: (to DC) Has the accused been advised of his right to be represented by legally qualified counsel?

DC: Yes (no), sir. The advice and the accused's response has been shown to the TC and is presented to you for examination (fig. 2-1, para 2-13, AR 27-10).

Note. If the document indicates that the accused does not desire such counsel, the military judge will continue:

MJ: The document will be appended to the record.

MJ: (to accused) _____, you have the legal right to be defended by a legally qualified counsel—a lawyer—at no expense to you. If you choose to be defended by such a lawyer your detailed defense counsel may be relieved by the convening authority. Do you understand this right?

ACCUSED: Yes (no), sir.

Note. If the accused answers in the affirmative, the military judge continues:

MJ: Understanding this right, do you want to be defended by a military lawyer at no expense to you?

ACCUSED: Yes (no), sir.

Note. If the accused desires legally qualified counsel, the court will recess and the TC will notify the convening authority. If, upon reconvening, legally qualified counsel has not been detailed, but a certificate of nonavailability of counsel has been received, it will be attached to the record as an appellate exhibit. See MCM 6c and chapter 2, AR 27-10. If the accused does not desire such counsel, the trial will proceed.

Explanation to Accused of
Article 38 Rights

Note. If the accused is not represented by individual civilian counsel the military judge will conduct the following interrogation; if the accused is represented by such counsel the military judge will proceed to "Individual Military Counsel."

MJ: (to accused) _____, you have a right to be defended by a civilian lawyer provided by you at no expense to the government in addition to detailed defense counsel. Do you understand this right?

ACCUSED: Yes (no), sir.

Note. If the accused is not represented by individual military counsel the military judge will conduct the following interrogation; if the accused is represented by such counsel the military judge will proceed to "Right to Associate Counsel."

MJ: (to accused): _____, you also have the right to be defended by military counsel, lawyer or non lawyer, of your own choice if reasonably available in addition to detailed defense counsel. Do you understand this right?

ACCUSED: Yes (no), sir.

MJ: If you are defended at this trial by a civilian lawyer or by military counsel of your own choice, (name of detailed defense counsel

Right to Associate
Counsel

and assistant, if any) will act as associate counsel, if you wish, or (he) (they) may be excused with your consent. Do you understand this right?

ACCUSED: Yes (no), sir.

MJ: Do you wish to exercise your right to individual counsel or military counsel of your choice?

ACCUSED: _____

Note. If the accused wishes to exercise his right to individual civilian counsel or military counsel the court will be adjourned for a reasonable time to enable him to obtain such counsel.

TC: Has any member of the defense (including individual counsel) acted as the accuser, a member of the prosecution, investigating officer, military judge, or member of the court in this case?

Prior participation in the case by defense counsel

DC: (No counsel for the defense has so acted.) (_____, a member of the defense, has acted as _____).

Note. If a member of the defense has participated in the same case as a member of the prosecution, he will be excused immediately (MCM 61f(4)). See MCM 6a. In other cases, the MJ will advise the accused:

Explanation to accused

MJ: _____, (the regularly detailed defense counsel) (_____), previously has acted as _____ in this case. He may not now defend you unless expressly requested by you. Do you want his services in this case?

ACCUSED: I do (not).

Note. If he does so request, the proceedings continue. If he does not request the services of the counsel, the MJ will excuse him.

Action when counsel not desired

Note. If the excusing of counsel because of prior participation (Art 27(a)) deprives the accused of counsel having the requisite legal qualifications (MCM 48a) or of qualified detailed counsel (MCM 6b), and the accused desires the services of such a detailed counsel, the MJ will recess the session and the TC will report the matter to the convening authority (MCM 61f(4)).

Note. Any counsel not desired by the accused may be excused by the MJ if the accused states:

Excusing counsel not desired

ACCUSED: I do not want the (regularly detailed defense counsel) (and) (assistant defense counsel) to act (as associate counsel) in this case.

Note. Counsel not desired by the accused will be excused at this time (MCM 61f(3)). If the accused has no individual counsel and one or more detailed defense counsel is present and is not to act in the case, the chief defense counsel should make an announcement similar to the foregoing. Counsel who are not to act will be excused.

MJ: It appears that counsel for both sides have the requisite qualifications.

TC: All personnel of the court required to be present have been sworn (except _____).

Note. If the military judge has not been previously sworn, the following procedure applies:

Military judge sworn

TC: You, _____, do swear (or affirm) that you will faithfully and impartially perform, according to your conscience and the laws applicable to trials by courts-martial, all the duties incumbent upon you as military judge of this court. (So help you God.)

MJ: I do.

Note. The military judge administers the oath to the members of the prosecution who have not previously been sworn.

Prosecution sworn

MF (to trial counsel): You (name(s) of counsel) do swear (or affirm) that you will faithfully perform the duties of counsel (in the case now in hearing) (in any case in which you are detailed to act as the same). (So help you God.)

TC (AND ASST TC): I do.

Note. The oath is then administered by the military judge to the members of the defense, including individual counsel, who have not previously been sworn.

Defense sworn

MJ (to defense counsel): You (name(s) of counsel) do swear (or affirm) that you will faithfully perform the duties of counsel (and individual counsel) (in the case now in hearing) (in any case in which you are detailed to act as the same). (So help you God.)

