introductory clause, present military law has adopted, verbatim, the Federal attitude. 28 U.S.C. § 1732. The boundaries of the business entry doctrine have been delineated by many Federal holdings, and they deserve some consideration here. The term 'regular course of business' has been defined as 'a course of transactions performed in one's habitual relations with others and as a natural part of one's mode of obtaining a livelihood. It [the doctrine] would probably exclude, for instance, a diary of doings kept merely for one's personal satisfaction; but it would not exclude any regular record that was helpful, though not essential nor usual in the same occupation as followed by others.' Wigmore, Evidence, 3d Ed § 1523. . . . Then, it was held in that case [Palmer v. Hoffman] not to be part of the business of railroading to preserve the railroad's versions of accidents for which it was potentially liable. And the recordation of convictions has been held not to be part of the business of a police department. . . . However, a memorandum of a telephone conversation between a defendant and a bank employee made as a routine entry in the regular course of the bank's business has been held to be admissible . . . and records of telephone calls and office visitors customarily kept by a Government office fall under the same exception to the hearsay rule. . . . It appears to be of little moment whether the entry is in a freight bill, . . . an invoice . . . a memorandum of telephone calls . . . or in a ledger or voucher . . . and all would fall within the term of the Manual. It is only necessary that the record be regularly kept for a business purpose, and not for only the idle amusement or private information of the maker. . . . When his [the accused's] conduct is measured by the Manual yardstick, it is easily seen that the writing on the envelope qualified as a memorandum of an act done by the accused. It was made in the regular course of his 'business' to collect and safeguard the funds of the association. The writing made by him was in strict compliance with the instructions he had received, and the direction involved was one likely to further the purposes of this business. It follows that in the regular course of business there was fixed upon the accused the duty of making just such a writing as this. Lastly, the memorandum made here was made at a time which was contemporaneous with the occurrence of the act done by the accused to safeguard the funds."

3. Notations on checks. On 16 March 1962, par. 144*c* of the Manual was amended (Executive Order Number 11009) to provide that

"a notation in the form of a stamp, ticket, or other writing" on or accompanying "a check, draft, or other order for the payment of money upon a bank or other depository" when it is returned to the prior holder through regular banking channels and "indicating that payment of the instrument has been refused by the drawee because of insufficient funds of the maker or drawer in the drawee's possession or control or other reasons" is admissible as a business entry "as evidence that payment of the instrument was refused by the drawee for the reasons indicated in the notation."

4. Military records. *a. General.* For the purpose of this exception to the hearsay rule, the performance of duties by military personnel may be considered "business." Hence, records kept by an individual in furtherance of his duties may, if the other prerequisites are present, qualify as business entries. It is immaterial that the keeping of the particular record is not required by any law, regulation or custom or, if it is so required, that some defect in the preparation thereof renders it inadmissible as an official record.

b. Illustrative cases.

(1) ACM 5561, *Roberson*, 12 CMR 768 (1953), *pet. denied*, 13 CMR 142 (1953). When it was shown that a proffered morning report had been signed by an officer not authorized to do so but such officer testified that it had been the customary practice for him to sign the morning reports in his organization at that time, the record was admissible as a business entry.

(2) CM 387850, *Slabonek*, 21 CMR 374 (1956), *pet. denied*, 21 CMR 340 (1956). When a morning report was inadmissible as an official record because it was initialled rather than signed, as required by regulations, it was nonetheless admissible as a business entry where the initialled entry was made in compliance with a prior regulation which was superseded only 32 days prior to the making of the entry by a new regulation of which the maker probably was unaware. For over 20 years it had been part of the regular doing of the business of personnel administration in the Army to make such initialed reports.

5. Fact or event. *a. General.* Only those business entries which record facts or events, as opposed to opinions, are admissible. There is no one rule by which it can be determined whether a particular entry pertains to a fact or an opinion. The borderline between fact and opinion is not sufficiently precise to permit of the formulation of such a rule. However, as a rough test, it may be stated that if the particular entry contains an "opinion" as to which reasonable men, if fully aware of the data upon which the opinion is based, might disagree, then the person who drew the conclusion should be subject to cross-

examination on this point and, therefore, the entry should be held inadmissible as a business entry.

b. Illustrative cases.

(1) CM 347748, *Martin*, 1 CMR 370 (1951). An autopsy report, otherwise qualified as a business entry, is admissible to establish the physical cause of the death, *viz.*, "a terrific physical beating the patient had sustained a short while prior to his demise."

(2) CM 323197, *Abney*, 72 BR 149 (1947). An autopsy report prepared as a business entry (and as an official record) is admissible in a homicide case to show the physical cause of death but not to show that it was a homicide.

(3) *New York Life v. Taylor*, 147 F. 2d 297 (1945). In an action against an insurer to recover under a double indemnity life insurance clause based upon a death resulting from a patient falling down a flight of stairs in Walter Reed Army Hospital, hospital records showing the diagnosis of the deceased's state of mind as being suicidal are not admissible as business entries under the Federal statute. The purpose of the statute was not to enlarge the common law shop book rule but merely to avoid the necessity of calling witnesses. An opinion as to mental condition is the type of opinion which must be subject to being tested by cross-examination.

(4) *United States v. Roland*, 9 USCMA 401, 404, 26 CMR 181, 184 (1958). A medical report may not be used by either the prosecution or the defense as evidence of the accused's mental condition. "Neither of these [reports] were admissible as evidence. See paragraph 144*d*, pages 266–267 [dealing with the opinion limitation] and paragraph 122*c* pages 203–204 [dealing with methods of proving sanity] of the Manual for Courts-Martial. . . ."

(5) CM 404566, *Paulson*, 30 CMR 465, 467 (1960). The "opinion" limitation prohibits the use of stockade records of disciplinary punishment as proof that certain acts of misconduct were committed by the accused. ". . . [A] record of punishment which has been imposed administratively and without the safeguards of due process is not competent evidence to prove the commission of the misdeeds for which the punishment was inflicted. Though such a record may be competent evidence that an accused was punished if it is offered in support of a plea in bar to further prosecution for the offense described therein, it may not be used to establish that the subject of the report committed such an act of misconduct. It does more than record a 'fact or event.' It states an opinion reached by someone, a legal conclusion, that the sub-

"a notation in the form of a stamp, ticket, or other writing" on or accompanying "a check, draft, or other order for the payment of money upon a bank or other depository" when it is returned to the prior holder through regular banking channels and "indicating that payment of the instrument has been refused by the drawee because of insufficient funds of the maker or drawer in the drawee's possession or control or other reasons" is admissible as a business entry "as evidence that payment of the instrument was refused by the drawee for the reasons indicated in the notation."

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ject committed an act violative of military law or a regulation, and was, therefore, guilty of an offense which warranted a penalty. If such a record is offered to prove the commission of the offenses set forth therein, it comes within the limitations as to the admissibility of official records and business entries covered by paragraph 144*d* of the *Manual*, and is not admissible under any exception to the heresay rule."

6. Entries made with a view to prosecution. As in the case of official records, a business entry which is made principally with a view to prosecution or during an investigation of alleged improper conduct is not admissible.

7. Evidence of absence of entry. *a. General.* "If a purported act, transaction, occurrence or event is of a kind which in the regular course of business would have been made the subject of an entry in certain business entries of a particular business, proof that these business entries contain no entry concerning such act, transaction, occurrence, or event may be received as evidence that the act, transaction, occurrence, or event did not take place." (Par. 143*a*(2), MCM, as amended by Exec. Order 11009, 16 March 1962.)

b. Illustrative cases.

(1) *United States v. Moten*, 6 USCMA 359, 265, 20 CMR 75, 81 (1955). In a prosecution for larceny of a Government pistol, evidence that a "sign-out roster," used as a business record to record the flow of weapons in and out of the arms room, showed that the subject pistol had been issued to X but failed to show that he had returned it, is admissible to refute the testimony of X, as a prosecution witness, that he had returned the weapon. "If the weapon had been surrendered to the arms room at that time [as claimed by X], the roster of weapons would, under standard procedure, have reflected that event. Since uncontroverted Government evidence indicated that no entry in the roster recited the pistol's return, the presumption of regularity would certainly dictate the conclusion that the weapon had not been restored to the arms room."

(2) *United States v. Grosso*, 9 USCMA 579, 26 CMR 359 (1958). In a prosecution for larceny of two electric razors, evidence that the business records of the Navy Exchange failed to disclose any purchase of such razor by the accused is admissible to refute the accused's assertion that the razors found in his possession had been purchased by him at the Exchange.

(3) ACM 5920, *Calhoun*, 9 CMR 687 (1953), *pet. denied*, 11 CMR 248 (1943). In a check forgery case, evidence that the records of the drawee bank show no account in the name of the

drawee of the check is admissible to show that no such account existed.