*DC (ASST DC AND IC): I do.

Disclosing grounds for challenge

Note. The TC now states the general nature of the charges and discloses every ground for challenge believed by him to exist in the case (MCM 62b).

—nature of charges

TC: The general nature of the charges in this case is _____ the charges were preferred by _____; forwarded with recommendations as to disposition by _____ (_____) (and _____); and investigated by _____. The military judge will not be a witness for the prosecution.

Note. All persons who have forwarded the charges should be stated.

—grounds disclosed

TC: If the military judge is aware of any matters which he believes may be a ground for challenge by either side against him, he should now state such matters.

Challenges:—procedure

Note. Before exercising their right to challenge for cause, the TC and DC may question the MJ to determine the existence of facts which may be the basis for a challenge for cause (MCM 62b). As to limitations on inquiry into the eligibility of MJ, see MCM 62g.

—by prosecution

TC: The prosecution (has no challenge for cause against the military judge) (challenges the military judge on the ground _____).

—by defense

TC: Does the accused desire to challenge the military judge for cause?

DC: No. (The accused challenges the military judge for cause on the ground _____).

MJ: The challenge is (sustained) (denied).

Note. See MCM 62b as to disclosing grounds for challenge. If disclosed grounds for challenge are undisputed and are within the first eight grounds enumerated in MCM 62f, the MJ must excuse himself immediately. If the grounds disclosed are other than the first eight grounds, the MJ may excuse himself. When the MJ excuses himself, he will adjourn the session and report the matter to the convening authority for action (MCM 62c, 62h(4)).

Inquiry into request for military judge alone

MJ: I have not received a request in writing for trial before a military judge alone.

MJ (to accused): _____, you are advised that you have the right to request in writing trial by me alone. Do you understand this right?

ACCUSED: Yes (No), sir.

Note. If the accused answers in the negative, the MJ will explain further. See MCM 53d(2), 61g and Article 16, Manual for Courts-Martial.

MJ: Understanding this right, do you want to be tried by me alone?

ACCUSED: Yes (no), sir.

*After this response, "DC" refers to the counsel who is conducting the defense.

Note. If the accused answers in the negative, the session continues. If he answers in the affirmative, the MJ will give him an opportunity to consult with counsel and submit a request in writing. See MCM, appendix 8e.

Note. If the accused requests trial by the MJ alone, the MJ must satisfy himself that the request has been made knowingly and voluntarily. If the TC contests the appropriateness of a one officer court, the MJ should hear arguments from TC and DC prior to deciding the issue. See MCM 58d(2)a and paragraph 9-5c, AR 27-10. If the MJ approves the request, the MJ may announce that the court is assembled and proceed with trial of the case. See b below. Any request will be attached to the convening orders which are to be inserted in the record. If the accused expressly declines to submit a request for trial by the MJ alone, or the MJ denies the request, the trial should proceed.

Note. When the accused is an enlisted person, the TC should state:

Request for enlisted
membership

Explanation to accused

TC: I have (not) received a request in writing that the membership of the court include enlisted persons.

MJ (to accused): You have the right to have at least one-third of the membership of this court composed of enlisted persons. Do you want enlisted person to be detailed to this court?

ACCUSED: Yes (no), sir.

Note. If the accused has made or now makes such a written request, the TC presents it to the MJ.

MJ: (This request will be attached to the convening orders and will be inserted in the record.)

Note. If such a request has been made and requirements for enlisted membership do not appear to have been met, the MJ will inquire into the matter to insure compliance before assembly of the court. See MCM 61h and Article 25(c).

Note. The Article 39(a) session continues. The MJ may proceed to dispose of interlocutory motions raising defenses and objections, ruling upon other matters that may legally be ruled upon by the MJ, and performing other procedural functions which do not require the presence of court members. The MJ should rule on all questions of the admissibility of evidence at this session. Evidence may be admitted at this time for subsequent consideration by the members rather than simply marked for identification.

The MJ should always, if possible, hold the arraignment, receive pleas and enter findings of guilty upon an accepted plea of guilty at an Article 39(a) session prior to assembly.

Arraignment

—distribution of charges
and specifications

MJ: The accused will now be arraigned.

Note. The TC now should present to the MJ copies of only those charges and specifications upon which the accused is to be arraigned.

TC: All parties to the trial have been furnished with a copy of the charges. Does the accused desire that they be read?

—waiver of reading
charges

DC: The accused (waives the reading of the charges) (desires that the charges be read).

—charges and
specifications read

Note. If the accused desires that the charges be read, the TC now reads the charges and specifications on which the accused is to be tried, with the name and description of the accuser, the affidavit, and the reference for trial. They are copied verbatim into the record at this point, regardless of whether the accused waives the actual reading of the charges and specifications. If the accused waives the reading of the charges, the proceedings continue:

MJ: The reading of the charges may be omitted.

TC: The charges are signed by _____, a person subject to the code, as accuser; are properly sworn to before a commissioned officer of the armed forces authorized to administer oaths; and are properly referred to this court for trial by _____, the convening authority.