(4) ACM 7081, *McDonough*, 12 CMR 883, 890 (1953), *pet. denied*, 13 CMR 142 (1953). Evidence that the records of a certain Western Union office failed to show that a certain telegram had been delivered to the accused together with evidence that the records would have shown such fact had it occurred is admissible to establish that the telegram was not delivered when such evidence "is adduced through the medium of one familiar with the manner in which the business entries were made, including the nature and scope thereof, and the trustworthiness or weight to be given such testimony could be fully proved through the medium of cross-examination or otherwise."

8. Difference between official records and business entries. The principal differences between these two types of documentary evidence are as follows:

a. A business entry must have been made at or reasonably near the time of the events recorded. An official record may have been made at any time.

b. The best evidence rule applies to business entries other than banking records. Copies of official records and banking records are admissible. (See Chapter XXIV.)

c. Business entries other than banking records must be authenticated by competent testimony. Official records and banking records may be authenticated by other means. (See Chapter XXV.)

9. Hypothetical problems. *a.* In a larceny case, a duly authenticated tally sheet used in the regular course of business to maintain a running inventory of the items stored in a warehouse is offered by the prosecution for the purpose of proving that the allegedly stolen item had been located in this warehouse. On cross-examination of the custodian, the defense establishes that this tally sheet had been instituted as a method of doing business only six hours before the alleged larceny and that prior to that time the custodian had maintained no records whatsoever as to the contents of his warehouse, but that such records were maintained in a central office. On re-direct, the custodian testifies that he had instituted the new system on his own initiative because he believed it desirable to know at all times the contents of the warehouse. Is the tally sheet admissible as a business entry?

b. The accused, Private Jones, is charged with damaging through neglect, a Government rifle. The prosecution puts in evidence as a business entry a tally sheet regularly used in the arms room to reflect the issue and return of weapons which has five columns. The first four are headed respectively, "Issued, Condition, Returned, Condition." The fifth column is masked. The entries in the tally sheet show

that the subject weapon was issued to the accused in "Good" condition and returned by him with a broken stock. The defense then moves, at an out-of-court hearing, that the mask in the fifth column be removed and that the entry therein also be admitted in evidence. This column is headed "Cause of damage" and the subject entry recites "Stock broken when weapon dropped by Pvt. Smith." The prosecution calls the supply officer who testifies that the primary purpose of this last column is to provide information as a basis for taking appropriate action against those individuals who damage weapons. The prosecution then objects that the entry in the fifth column is inadmissible as having been made "principally with a view to disciplinary action." How should the law officer rule?

CHAPTER XXIV

THE BEST EVIDENCE RULE

Reference. Par. 143*a*, MCM.

1. General. Whenever it is desired to prove *the contents of a writing*, the original of such writing must be introduced in evidence. This rule, known as the best evidence rule, is based upon the proposition that a writing is the best evidence of its contents and exists to avoid, in so far as is possible, the possibility of having a defective copy or an inaccurate description of the writing presented to the court.

2. Duplicate originals. *a. General.* A carbon copy of a document, as complete as the ribbon copy in all essential respects including any relevant signatures, or an identical copy made by photographic or other duplication process is considered to be a duplicate original and admissible equally with the original under the best evidence rule.

b. Illustrative cases.

(1) *United States v. Bennett*, 4 USCMA 309, 15 CMR 309 (1954). A mimeographed copy of an extract of special orders is a duplicate original of the extract.

(2) *United States v. Rhodes*, 3 USCMA 73, 11 CMR 73 (1953). Where the accused retained carbon copies of longhand letters written by himself to a third party, such carbon copies qualified as duplicate originals.

(3) CM 323197, *Abney*, 72 BR 149 (1947). A signed carbon copy of a typewritten autopsy report qualifies as a duplicate original.

3. Rule applicable only to writings. *a. General.* The best evidence rule applies only to writings. The phrase "best evidence" is, in this context, a term of art and it does not mean that a party must, in all situations, introduce the best evidence available to prove a particular fact at issue. For example, if the appearance of a certain knife is at issue, the knife itself is certainly the best evidence of its appearance. However, there is no rule of law which requires that the knife be accounted for before a witness may describe it. Similarly, in the field of writings, once the original is accounted for, thereby opening the door to the use of other evidence of the contents of the writing, there is no requirement that an available copy thereof be utilized in preference to testimony as to the contents.

b. Illustrative cases.

(1) *United States v. Fleming*, 7 USCMA 543, 563, 23 CMR 7, 27 (1957). Where the prosecution seeks to establish the contents of certain radio broadcasts including the voice characteristics of the speaker, the best evidence rule is not applicable so as to make it necessary to use the original taped recordings of the broadcast and rerecordings made by an expert for the purpose of eliminating certain high frequency noises are admissible.

(2) *United States v. Jewson*, 1 USCMA 652, 657, 5 CMR 80, 85 (1952). Where the prosecution seeks to establish the content of a certain conversation, the best evidence rule does not apply. "On the face of it, this problem does not involve the 'best evidence rule.' Time was when the rule applied to all classes of evidence, and was said to require in each instance the very best evidence of which the nature of the case would admit. Expressed in such a vague generalization, it was difficult of application. However, as understood today, the rule applies only when it is sought to prove the contents of a writing."

4. Rule applicable only when writing is fact to be proved. *a. General.* The mere fact that a writing is available as evidence of a fact to be proved does not bring the best evidence rule into play. It is only when the writing either is itself the fact to be proved or is offered as evidence of such fact that the rule applies. In the former case, the rule applies with reference to the specific writing the contents of which are at issue, and that writing is then the "original" even though it may purport to be a copy of yet another document. In the latter case, the writing which is offered to prove the fact at issue must be an "original."

b. Illustrative cases.

(1) *United States v. Jewson*, 1 USCMA 652, 5 CMR 80 (1952). Where the fact to be proved is the content of a certain conversation, the best evidence rule has no application in the first instance and any competent evidence of the conversation such as the testimony of auditors or participants or an authenticated recording thereof can be used. But if the prosecution elects to use a typed transcript of the taped recording, the best evidence rule applies to the writing which is being offered and the original thereof is required.

(2) CM 313689, *Davis*, 63 BR 215 (1947). Where the victim of a homicide makes both a written and an oral dying declaration, the best evidence rule does not require the prosecution to use the written one. It is only if the written one is in fact offered that the rule applies.

(3) CM 330803, *Berechid*, 79 BR 171 (1948). Where pertinent foreign law is legislative in nature, it is necessary to show the terms of the statute and the best evidence rule requires that the statute itself be produced for this purpose.

5. Exceptions to best evidence rule. *a. Original unavailable.* Secondary evidence of the contents of a writing is admissible if it is shown that the original has been lost or destroyed or is otherwise unavailable to the party offering the evidence. If the loss or destruction occurred while the writing was in the possession of the proponent of the evidence, he must show that such loss or destruction was due to accident or honest mistake or occurred in the regular course of business and not merely for the purpose of rendering a copy admissible. A writing which is shown to be in the possession of the accused is deemed to be unavailable to all other parties. In such a case it is improper for the prosecution to inform the court that the accused has declined to produce the document.

Illustrative cases.

(1) *United States v. Rhodes*, 3 USCMA 73, 11 CMR 73 (1953). A showing that a fellow conspirator of the accused had destroyed certain letters written to him by the accused opens the door to the use by the prosecution of copies of such letters.

(2) *McKnight v. United States*, 115 Fed. 972 (1902). The mere showing that a certain document was last seen in the defendant's possession is sufficient to render a copy admissible and it is reversible error for the judge to require the prosecution to make a demand upon the defendant in open court as a condition precedent to permitting the introduction of the copy.

(3) *United States v. DeBell*, 11 USCMA 45, 28 CMR 269 (1959). In a prosecution involving several bad checks, the defense counsel interposed a best evidence objection when the trial counsel attempted to prove the checks by secondary evidence. Trial counsel replied that "he had made written demand on defense counsel" for the originals. All members of the Court agree that such a demand was unnecessary and that the secondary evidence would be admissible upon a showing that the originals had been returned to the accused. However, the judges differed as to the consequences of trial counsel's remark. Chief Judge Quinn believes trial counsel acted in good faith ignorance of the exception to the best evidence rule and found no prejudice in view of the other evidence in the case. Judge Latimer agrees as to the lack of prejudice but would hold that "the erroneous concept was interjected into the case by defense counsel when he objected to the in-

troduction of certain competent evidence." Judge Ferguson, dissenting, would reverse because of "a deliberate invasion by the trial counsel of the accused's constitutional privilege against self-incrimination. . . ."

b. Numerous or bulky records.

(1) *General.* It sometimes occurs that the fact which it is desired to prove is the result of a calculation or synthesis of matters contained in otherwise admissible writings which are so numerous or bulky that it would be extremely inconvenient to have the court itself examine the records and make the necessary calculation. In such a case the calculation may be made by some competent witness who may then testify as to the result of his calculation. However, it must appear that the opposite party has had access to the records and such party must also be afforded the opportunity to cross-examine the witness as to his calculation. Furthermore, the writings which are thus synthesized must themselves be such as to have been admissible to establish the truth of the matters stated therein.

(2) *Illustrative case.*

CM 334097, *Anderson*, 4 BR–JC 347 (1949). In an embezzlement case, the testimony of an auditor, purportedly based upon an examination and audit of the books of the funds concerned, that certain shortages exist is rendered inadmissible by a showing that the auditor also made use of information not contained in the books in arriving at his conclusions. This other information consisted of statements made to him by other individuals and unofficial records which could not qualify under any exception to the hearsay rule.

c. Evidence of lack of entries. In those situations where it is desired to show the absence of an entry in records as tending to show that a certain event did not occur, the best evidence rule does not apply and the absence may be proved by any competent evidence.

(1) *Business entries.* The fact that a certain event is not recorded in certain business records may be established by the testimony of anyone, not necessarily the custodian of the records, who has first hand knowledge of the contents of the records and understands them. (Par. 143*a*(2), MCM, as amended by Exec. Order 11009, 16 March 1962.)

Illustrative cases.

(*a*) *United States v. Grosso*, 9 CMA 579, 581, 26 CMR 359, 361 (1958). It is not violative of the best evidence rule

for an investigator to testify that he had searched the records of the Base Exchange and that they did not reflect the purchase by the accused of any electric razors during a certain period. "To prove that a certain entry exists in a record is to prove the *contents* of the record. But as Professor Wigmore points out . . . proof that a search has been made of a record and that no entry was found to exist involves 'in a sense . . . the document's terms, yet is usually and properly regarded as not requiring the books' production for proof.' . . . § 1244. . . . In *McDonald v. United States*, 200 F2d 502 (CA 5th Cir) (1951), the accused had testified that he made a cash payment to the president of a named company. That officer denied receiving the payment. Over defense counsel's objection he was permitted to testify that he, and an accountant, had searched the company's books and found no record of a cash payment by the accused. . . . In *Bursie v. United States*, 81 Atl 2d 247 (1951) . . . a police lieutenant, who was not the custodian of the records, was permitted to testify that he had searched the records of the police department and could find no record of the issuance of a license to the defendant to carry a gun. . . . What is emphasized in cases of this kind is that the fact to be proved is the *absence of an entry* which is separate from the *content* of an *entry*. The weight of the testimony of an unsuccessful search depends, of course, upon the capacity of the witness to understand the records he looks at and the thoroughness of his search. However, these are matters which can be inquired into by cross-examination."

(*b*) ACM 5920, *Calhoun*, 9 CMR 687 (1953), *pet. denied*, 13 CMR 142 (1953). The assistant cashier of a bank may testify that he has searched the records of the bank and that they do not show the existence of any account under a certain name and such testimony is not inadmissible merely because the witness was not the custodian of the records which he searched.

(*c*) ACM 7081, *McDonough*, 12 CMR 883 (1953), *pet. denied*, 13 CMR 142 (1953). The manager of a local Western Union office may testify that the records of such office do not show that a certain telegram was delivered to the accused and such testimony does not violate the best evidence rule. The testimony is offered not to show any specific acts or events which could be more accurately proved by the records themselves but rather to show that no record of a particular event existed.

(2) *Banking records.* The absence of an entry in the banking records of any business regularly, although not necessarily exclusively, engaged in public banking activities may be established by a duly authenticated certificate or statement signed by the person in charge of the records or his assistant (par. 143*a* (2), MCM, as amended by Exec. Order 11009, 16 March 1962). It will be noted that such a certificate or statement constitutes an exception to the hearsay rule.

(3) *Official records.* The absence of an entry in official records may be shown in the same manner as in the case of business entries. Furthermore, by specific Manual provision (par. 143*a* (2)), such an absence may be established in the case of official records by a duly authenticated certificate or statement of the custodian or his assistant. It will be noted that such a certificate constitutes an exception to the hearsay rule.

d. Collateral issues. The best evidence rule does not apply when the writing at issue is relevant only to collateral issues, such as impeachment of witnesses or requests for continuances, and is not relevant to the principle issues in the case.

Illustrative case.

United States v. Jewson, 1 USCMA 652, 659, 5 CMR 80, 87 (1952). Secondary evidence of a written pretrial statement of the accused offered solely to impeach a portion of his testimony is not rendered inadmissible by the best evidence rule. "The object of its [the statement's] admission was the impeachment by self-contradiction of the appellant in a very small portion of his testimony. That matter was entirely collateral to the main issues of the trial. In such a situation the 'best evidence' rule is generally held inapplicable and secondary evidence admissible."

e. Official records and banking records. The most significant exception to the best evidence rule is that pertaining to official records and banking records which is discussed in detail below.

6. Official records and banking records. *a. General.* By specific Manual provision (par. 143*a*(2)) a duly authenticated copy of an "official record," as that term is defined in chapter XXII, is admissible to the same extent that the original would be without any preliminary requirement of accounting for the original. On 16 March 1962 this provision was amended (Executive Order 11009) to permit similar use of copies of business entries of public banking activities.

b. Copy must be exact. This exception to the best evidence rule permits the use only of an exact copy and a resume or summary cannot qualify as such. However, a copy is "exact" even though it consists of an extract of only certain portions of a record provided that the portion thus extracted is a verbatim copy of the original. A photographic copy of the entire original would, of course, qualify as a

duplicate original. Such a copy of only a portion would be considered a proper extract copy. When the "originals" of business entries of public banking activities are not maintained in a written or printed spoken lauguage but are maintained in the form of machine or electronic entries, "the copy or extract copy may consist of an accurate written 'translation' of such entry, whether made by machine or 'interpreter' ". (Par. 143*a*(2), MCM, as amended by Exec. Order 11009, 16 March 1962.)

c. Resume of confidential data. Paragraph 143*a*(2), MCM, provides that upon certification by the head of an executive or military department or independent Government agency that it would be contrary to the public interest to make public a certain record or pertinent portion thereof pertaining to a certain event, a certified resume of such record is admissible as an exception to the best evidence rule. However, if such action operates to deny to the accused the opportunity adequately to defend himself, a conviction may be set aside under the principles discussed in paragraph 9, chapter XXXI, *infra*, dealing with privileged communications.

7. Certificates as to fingerprint comparisons. *a. General.* Paragraph 143*a*(2), MCM, provides that a certificate by the chief custodian of the personnel records of an armed force that a duly qualified fingerprint expert on duty as such in his office has compared certain attached fingerprints with the fingerprints of a certain person on file and that the comparison shows both prints to have been made by the same person is admissible, prima facie, to establish the identity and military status of the person concerned. A similar proviso is made with respect to any other Federal department, bureau or agency, which maintains fingerprint files. It is obvious that this provision establishes an exception not only to the best evidence rule but also the hearsay rule. The only evidence required to render the certificate admissible to prove the identity of the person at issue would be some compentent evidence to identify the fingerprints which had been forwarded for comparison.

b. Illustrative cases.

(1) *United States v. White*, 3 USCMA 666, 670, 14 CMR 84, 88 (1954). A certificate of fingerprint comparisons prepared in the manner prescribed by the Manual is not rendered inadmissible merely because the matters set forth in the certificate go far beyond the testimony which the custodian could give as a witness. The President did not abuse the powers granted to him by Congress when he provided for this mode of proof. Fingerprint comparison exists on a firm scientific basis as a means of identification. Furthermore, ". . . the certificate is designated only as prima facie evidence of identity. Thus, the accused is left free to rebut this evidence

in any appropriate way, and, for the purpose of cross-examination, may either compel the attendence of the expert, whose comparison forms the basis of the certificate, or he may secure such testimony by deposition."

(2) *United States v. Taylor*, 4 USCMA 232, 15 CMR 232 (1954). The accused was charged with fraudulent enlistment in that he concealed prior service in the Navy. The Army authorities obtained fingerprint comparison certificates from the FBI and The Adjutant General. The former stated that the fingerprint specimen was identical to that of X who had served in the Navy. TAG stated that it was identical to that of the accused, describing him by full name and serial number. There was no identification of the specimen submitted. However, the two certificates taken together showed that the accused had served under the name X in the Navy. Furthermore, the court had before it a photostatic copy of the accused's enlistment record which contained a fingerprint which, under the presumption of regularity, may be deemed to be his. A comparison of this fingerprint with the specimen at issue could establish that they were made by the same individual. The provision in the Manual that the specimen can be identified by testimony of one who saw it made is merely illustrative and not exclusive.