—notice of service

TC: The charges were served on the accused by (me) (_____) on _____, 19 ____.

Note. Unless the date of service is at least 8 days prior to the date of trial, except in time of war, the accused may object to this defect in service (Art 35). See MCM 58c. If he does so, the court must grant a continuance at this point.

—end of arraignment

MJ: _____, how do you plead? Before receiving your pleas, I advise you that any motions to dismiss any charge or to grant other relief should be made at this time.

Note. The arraignment is complete when the accused is asked how he pleads. Neither pleas nor motions are part of the arraignment (MCM 65a).

Motions

Note. Motions for appropriate relief are waived if they are not made prior to plea or prior to the conclusion of any Article 39(a) session held prior to assembly, whichever occurs earlier (MCM 67b and 69a). Motions to dismiss should ordinarily be made before a plea is entered (MCM 67a and 68a). All proceedings and action on motions will be recorded. See MCM 53d, 66, 67, 68, 69, and 122. Any explanation of the accused's right to move that a charge be dismissed because barred by the statute of limitations (MCM 53h and 68e), and the accused's response, will be recorded.

DC: The Defense has (no) motions to be made.

DC: The defense [moves that Specification _____, Charge _____, be dismissed because of former acquittal, on _____, by a court-martial convened pursuant to _____, dated _____, 19____, of the charge of _____ (reciting charge and specification in full)] [moves that _____].

Hearing on motion

Note. The MJ rules on all interlocutory questions arising during the proceedings. Any ruling by the military judge upon a question of law, including a motion for a finding of not guilty, or upon any interlocutory question other than the factual issue of mental responsibility of the accused, is final and constitutes the ruling of the court. See MCM 67 and 71a.

Ruling on motion

MJ: The motion is (denied) (granted). (The accused will not be required to plead to Specification _____, Charge _____.)

Ruling on mental responsibility

Note. The MJ may rule on the factual issue of mental responsibility, but the issue must be presented to the court after assembly, with appropriate instructions, to ascertain if any member objects to the ruling (MCM 122b(4)).

Amendment of charges

Note. If charges are amended on motion or otherwise or after a motion to sever is granted in the case of accused jointly charged, the amendment will be formally stated for the record. See MCM 69b(3). For example, after a motion to sever is granted, the formal amendment may be in the following form:

Form of amendment after severance

MJ: Each Specification is formally amended by striking out the words "and _____," the accused who is not now to be tried, and not the words "acting jointly and in pursuance of a common intent," and by inserting after the word "did," the words "in conjunction with _____," "the accused who is not now to be tried. Trial will proceed on the charges as amended.

Pleas of accused

Note. When no motions are made or when the DC indicates that he has no further motions, the disposition of pleas will follow.

DC: The accused: _____, pleads:

To all Specifications and Charges: (Not guilty) (Guilty)

To Specification 1 of the Charge: Guilty

To Specification 2 of the Charge: Not guilty

To the Charge: Guilty

_____ or

To Specification _____, Charge _____: Guilty, except the words "_____" and "_____" (, substituting therefor, respectively, the words

—guilty to one specification

—with exceptions and substitutions

Form of explanation of
plea of guilty

—consultation with DC

—statute of limitations

—determination of
punishment

—advice as to punishment

—effect of previous
convictions on
punishments

—accused's understanding
of punishment

—general explanation

"_____ " and "_____, " to the excepted words, not guilty to the substituted words, guilty).

To Charge ____ : (Guilty) (Not guilty, but guilty of a violation of Article ____).

Note. In any case in which a plea of guilty is entered, the MJ should explain the meaning and effect of the guilty plea (MCM 70b(2) and (3)). The following inquiry and explanation should be used:

MJ: Have you had enough time to talk with your counsel about your plea(s) in this case?

ACCUSED: Yes (No), sir.

Note. If the accused has refused to talk with counsel, the plea should not be received. If the answer is "no," the necessary time will be made available for consultation.

Note. If the accused pleads guilty to a lesser included offense against which the statute of limitations has apparently run, the MJ should insure that the accused is aware of his right to interpose the statute in bar of trial as to that offense (MCM 53h, 68c).

Note. The MJ may consult with the TC and DC as to their opinions of the maximum authorized punishment for the offenses to which the accused has pleaded guilty and allow them to submit legal authority if there is disagreement.

MJ: The maximum authorized punishment for the offense(s) to which you have pleaded guilty is (_____).

Note. The following applies only when a bad conduct discharge is authorized. The accused should be informed that if he is convicted of two or more offenses the authorized punishment for which is 6 months or more, he may receive a bad conduct discharge (sec B, MCM 127c). If the maximum punishment would be increased by proof of admissible prior convictions after findings (MCM 75b(2) and Section B, MCM 127c), the advice should include the prospective effect of proof of these convictions. This supplementary advice may be:

"However, [if the court receives evidence of two or more previous convictions adjudged during the 3 years next preceding the commission of any offense to which you plead guilty, the maximum punishment would be: a bad-conduct discharge, confinement at hard labor for _____, forfeiture of two-thirds pay per month for _____ months, (and reduction to the lowest enlisted grade)."

MJ: Do you understand the maximum authorized punishment for the offense(s) to which you have pleaded guilty?