8. Waiver. *a. General.* By specific Manual provision (par. 143*a*(1)), any objection to the use of secondary evidence in violation of the best evidence rule is waived by a failure to object and specifically invoke the best evidence rule. Such a provision is essential in the interest of justice inasmuch as this is the type of error which can readily be avoided upon objection. Any other rule would permit defense counsel to stand quietly by and permit error to creep into the record when an objection would in all but the most unusual cases result in either the production of the original or a sufficient showing to permit the use of the secondary evidence.

b. Illustrative cases.

(1) *United States v. Lowry*, 2 USCMA 315, 8 CMR 115 (1953). Where the custodian of the accused's service record read aloud what purported to be entries therein pertaining to prior convictions, such testimony was competent secondary evidence of the entries and the failure of the defense to object thereto waived its right to have demanded the introduction into evidence of the record itself.

(2) ACM 5198, *Wilson*, 5 CMR 762 (1952), *pet. denied*, 5 CMR 131 (1952). Where a bank cashier testified, by deposition, to the status of the accused's account as reflected in the books

of the bank such testimony was secondary evidence of the contents of the books but the failure of defense counsel to invoke the best evidence rule at the time the deposition was taken amounts to a waiver thereof.

(3) *United States v. Deller*, 3 USCMA 409, 415, 12 CMR 165, 171 (1953). In the absence of an invocation of the best evidence rule by defense counsel, a document which is certified by the custodian of accused's service record to contain true copies of "time lost" entries in the record is admissible. ". . . verbatim extract copies of its appropriate entries would have been entirely competent. . . . Exhibit 4, however, is not a verbatim extract copy. Instead, it is a *summary* of applicable service record entries. This distinction cannot be held fatal to its competence. The warrant officer who certified the Exhibit could—as custodian of the accused's service record—have taken the stand and testified orally in the same manner and to the same matter as that set out in the Exhibit. Under the circumstances of this case, it was, to our minds, competent 'secondary evidence' of the relevant portions of the service record. It is to be noted that, although defense counsel objected to the receipt of the Exhibit in evidence, he did so on the asserted basis of immateriality. The Manual specifically requires an objection to 'secondary evidence' *as such*. Otherwise the objection is waived. . . . The taint—such as it is—arising from the 'secondary' character of Exhibit 4 was waived by the failure of defense counsel to object specifically thereto."

9. Hypothetical problems. *a.* In a forgery and desertion case, the defense offers a duly authenticated copy of a letter written by the accused during his absence to a friend wherein the accused announced his intent to return to the Army within a few months. Trial counsel concedes the relevancy of the letter but objects to the use of the copy. Defense counsel requests an out-of-court hearing at which he states that trial counsel is demanding the original, which is in the possession of the accused, for the sole purpose of getting before the court a proved specimen of the accused's handwriting to be considered in connection with the forgery case as to which the evidence of the prosecution is weak and which will be strengthened greatly by this additional evidence. How should the law officer rule?

b. In a larceny case the prosecution establishes by official records the serial number of the allegedly stolen pistol. It then offers the testimony of a witness that shortly after the alleged theft he saw the accused in possession of a pistol bearing the same serial number. The defense objects that the number on the pistol is a writing and that the Government must either produce the weapon or lay a foundation

for the use of secondary evidence on this matter. How should the law officer rule?

c. The accused officer is charged with failure to obey a certain order issued by his battle group commander. The evidence shows that the battle group commander signed a sufficient number of carbon copies of the order, which was addressed to each officer under his command, for distribution to each company commander and that the accused's company commander prepared copies thereof and distributed one of these copies to each officer within the company, including the accused. This distribution took place at an officer's call immediately after the company commander had read the order to those present. Assuming that the defense counsel properly invokes the best evidence rule, what evidence may be used by the prosecution to show the contents of the order?

CHAPTER XXV

AUTHENTICATION OF WRITINGS

References. Pars. 148*b*, 144*e*, MCM.

1. General. A writing is not admissible in evidence until it has been authenticated. Authentication can be accomplished by any competent evidence that it is genuine, *i.e.*, that it is what it purports to be. When authentication is sought to be accomplished by means other than sworn testimony of a witness given in open court such means must fall within one of the recognized exceptions to the hearsay rule or one of the special rules set forth in par. 143*b*, MCM. A failure to object to the lack of proof of authenticity will be deemed a waiver thereof.

2. Official records. *a. General.* One of the paramount considerations attending the development of the official records exception to the hearsay rule was the desire to eliminate the need to call witnesses to testify as to the data recorded therein. The same considerations also demand a simplified method of authenticating such records. As a result it is possible to authenticate any official record of the United States, including the military establishment, of the several states and of any foreign government, without requiring the testimony of a witness for this purpose.

b. Authentication by attesting certificate. The most common method of authenticating an official record, or copy thereof, is by the use of an attesting certificate. An attesting certificate is the signed statement of the custodian of the record, *i.e.*, the person who has official custody thereof by authority of law, regulation or custom, or of his deputy or assistant, that the paper in question is the original, or true copy thereof as the case may be, and that the signer is acting in his official capacity as custodian of the record. This attesting certificate must itself be then authenticated by competent evidence. In this context, "authentication" means a showing that the attesting certificate is itself genuine, *i.e.*, that the signer thereof is who he purports to be. If the attesting certificate bears a signature of which the court may take judicial notice, no further authentication is required. (The matters which are subject to judicial notice appear in par. 147*a*, MCM.) If it does not, there must be an authentication of the attesting certificate by either a signature or seal of which judicial notice may be taken before the writing is admissible. In some cases, this

may require a chain of "authenticating certificates" until the point is reached at which judicial notice may be invoked.

Illustrative cases.

(1) *Turnbull v. Payson*, 95 U.S. 418 (1877). In a proceeding in a federal court in Maryland to enforce a judgment entered in a federal court in Illinois, a copy of the judgment bearing an attesting certificate of the clerk of the latter court and bearing its seal is properly authenticated since each federal court may take judicial notice of both the signature of the clerk and the seal of any other federal court.

(2) *New York Life v. Aronson*, 38 F. Supp. 687 (1942). A purported copy of a birth certificate issued by a foreign country was properly authenticated by the following chain of authentications: The register of vital statistics of the municipality involved attested to the copy of his records and his capacity as custodian of the records; the county commissioner certified to the genuineness of the attestation and that it was issued in proper form; the governor's agent certified to the genuineness of the commissioner's signature; the acting minister certified the agent's signature; and the American vice-counsel certified that of the acting minister. Judicial notice could be taken of the last signature.

3. Military records. *a. General.* Courts-martial may take judicial notice of the seals and similar official identifying marks of all military agencies and of the signatures of all custodians of official military records. Therefore, such records may be authenticated by a seal or other mark *or* by an attesting certificate. The custodian need not state that he is the custodian as the court may also take judicial notice of his capacity and duties. However, if the individual signing the attesting certificate is not in fact the custodian, the court may also take notice of this lack of capacity and the record will not be deemed authenticated.

b. Illustrative cases.

(1) ACM 4272 *Patton*, 2 CMR 658 (1951). Where pertinent Air Force Regulations make the commanding officer the sole custodian of retained copies of morning reports, an extract copy thereof attested to by an individual who, in fact, was the unit adjutant is inadmissible over objection to lack of authentication unless some showing is made that the signer had lawful custody of the records at the time in question.

(2) ACM S-5333, *Cox*, 8 CMR 825 (1953). A purported extract copy of a morning report of unit A was attested to by the commanding officer of unit B and, at the request of trial

counsel, the court took judicial notice of the fact that unit A had been redesignated as unit B, and admitted the extract over objection of the defense. However, examination of the pertinent orders disclosed that unit A had been inactivated and not merely redesignated. Therefore, the commanding officer of unit B was not by regulation the official custodian of the records of unit A and, absent a specific showing that he had been given official custody thereof, the proffered document was not authenticated.

4. United States records. The various methods of authenticating records of the United States are set forth in paragraph 143*b* (2) (*c*), MCM. In addition to the usual method of an attesting certificate, authenticated either by judicial notice or by a seal or authenticating certificate of which judicial notice may be taken, such records may be authenticated by the great seal alone or by any means authorized by Federal law.

5. State records. *a. General.* State records may be authenticated as provided in paragraph 143*b* (2) (*d*), MCM. In general the methods are the same as are used to authenticate Federal records. However, proof of the genuineness of signatures of state officials must be made in compliance with Federal, and not state, law. Thus, a state statute authorizing the taking of judicial notice of the signatures of its officials is ineffective in courts-martial.

b. Illustrative case.