Note. If it appears that the accused was previously of the opinion that the maximum authorized punishment was other than determined by the MJ for the offense or offenses of which he has pleaded guilty, he will be given an opportunity to consult further with the DC and thereafter express any changes in his plea.

MJ: _____, you have pleaded guilty to (Specification _____, Charge _____) (the lesser included offense of _____) (all the specifications and charges). By so doing, you admit every act or omission and every element alleged with respect to the offense(s) to which you have pleaded guilty. The elements of the offenses to which you have pleaded guilty are _____. Your plea will subject you to (a) finding(s) of guilty without further proof of (that) (those) offense(s), in which event you may be sentenced by the court to the maximum punishment authorized for (it) (them). You are legally entitled to plead not guilty and place the burden upon the prosecution of proving your guilt of (that) (those) offense(s). Your plea of guilty will not be accepted unless it appears that you understand its meaning and effect and that you are voluntarily pleading guilty because you are convinced that you are guilty. If you are not convinced that you are guilty, you should not allow any other considerations to influence you.

MJ: Do you understand this explanation of the meaning and effect of your plea of guilty?

ACCUSED: (Yes, sir). (_____).

MJ: Are you voluntarily pleading guilty?

ACCUSED: (Yes, sir). (_____).

MJ: Are you convinced that you are guilty?

ACCUSED: (Yes, sir). (_____).

—additional explanation

Note. If the MJ considers it appropriate, further inquiry and a more detailed explanation may be conducted. This may include, for example, inquiry into the reason for the guilty pleas, and inquiry into and explanation of any agreement involved in connection with the pleas.

—verification of guilty plea

MJ: Understanding the things we have discussed, do you still want to plead guilty?

ACCUSED: Yes, sir. (I want to plead _____).

—acceptance of guilty plea

Note. If the accused persists in his proposal to plead guilty and the MJ finds cause to doubt its providence, he may discuss the question further. In any case, the MJ should advise the parties present of his decision as to accepting or rejecting the guilty pleas:

MJ: [The plea(s) of guilty will be accepted.] [The plea(s) of guilty (to _____) will not be accepted (because _____)].

Erroneous advice

Note. If a plea of guilty has been entered and it appears later that the accused was erroneously advised that the maximum punishment was other than that legally authorized for the offense or offenses to which he pleaded guilty, the MJ should advise him of the correct maximum punishment and give him an opportunity to withdraw his plea of guilty. See MCM 70b for other situations which may warrant the withdrawal of an accepted guilty plea.

Findings of guilty

Note. Findings of guilty as to any charge and specification will be entered immediately without vote after a plea of guilty has been accepted by the MJ (MCM 70b). No finding will be entered at this time pursuant to a plea of guilty to any lesser included offense. Findings are entered when the MJ announces that the accused has been found guilty in accordance with his plea. If a plea of guilty has been accepted as to any charges and specifications, the MJ will state:

MJ: _____, it is my duty as military judge to inform you that, in accordance with your pleas of guilty, this court finds you [of all the specifications and charges] [_____]: Guilty.

Note. At the conclusion of the session, the MJ should state:

MJ: This session is (recessed) (adjourned).

b. Procedure for Special Courts-Martial Other Than Article 39(a) Sessions

Note. This procedure guide may be used for trial by a court composed of MJ and members or MJ alone. When the MJ is sitting alone, he should make appropriate omissions from the procedure.

Items marked with # are omitted if previously covered at an Article 39(a) session.