United States v. Bryson, 3 USCMA 329, 335, 12 CMR 85, 91 (1953). The authenticity of a purported check issued by the state of Pennsylvania cannot be established by taking judicial notice of the signature and capacity of the signer as State Treasurer despite the fact that a Pennsylvania statute authorizes such judicial notice. The admissibility of evidence in courts-martial cannot be made to depend upon local state law. The rules of evidence in courts-martial must be uniform. "On that basis, we hold that a court-martial cannot look to the local law of a state for judicial notice of the presumption of genuineness of the signature of a state official. If it were otherwise, different results would obtain in different courts-martial."

6. Foreign records. The permissible methods of authenticating foreign records are set forth in paragraph 143*b* (2) (*e*), MCM. Judicial notice may be taken of the great seal of any government but any other form of authentication must continue to the point where it is supported by a signature of which judicial notice may be taken, such as that of an American consular official or a military officer stationed in the foreign country concerned.

7. Authentication by testimony. Any record including those discussed above, can be authenticated by the competent testimony of a witness. Thus, a witness who has first-hand, personal knowledge of

the genuineness of a proffered document, can authenticate it by his testimony alone and the genuineness of an attesting certificate can likewise be established by competent testimony.

Illustrative cases.

a. United States v. Johnson, 10 USCMA 630, 28 CMR 196 (1959). Since long standing Navy custom makes the trial counsel the official although temporary, custodian of the accused's service records, the former is a competent witness to authenticate a document as having been on file in the accused's record. (Per Latimer, J. Quinn, C. J., and Ferguson, J., "concur in the result.")

b. CM 401902, *Cazenave*, 28 CMR 536, 543 (1959). A record can be authenticated by the testimony of its custodian. However, it cannot be authenticated by testimony of a witness "that a sergeant major removed the document from the 201 files of accused and gave it to the witness."

8. Writings other than official records. *a. Banking records.* A business entry, or proper copy thereof, of a public banking activity and pertaining to such activity may be authenticated by competent testimony or other competent evidence as to its nature and genuineness. It may also be authenticated "by a certificate or statement, signed under oath before a notary public by the person in charge of the business entry or his assistant, indicating that the writing in question is the original business entry or a true copy thereof (or an accurate 'translation' of a machine or electronic entry), as the case may be, that the entry was made in the regular course of [public] banking business, and that it was the regular course of the business to make the entry, and that the signer is the person in charge of the business entry, or his assistant, accompanied by a signed statement by the notary of his administration of the oath, under the seal of his office. A certificate or statement by a person in charge of such banking entries, or by his assistant, that after diligent search no record of entry of a specified tenor has been found to exist in such entries. . . ., may also be authenticated by subscribing the same under oath before a notary public, provided the certificate or statement is accompanied by a signed statement of the notary of his administration of the oath, under the seal of his office." (Par. 143*b*, MCM, as amended by Exec. Order 11009, 16 March 1962.)

Competent evidence establishing that a certain notation in the form of a stamp, ticket, or other writing was either on or accompanying a check, draft, or other order for the payment of money when it was purportedly returned to the prior holder through regular banking channels, after the holder had presented it through such channels for payment, collection or deposit, and indicating that payment on the instrument had been refused by the drawee because of insufficient

funds of the maker or drawer in the drawee's possession or control, is sufficient to authenticate the notation as having been made in the regular course of banking business by a business whose regular course it was to make the notation. (Par. 144*o*, MCM, as amended by Exec. Order 11009, 16 March 1962.)

b. Other writings. All other writings must be authenticated by competent testimony. Thus, a business entry, for example, must be authenticated by testimony as to the source and genuineness of the proffered writing. The nature and scope of the authenticating evidence required will depend upon the purpose for which a particular writing is offered. Thus, if the sole relevancy of a certain letter purportedly signed by X is the fact that a letter of that content was received by Y and the identity of the writer is completely irrelevant, the letter could be authenticated by any evidence that it was recived by Y and the genuineness of the signature need not be shown. However, if the relevance of the letter springs from the fact that it was written by X, the authenticity of X's signature must be shown. Similarily, if the letter is offered merely as a sample of X's handwriting, its content being irrelevant, it becomes admissible upon an identification of the handwriting. In the first situation, authentication can be established by the testimony of one who saw Y receive the letter. In the latter two, it could be supplied by the testimony of X or of someone who saw him write the letter. However, it frequently occurs that X is the accused or is otherwise unavailable as a witness and there are no other competent witnesses available. To meet these contingencies certain special rules have been developed.

c. Presumptive genuineness of replies.

(1) *General.* If Y mails a letter addressed to X, the arrival by mail of a letter of a purported reply thereto by X is sufficient evidence of authenticity of the reply to permit its being received in evidence. Similarly, if Y telephones or sends a telegram to X, a telegraphic reply purporting to be from X is admissible. In either situation the circumstantial evidence warrants an inference that the reply is authentic. It must be noted that this rule requires a showing that the initial communication was made and that the purported reply was received either by mail or telegram, as the case may be. Furthermore, it does not permit the authenticity of the initial communication to be established by a showing that a reply thereto was received.

(2) *Illustrative case.*

United States v. Bryson, 3 USCMA 329, 12 CMR 85 (1953). Where an individual mails an application for a bonus payment to a state, the receipt by mail of a check purporting to be from the state could be considered proof of the authen-

ficity of the check. However, a mere showing of the fact that the application was made and of the additional fact of of the existence, thereafter, of the purported check is not enough. There must also be an affirmative showing that the check was received through the mails by the addressee thereof.

d. Handwriting.

(1) *General.* Any competent evidence that the signature to a certain writing is that of a certain person will, of course, warrant an inference that such person wrote it. A similar inference may be drawn with respect to an unsigned writing which contains handwriting. Identification of handwriting may be accomplished either by opinion testimony or by comparison of the handwriting at issue with an identified sample.

(2) *Opinion.* Any person who is acquainted with the handwriting of the alleged writer of a document before the court may express his opinion as to whether such person did or did not write the document. The witness is deemed sufficiently so acquainted if he has, at any time, seen such person write, or has received signed or handwritten purported replies to letters of his own from such person or has received purported signed communications from such person in the regular course of business.

Illustrative case.

United States v. Ocomb, 12 USCMA 492, 493, 31 CMR 78, 79 (1961). A signature on a pawn shop record was sufficiently identified as that of the accused by the testimony of another sailor that he had previously "witnessed the signature of the accused" and that the signature at issue was "to the best of his knowledge" and "believed" by him to be the accused's. "A witness is competent to testify to the signature of another if he has previously seen him sign his name. . . . The witness need not be absolutely positive in his identification; it is sufficient if he 'believes' the signature is that of the person charged with making it."

(3) *Comparison.* A duly qualified handwriting expert may give his opinion as to whether or not a proved specimen of a person's handwriting and the writing at issue were written by the same person. Furthermore, the court itself may compare such a proved specimen and the writing at issue and from such comparison conclude whether or not they were written by the same person.

Illustrative case.

United States v. Manuel, 3 USCMA 739, 14 CMR 157 (1954). The law officer could properly compare a proved specimen of the accused's handwriting (a signature on a confession) with the allegedly forged indorsement on a money order and thereby conclude that the indorsement probably was written by the accused.

9. Waiver. *a. General.* A failure to object to the receipt in evidence of a particular document on the specific ground of a lack or failure of proof of its authenticity is deemed to be a waiver of such proof. Such a waiver would also extend to the lack of proof of the genuineness of any particular signature appearing on the document. As in the case of the best evidence rule, such a waiver is necessary to avoid reversals based upon errors which could have been corrected quite easily at the trial if raised at that time.

b. Illustrative cases.

(1) *United States v. Castillo*, 1 USCMA 352, 356, 3 CMR 86, 90 (1952). Where trial counsel, without being sworn as a witness, read to the court, from what purported to be accused's service record, evidence of 5 previous convictions and the defense did not object thereto, the lack of authentication of the record was waived. "Certainly the trial counsel did not present affirmatively evidence authenticating the items from the service record of the accused offered in the case at bar. Certainly too the accused could have required the Government to establish through the testimony of the trial counsel, or in some other appropriate manner, that the documents offered were in fact authentic records relating to the accused. We do not doubt that the Government could have met this demand without difficulty. Defense counsel could indeed have challenged the offered evidence of previous convictions either on the facts or on the law. He chose to do neither, however. In our opinion—and in the Manual language quoted above—he 'waived [proof of authenticity] by a failure to object on the ground of lack of such proof.'"