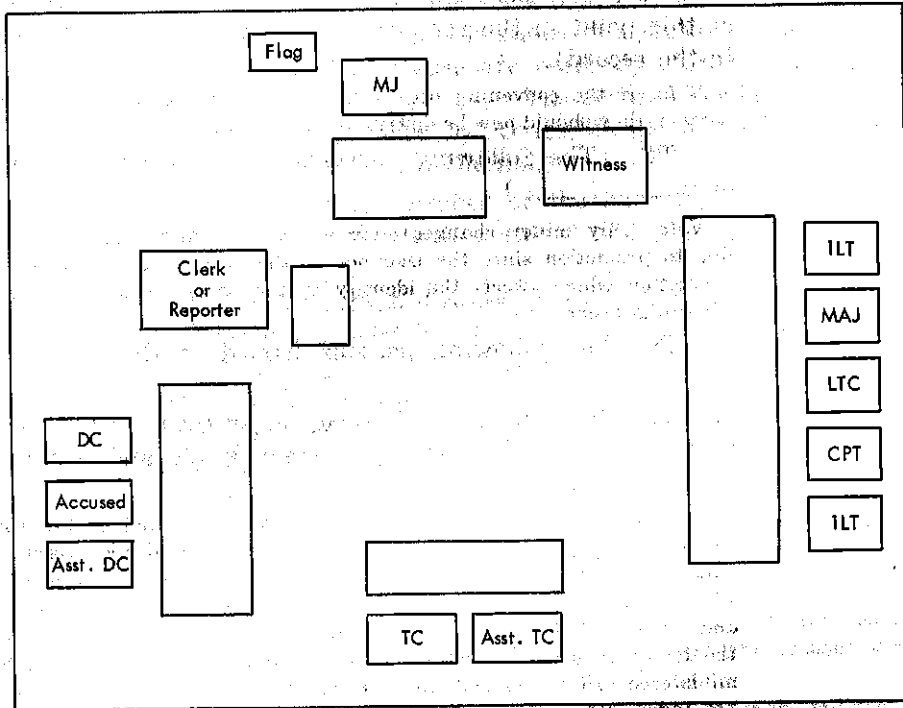
Informal inquiry

Note. Before the MJ calls a special court-martial to order, he should examine the convening order, determine that the accused and a quorum are present, including one-third enlisted persons if they have been requested, and that the detailed trial, counsel and defense counsel are apparently qualified. See MCM 38c(2). He should also verify the qualifications of any individual counsel. See MCM 48a. Witnesses should be excluded from the courtroom except when they testify. See MCM 58f. Matters resolved at an Article 39(a) session need not be considered anew if the circumstances remain unchanged and accused is not deprived of any rights, such as the right to request, before assembly, trial by military judge alone, the right of an enlisted person to request enlisted court members, or the right to request qualified counsel. See Article 16.

Seating

Note. The members, if any, are seated alternately to the right and left of the

SPECIAL COURT-MARTIAL



president according to rank. The MJ is seated apart from the members. An acceptable seating arrangement appears below:

Court called to order

MJ: The court will come to order.

Note. When a reporter is detailed, he records all proceedings verbatim (MCM 49b and 53d, subject to the exceptions set forth in appendix 9 of the Manual and herein. He is responsible for keeping a record of the hour and date of each opening or closing of the court, whether for recess, adjournment, or otherwise, for insertion in the record. When a verbatim record is not authorized, the TC, with any clerical assistance, is responsible for keeping a summarized record. See MCM, appendix 10a.

Convening orders

TC: The court is convened by _____, (as amended by _____) a copy of which has been furnished to the military judge, each member of the court, counsel, and the accused (and to the reporter for insertion at this point in the record) (and which will be inserted at this point in the record).

Note. If the convening orders were previously distributed at an Article 39(a) session, they should now be distributed to the court members.

TC: (The following corrections are noted in the convening orders: _____.)

Note. Only minor changes such as typographical errors or changes of grade due to promotion since the issuance of the orders can be made in this way. Any correction which affects the identity of the party concerned must be made by an amending order.

Persons present

TC: The following persons named in the convening orders are present:

Presence of accused

TC: The prosecution is ready to proceed with the trial in the case of the United States against (name, grade and organization of each used), who (is) (are) present in court.

Note. Chapter 5, AR 27-10 provides that personnel of the court need not be sworn in the presence of the accused. If any accused are present solely to permit swearing in their presence of those officials and clerical assistants of the court who are required to act under oath and were not previously sworn (MCM 58b and 112c) Art 42), the TC will make the following announcement: "In addition, the following accused persons, who will be excused after the oaths have been administered to those officials and clerical assistants of the court who are required to act under oath, are present:

Detail of reporter

Note. When a reporter has been detailed, the TC will announce:

TC: _____ has been detailed reporter for this court (and will now be sworn) (and has previously been sworn).

Note. The reporter rises and stands with right hand raised; the TC, right hand raised, faces the reporter and administers the oath.

Reporter sworn

TC: You swear (or affirm) that you will faithfully perform the duties of reporter (to this court) (to any court to which you shall be detailed). (So help you God.)

Note. The oath need not be given to the reporter or other court-martial personnel if they were previously sworn and the record so reflects (Art 42).

REPORTER: I do.

Qualifications of prosecution

TC: The legal qualifications and status as to oaths of all members of the prosecution are correctly stated in the convening orders (except that _____).

Prior participation by member of prosecution

TC: No member of the prosecution named in the convening orders has acted as investigating officer, military judge, court member, or a member of the defense in this case, or as counsel for the accused at a

pretrial investigation or other proceedings involving the same general matter.

Note. If any member of the prosecution appears to be disqualified, the MJ will take the action indicated in MCM 61a. See MCM 6a.

#Introduction of defense counsel

TC: By whom will the accused be defended?

DC: The accused is to be defended by (_____, the detailed defense counsel) (and), (_____, the detailed assistant defense counsel) (and) (_____, individual counsel).

#Qualifications of defense counsel

TC: Will counsel representing the accused state whether the legal qualifications and status as to oaths of the detailed members of the defense are correctly stated in the convening orders (and will individual counsel state his legal qualifications)?

DC: The legal qualifications and status as to oaths of all detailed members of the defense are correctly stated in the convening orders (except that _____). The accused has been advised of his rights to counsel established by Article 38 of the Code and paragraph 48 of the Manual for Courts-Martial.

#Qualification of individual counsel

IC: I am (a member of the bar of _____) (certified by The Judge Advocate General of the _____ under Article 27 (b)).

Note. If the individual counsel is not qualified under MCM 48a, and a bad conduct discharge is authorized to be adjudged, the MJ will advise the accused:

#Unqualified IC

MJ: _____, does not possess the necessary legal qualifications to defend you. You may be defended by the detailed (defense counsel) (and) (assistant defense counsel) who (is) (are) properly qualified, or you may attempt to obtain another individual counsel who is properly qualified. What do you desire?

ACCUSED: I want [to be defended by the detailed (defense counsel) (and) (assistant defense counsel)] [to obtain another individual counsel].

Note. If the accused does not desire to proceed with detailed counsel, the MJ will adjourn the court for a reasonable time to allow the accused the opportunity to obtain another individual counsel. See MCM 58c.

Right to qualified counsel and Article 38 rights

Note. At this time the accused will be questioned by the military judge about his understanding of the various rights to counsel under the Uniform Code of Military Justice. If the accused is *not* represented by legally qualified counsel certified by The Judge Advocate General of an armed force (Article 27(b)) the military judge will conduct the interrogation immediately following this note. If the accused is represented by legally qualified counsel certified by The Judge Advocate General of an armed force, the military judge will proceed to the interrogation beginning at "Explanation to Accused of Article 38 Rights." If the accused in response to any question concerning his understanding of any of his rights responds that he does not understand, the military judge will explain further so that the accused fully understands his right.

MJ: (to DC) Has the accused been advised of his right to be represented by legally qualified counsel?

DC: Yes (no), sir. The advice and the accused's response has been shown to the TC and is presented to you for examination (fig. 2-1, para 2-13, AR 27-10)

Note. If the document indicates that the accused does not desire such counsel, the military judge will continue:

MJ: The document will be appended to the record.

MJ: (to accused) _____, you have the legal right to be de-

fended by a legally qualified counsel—a lawyer—at no expense to you. If you choose to be defended by such a lawyer your detailed defense counsel may be relieved by the convening authority. Do you understand this right?

ACCUSED: Yes (no), sir.

Note. If the accused answers in the affirmative, the military judge continues:

MJ: Understanding this right, do you want to be defended by a military lawyer at no expense to you?

ACCUSED: Yes, (no), sir.

Note. If the accused desires legally qualified counsel, the court will recess and the TC will notify the convening authority. If, upon reconvening, legally qualified counsel has not been detailed, but a certificate of nonavailability of counsel has been received, it will be attached to the record as an appellate exhibit. See MCM 6c and chapter 2, AR 27-10. If the accused does not desire such counsel, the trial will proceed.

Explanation to Accused of
Article 38 Rights

Note. If the accused is *not* represented by individual civilian counsel the military judge will conduct the following interrogation; if the accused is represented by such counsel the military judge will proceed to "Individual Military Counsel."

MJ: (to accused) _____, you have a right to be defended by a civilian lawyer provided by you at no expense to the government in addition to detailed defense counsel. Do you understand this right?

ACCUSED: Yes (no), sir.

Note. If the accused is *not* represented by individual military counsel the military judge will conduct the following interrogation: if the accused is represented by such counsel the military judge will proceed to "Right to Associate Counsel."

MJ (to accused): _____, you also have the right to be defended by military counsel, lawyer or non lawyer, of your own choice if reasonably available in addition to detailed defense counsel. Do you understand this right?

ACCUSED: Yes (no), sir.

MJ: If you are defended at this trial by a civilian lawyer or by military counsel of your choice, (Name of detailed counsel and assistant, if any) will act as associate counsel, if you wish, or (he) (they) may be excused with your consent. Do you understand this right?

ACCUSED: Yes (no), sir.

MJ: (If detailed counsel is absent); (Name of absent counsel) is not present in court. You are entitled to be defended by each and every defense counsel or assistant defense counsel named on the convening order. Do you understand this right?

ACCUSED: Yes (no), sir.

MJ: Do you wish to exercise your right to (individual counsel) or (military counsel of your choice) or (your right to be defended by each counsel named on the convening order.)

ACCUSED: _____.

Note. If the accused wishes to exercise his right to individual counsel, military counsel or his right to the presence of absent counsel the court will be adjourned for a reasonable time to enable him to obtain such counsel.

TC: Has any member of the defense (including individual counsel) acted as the accuser, a member of the prosecution, investigating officer, military judge, or member of the court in this case?

DC: (No counsel for the defense has so acted.) (_____, a member of the defense, has acted as _____.)

#Prior participation by
defense counsel

Note. If a member of the defense has participated in the same case as a member of the prosecution, he will be excused immediately (MCM 61f(4)). See MCM 6a. In other cases, the MJ will advise the accused:

Explanation to accused

MJ: _____, (the regularly detailed defense counsel) (_____), previously has acted as _____ in this case. He may not now act as a member of the defense unless expressly requested by you. Do you want him to defend you?

ACCUSED: I do (not).

Note. If he does so request, the proceedings continue. If he does not request the services of the counsel, the MJ will excuse him.

Action when counsel not desired

Note. If the excusing of counsel not desired by the accused, because of prior participation (Art 27(a)), deprives the accused of counsel having the requisite legal qualifications (MCM 48a), or of qualified detailed counsel (MCM 6a), and the accused desires the services of such a detailed counsel, the MJ will adjourn the court and report the matter to the convening authority (MCM 61f(4)).

Note. Any counsel not desired by the accused may be excused by the MJ if the accused states:

Excusing counsel not desired

ACCUSED: I (do not) want the (regularly detailed defense counsel) (and) (assistant defense counsel) to act (as associate counsel) in this case.