(2) CM 363306, *Porter*, 10 CMR 460 (1953), *pet. denied, sub nom. Morales*, 12 CMR 204 (1953). Where the attesting certificate on the record of previous conviction was unsigned and merely bore a typewritten name as follows, "/s/W J Lynge," the failure to object to the document as being unauthenticated was a waiver of the lack of signature.

10. Altered writing. If it appears that a part of a writing has been altered after the execution thereof, neither such part or any other part dependent for its admissibility upon the altered part may be received in evidence over objection unless the alteration is first explained satisfactorily.

11. Maps, photographs, and photostats. *a. General.* Such items as maps, photographs, X-ray plates, sketches, etc., although not normally classified as writings are subject to the same general requirements as to authentication. It is possible for such items to be official records or business entries in which case they can be authenticated like any other such record. In all other situations they must be authenticated by establishing that they are what they purport to be in all material respects. If the relevancy of a photograph depends upon it being an accurate representation of a certain locale at a certain time, such accuracy must be established by competent evidence such as the testimony of the person who took the photograph or by the testimony of one who is familiar with the locale. In the case of a photostat of a document, the genuineness of the reproduction must be established in the same manner.

b. Illustrative cases.

(1) *United States v. Field*, 3 USCMA 182, 185, 11 CMR 182, 185 (1953). In a payroll forgery case the testimony of a photographer that certain purported photostats of the payrolls concerned were ones which he had caused to be reproduced in his office upon the request of a certain officer who had furnished the originals was insufficient to authenticate the photostats. "If a foundation to admit the exhibits can be found in the record, it must be extracted from the testimony of the photographer. We have searched the record with care and find none. The witness stated that he had not made the actual photographs but they had been done by someone in his offce. He further stated that he could not identify the exhibits as copies of an official military payroll list because he was unfamiliar with such documents, and it was not within his duties to know about or maintain such official records."

(2) CM 362664, *Jefferey*, 12 CMR 337, 345 (1953). In a prosecution for manslaughter by motor vehicle it was error to admit in evidence an unauthenticated picture of the accused's car. "The sole foundation for the admission at the time was two witnesses' assertions that the automobile pictured was similar to the one seen at the accident and later on a street a few blocks away. The most important matter depicted by the picture, however, was a license plate on a car in a peculiarly damaged condition. Neither witness had seen this damage to the car at the scene of the accident or knew the license number. Such a foundation was inadequate. To lay a foundation for a photograph a witness must be able to state that he is personally acquainted with the object, and that from his personal knowledge or observation he can state that it actually represents the appearance of the matter in question. . . . The

danger in admitting this prior to providing a proper foundation is apparent. Any car similar to the one in the picture could have been the accused's. The type was a Ford of which there could have been thousands of a similar type. To place the picture with the license plate (later proved to be the accused's) before the court is to indicate to it that it had been proved that the accused's car was the one which the witness had identified."

(3) CM 350548, *Dittmar*, 2 CMR 475 (1952). A map may be an official publication of the military establishment and a court may take judicial notice of the location of certain terrain features on an official military map of Korea.

12. Hypothetical problems. *a.* In order to establish the unauthorized absence of the accused in a desertion case the prosecution offered in evidence what purported to be the original copy of the morning report accused's unit which, on its face, had been prepared and signed in accordance with regulations. Is this document admissible over defense counsel's objection that it has not been authenticated?

b. In a desertion case, the prosecution offers a purported photostatic copy of a duly authenticated extract copy of a morning report pertaining to the accused. Is further authentication required upon demand thereof by the defense counsel?

c. The prosecution offers a duly authenticated extract copy of a relevant entry in an official record. The portion of the record which is extracted does not indicate to whom the entry pertains. However, the authenticating certificate includes the statement that the extract pertains to the accused. May the extracted entry be treated as pertaining to the accused?

d. An extract copy of a morning report offered by the prosecution is authenticated by an attesting certificate in proper form. However, in lieu of the signature of the custodian the following appears "J. J. JONES." How should the law officer rule on an objection by the defense invoking the best evidence rule?

e. The defense offers in evidence a document which purports to be a copy of a relevant entry in the official records of a foreign government. This copy is authenticated by the signatures of the official custodian and his superior. Upon objection by the prosecution to lack of proof of authenticity the defense cites the provision of paragraph 143*b* (2) (*e*), MCM, that any method of authentication of a foreign official record provided for by the law of such foreign government is acceptable and then establishes by competent evidence that the law of the foreign government here concerned provides for the precise form of authentication here involved. How should the law officer rule?

CHAPTER XXVI

JUDICIAL NOTICE

Reference. Par. 147*a*, MCM.

1. General. In order to expedite the orderly trial of cases it is deemed desirable to avoid having the parties litigate certain issues of fact which are truly indisputable. The doctrine of judicial notice has evolved to accomplish this salutary result. Generally speaking, a court is authorized to take judicial notice of such matters as the domestic law of its own jurisdiction and those propositions of general knowledge and those specific facts which are so notorious or easily demonstrable as to be beyond any possibility of intelligent dispute. Paragraph 147*a*, MCM, lists certain matters of which judicial notice may be taken. However, this listing does not purport to be all inclusive.

2. Procedure. The doctrine of judicial notice does not relieve the court from the necessity of being satisfied of the existence of the fact which it is asked to notice. For this reason, it is customary for the party requesting that the notice be taken to present to the court some authentic information on the subject except in those cases where it is apparent that the court has actual knowledge of the fact at issue. When judicial notice is taken, such fact should be announced for the record and if the fact noticed is set forth in a document, the document or pertinent extracts therefrom should be attached as an exhibit for the consideration of the reviewing authorities.

3. On review. *a. General.* Any matters of which the trial court properly has taken judicial notice, as shown in the record of trial, will of course also be so noticed by any reviewing authorities. Furthermore, it will be assumed upon review that the trial court took notice of those pertinent facts which, because of their notoriety or universal acceptance, must have been within the knowledge of the members of the court at the time of the trial and of which they properly could have taken notice if so requested at the trial.

b. Illustrative cases.

(1) *United States v. Jones*, 2 USCMA 80, 87, 6 CMR 80, 87 (1952). In a prosecution for introducing marihuana into a military "station," the lack of specific proof that a "Snack Bar" on the Autobahn was such a station can be cured by the assumption that the members of the court were fully aware of the fact that the European Exchange Service

operated such facilities as military installations. "Quite clearly the court could have taken judicial notice of the snack bar's character as a 'station,' but there is no notation in the record, as required by proper procedure, that this action was taken. There is, however, a doctrine analogous to that of judicial notice which furnishes the short answer to appellant's argument. That doctrine is explained as follows in Wigmore, Evidence, 3d ed. § 2570: 'In general, the jury may in modern times act only upon evidence properly laid before them in the course of the trial. But so far as the matter in question is one upon which men in general have a common fund of experience and knowledge, through data notoriously accepted by all, the analogy of judicial notice by the Judge obtains here also, to some extent, and the jury are allowed to resort to this information in making up their minds.' In military trials, it would hardly be necessary that a fact, to be regarded by the court-martial under this theory, be notorious to men in general. It is indeed enough if it is notorious to military men—and particularly to those in the area involved."

(2) *United States v. Cook*, 2 USCMA 223, 225, 8 CMR 23, 25 (1953). In a misbehavior case the issue arose as to whether the accused, a member of a medical company serving an armored regiment, was aware of the hazardous nature of his impending duties. ". . . it is common knowledge in the Army, of which this Court may take judicial notice, that medical men are always attached to units such as machinegun platoons when these units are going into combat."

4. Examples of judicial notice. *a. General.* There are set forth below some of the more common categories of matter which may be judicially noted.

b. Matters of common knowledge. Under this heading fall not only those matters which are within the common knowledge of civilized mankind in general but also those matters which are within the common knowledge of the community from which is drawn the membership of the tribunal which is asked to take notice.

Illustrative cases.

(1) *United States v. McCrary*, 1 USCMA 1, 1 CMR 1 (1951). Judicial notice may be taken of the existence of hostilities in Korea in 1950 and of the distance between the installation from which the accused absented himself and that at which he surrendered.

(2) *United States v. Uchihara*, 1 USCMA 123, 2 CMR 29 (1952) A court-martial sitting in Japan may take judicial notice

of the mission of Camp Drake, also in Japan, as a personnel processing center and of the specific mission of a certain unit at Camp Drake to furnish replacements to troops stationed in Korea.

(3) *United States v. Weiman*, 3 USCMA 216, 11 CMR 216 (1953). A court-martial sitting in France can take judicial notice of the fact that a "Labor Service Company" stationed in France was composed of aliens recruited in Germany for service in the United States armed forces.