Note. Counsel not desired by the accused will be excused at this time. (MCM 61f(8)). If the accused has no individual counsel and one or more detailed members of the defense is present and is not to act in the case, the chief defense counsel should make an announcement similar to the foregoing, whereupon the counsel who are not to act will be excused.

MJ: It appears that counsel for both sides have the requisite qualifications.

Inquiry into request for military judge alone

MJ: I have not received a request in writing for trial before a military judge alone.

MJ (to accused): _____, you are advised that you have the right to request in writing trial by me alone. Do you understand this right?

ACCUSED: Yes (no), sir.

Note. If the accused answers in the negative, the MJ will explain further. See MCM 53d(2), 61g and Article 18.

MJ: Understanding this right, do you want to be tried by me alone?

ACCUSED: Yes (no), sir.

Note. If the accused answers in the negative, the trial continues. If he answers in the affirmative, the MJ will give him an opportunity to consult with counsel and submit a request in writing. See MCM, Appendix 8e.

Note. If the accused requests trial by the MJ alone, the MJ must satisfy himself that the request has been made knowingly and voluntarily. If the TC contests the appropriateness of a one officer court, the MJ should hear arguments from TC and DC prior to deciding the issue. See MCM 53d(2)a and paragraph 9-5c, AR 27-10. If the MJ approves the request, the MJ should excuse the members from further duty in the case and announce that the court is assembled for the trial of the case. Any request will be attached to the convening orders and (which are to be) inserted in the record. If the accused does not request trial by the MJ alone, or the MJ denies the request, the trial should proceed as follows:

Request for enlisted membership

Note. When the accused is an enlisted person, the TC should state:

TC: I have (not) received a request in writing that the membership of the court include enlisted persons.

#Explanation to accused

MJ (to accused): You have the right to have at least one-third of the membership of this court composed of enlisted persons. Do you want enlisted persons on this court?

ACCUSED: Yes (no), sir.

Note. If the accused has made or now makes such a written request, the TC presents it to the MJ.

MJ: (This request will be attached to the convening orders and inserted in the record.)

Note. If such a request has been made and requirements for enlisted membership have not been met, the MJ will adjourn the court and report the matter to the convening authority. See MCM 61h and Article 25(c).

Preliminary instructions

Note. At this point the MJ should, in his discretion, give the court preliminary instructions to assist them during the course of the trial. These instructions are particularly desirable if the court has not previously heard other cases, but they may be given in any case. The contents of these instructions are discretionary with the MJ, but they should be limited to a general discussion of the duties of the personnel of the court and matters concerning the proper conduct of the trial.

Members sworn

TC: (The members will be sworn. All persons rise.) (All members of the court have previously been sworn.)

Note. The oath may be omitted if all members have been previously sworn in accordance with chapter 5, AR 27-10. Otherwise, all persons stand while the oath is administered to the members of the court, the MJ and counsel. Each member raises his right hand and the TC administers the following oath:

TC: Each of you do swear (or affirm) that you will faithfully perform all the duties incumbent upon you as a member of this court; that you will faithfully and impartially try, according to the evidence, your conscience, and the laws applicable to trials by courts-martial, the case of (the accused now before this court) (any accused brought before you); and that you will not disclose or discover the vote or opinion of any particular member of the court upon a challenge or upon the findings or sentence unless required to do so in due course of law. (So help you God.)

EACH MEMBER OF THE COURT: I do.

Note. If the MJ has not been previously sworn, the members lower their hands but remain standing while the TC administers the oath to the MJ, who raises his right hand.

#Military Judge sworn

TC: You (name of military judge) do swear (or affirm) that you will faithfully and impartially perform, according to your conscience and the laws applicable to trials by courts-martial, all the duties incumbent upon you as military judge of this court. (So help you God.)

MJ: I do.

#Prosecution sworn

Note. Unless the members of the prosecution have been previously sworn (chap 5, AR 27-10), the MJ administers the oath to them as they raise their right hands:

MJ (to trial counsel): You (name(s) of counsel) do swear (or affirm) that you will faithfully perform the duties of counsel (in the case now in hearing) (in any case in which you are detailed to act as the same). (So help you God.)

TC (and Asst TC): I do.

Note. Unless members of the defense have been previously sworn (AR 27-10), the oath is then administered to them by the MJ as they raise their right hands:

#Defense sworn

MJ (to defense counsel): You (name(s) of counsel) do swear (or affirm) that you will faithfully perform the duties of counsel (and individual counsel) (in the case now in hearing) (in any case in which you are detailed to act on the same). (So help you God.)

*DC (Asst DC and IC) : I do.

Note. All persons except the TC are then seated.

MJ: The court is assembled.

Note. If it appears that any witnesses in the case are present in the courtroom, the MJ should announce:

MJ: Unless they are required to be present for other reasons, all persons who expect to be called as witnesses in the case of _____ will withdraw from the courtroom.