(4) *United States v. DeLeon*, 5 USCMA 747, 19 CMR 43 (1955). Judicial notice may be taken of the fact that extension telephones were in general use in 1934 when Congress enacted the Communications Act.

(5) *United States v. Dickenson*, 6 USCMA 438, 20 CMR 154 (1955). Judicial notice may be taken of the fact that many American prisoners of war of the Chinese Communists in Korea were subjected to severe brutality and tremendous psychological pressures which made them do and say things which they might otherwise have avoided.

(6) *United States v. French*, 10 USCMA 171, 181, 27 CMR 245, 255 (1959). "We may take judicial notice of the 'cold war' conditions which are presently existing between the United States and Russia. . . ."

(7) ACM 17059, *Reyes*, 30 CMR 777, 788 (1960). The specific mission of a certain Strategic Air Command aircraft is not a proper matter for judicial notice. Court members are ". . . permitted and expected to weigh the evidence iu light of their 'common knowledge' of the world, but this does not permit them to apply specialized knowledge which they may have as the result of experience or training not shared by their class in general. . . . This does not, for example, mean that Air Force personnel serving as court members must put aside their knowledge of Air Force matters generally nor their military specialties, aeronautical or otherwise, in weighing the evidence . . ., but they may not consider specialized knowledge not available within the military community generally. . . . The fact that B–52s of the SAC alert force are scheduled for extended missions is, of course, such common knowledge, but not the special mission of certain aircraft or units."

c. Official regulations and publications. The doctrine of judicial notice permits the court to note the contents of all official regulations and publications of the armed forces. However, such notice is limited to recognizing the existence and content of such matters. It does not make irrelevant matters relevant nor does it remove the necessity in an

appropriate case of proving that a certain person was aware of a certain regulation. The doctrine may be invoked only when the existence or the content of the regulations is relevant and only to establish such existence or content.

Illustrative cases.

(1) *United States v. Addye*, 7 USCMA 643, 23 CMR 107 (1957). Judicial notice may be taken of the Army Regulations which govern the entitlement to pay and allowances and the procedures for making payment.

(2) CM 355011, *Voelker*, 7 CMR 102 (1952). The provision in Army Regulations which states that travel time will be computed under certain circumstances by reference to "schedules governing the type of transportation and times of travel involved" incorporates by reference all existing transportation schedules and thereby permits judicial notice to be taken of certain railroad and airline schedules which bear upon the issue of what transportation was available to return the accused to his station.

(3) CM 350548, *Dittmar*, 2 CMR 475 (1952). Judicial notice may be taken of official tactical maps of Korea and the location of certain terrain features as shown thereon.

(4) *United States v. Kunak*, 5 USCMA 346, 371, 17 CMR 346, 371 (1954). The Army Manual, TM 8–240, Psychiatry in Military Law, merely expresses the opinions of the authors and is not entitled to any recognition as being a statement of the law of insanity. As such, it is not a proper subject for judicial notice which permits the recognition only of *facts*. "To construe the judicial notice provision of the Manual as a license to admit in evidence, indiscriminately, every kind of matter merely because it bears the imprimatur of the head of a service branch opens the door to administrative prejudgment of the guilt of an accused. . . . The apparent purpose of the Manual's provision on judicial notice is to obviate proof of the facts which, in general, are notoriously known in the military establishment. It is a perversion of that purpose to use it as authority to take judicial notice of individual beliefs or opinions." In the instant case, the presentation of the TM to the court as an official publication operated to deny to the accused the right to develop the defense of irresistible impulse and was prejudicial error. (Dissent of Quinn, C.J., adopted in *U.S. v. Shick*, *infra*.)

(5) *United States v. Shick*, 7 USCMA 419, 424, 22 CMR 209, 214 (1956). "In this connection we announce that at most the 'Tech Manual' [TM 8–240] occupies the position of a text-

book or treatise on the subject of insanity. (See opinion of Chief Judge Quinn, *United States v. Kunak*. . . .) It is not competent evidence of either the facts or opinions advanced by the authorities. It may be used to a limited extent in connection with the testimony of an expert witness, but it does not have any independent probative value."

(6) ACM S-3866, *Rooks*, 7 CMR 568 (1952). Where a regulation has been issued by an "inferior" headquarters in the sense that a conviction under Article 92 cannot stand without a showing of knowledge by the accused of the regulation, the fact that the court may take judicial notice of the regulation does not dispense with the necessity of proving knowledge thereof by the accused.

d. Signatures and duties of federal officials. Judicial notice may be taken of the signature and duties of any person attesting official records or copies thereof of any United States governmental agency, including the armed forces. However, such notice may not be taken with regard to state officials even though the law of the state concerned purports to authorize the taking of notice.

Illustrative case.

United States v. Bryson, 3 USCMA 329, 335, 12 CMR 85, 91 (1953). ". . . we hold that a court-martial cannot look to the local law of a state for judicial notice of the presumption of genuineness of the signature of a state official. If it were otherwise, different results would obtain in different courts-martial."

e. Seals. Notice may be taken of the seals of courts of record and public officers of the United States and the several states and political subdivisions thereof, the great seals or seals of state of any government, and the seals of all notaries public, foreign and domestic.

f. Domestic law. Notice may be taken of the organic and public laws, including customary law and regulations having the force of law, of the United States and its territories and possessions, and of the several States and of the treaties and executive agreements of the United States.

g. Foreign law. Notice may be taken of the law of nations, the law of war and the common law. Judicial notice may be taken of the law of any foreign country only when such country is occupied by armed forces of the United States. In this context "occupation" does not include the mere presence of such forces in a country.

Illustrative case.

ACM S-12085, *Coombs*, 21 CMR 805 (1956). Judicial notice may not be taken of the laws of Japan in effect after the date on which the Treaty of Peace between Japan and the Allied Powers ended the occupation of that country.

5. Hypothetical problems. *a.* The accused is charged with drawing a check on a certain nonexistent bank which he represented to be in a certain town adjacent to the installation at which the trial is taking place. May the court take judicial notice of the fact that no bank of that name exists in the nearby town?

b. The admissibility of a certain deposition turns upon whether a given town is more than 100 miles from the place of trial. The trial counsel offers an atlas which shows the distance to be 110 miles and asks the law officer to take judicial notice of the distance as stated therein. The defense objects and offers a road map which shows the distance to be but 95 miles. What action should the law officer take?

CHAPTER XXVII

FOREIGN LAW

Reference. Par. 147*b*, MCM.

1. General. With the sole exception of the law in effect in a country occupied by United States armed forces, a court-martial may not take judicial notice of foreign law. Foreign law is a fact to be proved like any other fact by competent evidence.

Illustrative case.

ACM S–12085, *Coombs*, 21 CMR 805, 807 (1956). ". . . only six jurisdictions in the United States permit its court to take judicial notice of the law of foreign lands. In each of these latter states, there is a statute that authorizes such action. . . . The Manual prohibition against taking judicial notice of the law of an unoccupied foreign land is thus in accord with the weight of authority. Moreover, there is a practical reason for refusing to make an exception to the Manual requirement that foreign law be proved. The source material for local law is easily accessible in the country of origin. It is often unavailable beyond the boundaries of the country in question. This insistence on compliance with the Manual provision on proving foreign law will insure that authoritative information on such law is available to appellate agencies in the United States that are required to review the case."

2. Methods of proving foreign law. *a. General.* Paragraph 147*b*, MCM, provides for three methods of proving foreign law. It will be noted that each of these methods, except the first, involves an exception to the best evidence or the hearsay rule.

b. Testimony. A witness who is duly qualified to do so may testify as to the content and construction of foreign law. In so far as his testimony relates to construction of the law it is, of course, opinion testimony but it is nonetheless admissible. However, testimony as to the content of a specific statute or regulation is subject to objection based on the best evidence rule and upon such objection the statute or regulation must be accounted for or produced.

Illustrative case.

CM 330803, *Berechid*, 79 BR 171 (1948). In an attempt to prove the law of Luxembourg relating to customs duties, trial counsel offered the deposition of the Collector of Customs of that country. The deposition indicated that the existing law was legislative in nature and, therefore, the defense objection to the testimony of the deponent on the

ground that it was not the best evidence of such law should have been sustained.

c. Official publications. Foreign law may be proved by official publications of the country concerned or of any agency or department of the United States. The latter are not subject to objection on the ground of the best evidence rule and, furthermore, may be authenticated in the same manner as any other official Federal record. The official legal publications of a foreign country may be authenticated like any other foreign official record. Furthermore, any purported official publication, foreign or domestic, may be presumed to be authentic if obtained from a public library or other public office, foreign or domestic, and the fact of such obtaining may be shown by an authenticated certificate of the custodian of the publication.

d. Treatises. Treatises, textbooks, or commentaries on foreign law, written by professionally qualified persons, may be received to the same extent as oral testimony. Treatises obtained from public libraries or other official sources may be presumed authentic in like manner as official publications.