Note. The TC now states the general nature of the charges and discloses every ground for challenge believed by him to exist in the case (MCM 62b). When any charge or specification has been withdrawn, the TC should insure that the court is not made aware that the withdrawn charge or specification was ever preferred. See MCM 56d. If the MJ denied a challenge against himself at an Article 39(a) session held prior to assembly, the challenge may be renewed at this time only for good cause, such as newly discovered evidence (MCM 62d).

TC: The general nature of the charges in this case is _____; the charges were preferred by _____; forwarded with recommendations as to disposition by _____ (_____) (and _____); and investigated by _____. Neither the military judge nor any member of the court will be a witness for the prosecution.

Note. All persons who have forwarded the charges should be stated.

TC: The records of this case disclose [no grounds for challenge] [grounds for the challenge of _____ for the following reasons: he (is not eligible to serve as _____) (is the accuser) (was the investigating officer) (forwarded the charges with recommendation as to the disposition) (has previously participated in the case as _____) (is an enlisted member of the same unit as accused) (_____)].

TC: Records indicate that the accused is a member of _____. If any enlisted member of the court is now a member of the same unit, it is requested that he so state.

TC: If any member of the court or the military judge is aware of any matters which he believes may be a ground for challenge by either side against him, he should now state such matters. If a statement is to be made, it should only include the general nature of the matter and not any specific facts which might tend to disqualify other members when heard by them.

Note. See MCM 62b as to disclosing grounds for challenge. If disclosed grounds for challenge are undisputed and are within the first eight grounds enumerated in MCM 62b, the MJ must excuse himself or the member challenged immediately. If the grounds disclosed are other than the first eight grounds, and relate to the MJ, he may excuse himself. If they relate to a member, his ruling on the challenge is made within his sole discretion. See Article 41 and MCM 62.

Note. Before exercising their right to challenge for cause, the TC and DC may question the MJ and members of the court, either individually or as a group, to determine the existence of facts which may be the basis for a challenge for cause (MCM 62b). It is optional with the counsel conducting the inquiry whether a member being questioned shall be required to answer under oath. See MCM 114g for the form of the oath. As to limitations on inquiry into the eligibility of MJ, see MCM 62g. The MJ may direct that the examination of the MJ or a member be conducted out of the presence of the remaining members of the court (MCM 62b).

*After this response "DC" refers to the counsel who is conducting the defense.

Disclosing ground for
challenge

—nature of charge

—grounds disclosed by
records

—grounds disclosed by
enlisted members

—grounds disclosed by
members

Challenges:
—procedure

If the DC consents, the TC may present to the members prior to challenges copies of the charges and specifications upon which the accused is to be arraigned.

See MCM 62a concerning the procedure to be followed on challenges. A challenged member will be afforded the opportunity to make a statement with respect to the challenge. When the MJ has been challenged, he shall continue to rule on interlocutory questions arising during the hearing even though he may at that time be making a statement as to his competency. After the hearing on a challenge for cause has been completed, the MJ will determine the relevancy and validity of the challenge.

Challenges for cause should be made immediately following assembly of the court, but the MJ may allow a challenge for cause to be presented at any stage of the proceedings. Challenges for cause may again be presented, even though once overruled, if for good cause, such as newly discovered evidence (MCM 62d).

—by prosecution (for cause)

TC: The prosecution (has no) challenges for cause (_____ on the ground_____).

(peremptory)

TC: The prosecution (has no peremptory challenge) (desires to challenge peremptorily_____).

Note. As to peremptory challenges, see MCM 62e. When the right to make a peremptory challenge is exercised, the challenged member will be excused immediately.

—by defense

TC: Does (any of) the accused desire to challenge any member of the court or the military judge for cause?

Note. When there is more than one accused, the challenges of each for cause are ordinarily disposed of before their peremptory challenges are made.

(for cause)

DC: No (The accused challenges_____ for cause on the ground_____).

(peremptory)

TC: Does (any of) the accused wish to exercise his right to one peremptory challenge against any member?

Note. Each accused is entitled to one peremptory challenge.

DC: The accused,_____, (has no peremptory) challenges (_____ peremptorily). (_____).

Withdrawal of charges

Note. See MCM 56 concerning limitations on withdrawing all or less than all charges and specifications after a trial has commenced and for action to be taken at this or any other time when less than all of them are withdrawn after the court has been made aware of their existence.

#Arraignment

MJ: The accused will now be arraigned.

Note. The arraignment procedure set out in *a* above should be followed.

Announcing prior arraignment

Note. If the accused has been arraigned at an Article 39(a) session held prior to assembly, the following procedure should be used:

MJ: The accused was arraigned at a session conducted on_____. (The trial counsel will now distribute copies of the charges.)

Note. TC should present to the members copies of only those charges and specifications upon which the accused has been arraigned unless distributed earlier with the consent of DC.

Motions

Note. Motions not made at an Article 39(a) session held prior to assembly may, if appropriate, be made at this time in the manner indicated in *a* above.

Pleas

Note. If the pleas of the accused were not entered at an Article 39(a) session held prior to assembly, they will be made and the meaning and effect of a guilty plea will be explained out of the hearing of the court in the manner set forth in *a* above. If the accused entered his pleas at an Article 39(a) session prior to assembly, and his pleas have been accepted, the TC should announce the pleas.

TC: At a session of this trial held on_____ the accused entered the following pleas:_____.