CHAPTER XXVIII

DEPOSITIONS

References. Art. 49, UCMJ; Pars. 117, 145*a*, MCM.

1. General. Article 49, UCMJ, authorizes the use of depositions under certain circumstances in trials by courts-martial. The procedures to be followed in the taking of depositions are set forth in paragraph 117, MCM, and the legal limitations upon their use appear in paragraph 145*a*, MCM.

2. The denial of confrontation. *a. General.* Article 49, UCMJ, authorizes the taking and use, under certain conditions, of "oral or written depositions." The use of such depositions by the prosecution requires consideration of whether the accused may thus be deprived of the right, (1) personally to confront the witnesses against him, and (2) to have the witness testify in the presence of the court.

b. Confrontation by the accused. Until the Court of Military Appeals handed down its decision in *Jacoby*, *infra*, Article 49, UCMJ, as amplified by paragraph 117, MCM, had been consistently interpreted as authorizing the use by the prosecution of depositions, both oral and written, taken in the absence of the accused. It was held that factors peculiar to the military created a need for this procedure which outweighed the right of the accused personally to confront witnesses against him. In *Jacoby*, the Court held that the accused's constitutional right of confrontation is violated by the use by the prosecution *over his objection* of a deposition taken on *written interrogatories* when he was denied the right to be present at the taking. Although the case was concerned with a written deposition, the recognition by the Court of the existence of a *constitutional* right to personally confront adverse witnesses compels the conclusion that a similar requirement exists with respect to oral depositions. It must also be noted that the Sixth Amendment recognizes a right "to be confronted with the witness *against* him." Therefore, the *Jacoby* case would not apply to defense witnesses and prior law would continue to govern depositions offered by the defense.

Illustrative cases.

(1) *United States v. Sutton*, 3 USCMA 220, 222, 11 CMR 220, 222 (1953). The board of review erred in holding that "the accused had been denied the right of confrontation, because he was neither present at the time or place when the witness answered the questions, nor did he waive his right to be

present." A deposition is admissible even though the accused was not present at the taking. (Per Latimer, J., and Brosman, J., with Quinn, C.J., dissenting.)

(2) *United States v. Jacoby*, 11 USCMA 428, 29 CMR 244 (1960). In a prosecution for passing worthless checks, defense counsel objected to taking written depositions from the officials of the banks concerned and requested either the personal attendance of the witnesses at trial or that the accused be present at the taking of the depositions. Both requests were denied. Defense counsel submitted no cross-interrogatories and objected at the trial to the use of the depositions. ". . . it is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces. . . . Moreover, it is equally clear that the Sixth Amendment guarantees the accused the right personally to confront the witnesses against him." (At 430, 246.) Dean Wigmore's view that the right to cross-examine satisfies the Sixth Amendment and that personal confrontation is not required is not supported by "decided Federal cases" and other text writers appear to disagree with his conclusion. Effective cross-examination cannot be had when the cross-examiner must frame his questions in ignorance of the testimony on direct examination. "[The legislative history of Article 49] offer[s] a sufficient foundation for our conclusion that the statute demands the opportunity for confrontation of the accused and the witness at the taking of depositions. It is our duty to interpret an act of the Congress so that it accords with the Constitution if that construction is at all possible." (At 432, 248.) Prior cases involving this issue are overruled. "The correct and constitutional construction of the Article in question requires that the accused be afforded the opportunity (although he may choose knowingly to waive it thereafter) to be present with his counsel at the taking of written depositions. We so hold." (At 433, 249.) (Per Ferguson, J., and Quinn, C.J. Latimer, J., dissenting.)

(3) WC NCM 60-00577, *Wilson*, 30 CMR 630, 638 (1960). The right of confrontation recognized in *United State v. Jacoby* applies only as to prosecution witnesses and does not support defense counsel's contention that *defense* witnesses must be called in person because examination of them can "be effectively pursued only in person." "The rule of *Jacoby* is thus seen to be one of protection of the accused from the *absentee testimony of prosecution witnesses* whom the accused has never been permitted to confront personally and to cross-

examine effectively. . . . *Jacoby* is a shield, against faceless prosecution witnesses. It is not a sword in the hand of the defense counsel who wants to cut a wider swath in the case by a more effective presentation of defense testimony than can be made by written interrogatories. The fact that one of the defense witnesses . . . was hostile cuts no ice. Conceding his hostility, a confrontation and oral examination could have produced only two substantial benefits for the accused; first, impeachment; second admissions favorable to the defense. But of course the accused has no right to impeach his own witness except on being surprised or unless in addition to being hostile he is indispensable, and the record shows neither surprise nor indispensability. In fact at least three other witnesses duplicated the coverage of his testimony. And the deprivation of the possibility of obtaining from a hostile defense witness by personal confrontation and examination maximum admissions useful to the accused, is not violative of either the Constitution, the Code, or the rule of *Jacoby*. Moreover, in view of the exigencies of military life in which these problems are rooted we oppose any interpretation which would lead to a contrary conclusion."

c. Waiver. In *United States v. Jacoby*, *supra*, the Court made specific mention of the fact that the accused may knowingly waive his right to be present at the taking of depositions from prosecution witnesses. Furthermore, any objection to the admissibility of a deposition on the ground that the accused had not been afforded the opportunity to be present when it was taken must be specifically raised at the time the deposition is offered in evidence and a failure to raise this specific objection will be treated as a waiver of it.

Illustrative case.

United States v. Pruitt, 12 USCMA 322, 30 CMR (1961). The fact that depositions of two prosecution witnesses were taken on written interrogatories in the absence of the accused was waived by defense counsel when, at the trial, he stated that he had no objection to "the method in which" one had been taken and objected to the other on grounds not involving the absence of the accused at the taking of the deposition (Per Quinn, C. J., and Latimer, J. Ferguson, J., dissents on the ground that there was no waiver as to the second deposition.)

d. Confrontation by the court. Depositions are not inadmissible merely because the court is deprived of the opportunity personally to observe the demeanor of the witness as he testifies. This principle has always been given full acceptance by the court and was again recognized in *Jacoby*.

Illustrative cases.

(1) *United States v. Ciarletta*, 7 USCMA 606, 610, 23 CMR 70, 74 (1957). The argument that the use by the prosecution of a deposition denied the accused the right to have the court properly evaluate the testimony of the witness by observing his demeanor on the witness stand is without merit. "In every case when depositions are used, the court-martial is denied the opportunity of visually observing the witness. As a general proposition, demeanor is important to credibility, and credibility is important to the court when there is a dispute in the testimony. . . . [A]ssuming, without deciding that a personal appearance by Dooley would have inured in some small degree to the benefit of the accused, that does not take this case out from under the codal provision and our decisions which hold that depositions may be used." Per Latimer, J., Quinn, C.J., concurring.)

(2) *United States v. Jacoby*, 11 USCMA 428, 433, 29 CMR 244, 249 (1960). The accused's right of confrontation is satisfied when he is afforded the opportunity to be present at the taking of a deposition. It does not require the presence of the witness at the trial. "That the exigencies of the military service frequently prohibit the appearance of a military witness or a civilian far removed from the place of trial is too well known to require documentation."

3. Accused's rights under Article 46. *a. General.* Although the accused's right of confrontation does not extend to defense witnesses, there is another principle which may enable the defense to obtain personal confrontation of *certain* defense witnesses. The authorization of Article 49 for "any party" to take depositions may not be construed so as to defeat the right given the defense in Article 46 to have "equal opportunity" with the prosecution to secure the personal attendance of witnesses. A request by the defense that the convening authority take appropriate action to secure the personal attendance of an important defense witness cannot necessarily be set aside merely by directing that the deposition of the witness be taken. It must be noted, however, that this applies only in the case of defense witnesses and then only when such witnesses are *essential* to the presentation of the defense case.

b. Illustrative case.

(1) *United States v. Thornton*, 8 USCMA 446, 449, 24 CMR 256, 259 (1957). It was improper to deny the defense counsel's request that the accused's former superior officer, now a civilian residing in New York, be subpoenaed to appear as a defense witness at a trial in Alabama, merely because trial

counsel consented to (and did) stipulate as to the testimony to be expected of the witness. "An accused cannot be forced to present the testimony of a material witness on his behalf by way of stipulation or deposition. On the contrary, he is entitled to have the witness testify directly from the witness stand in the courtroom. To insure that right, Congress has provided that he 'shall have equal opportunity [with the prosecution and court-martial] to obtain witnesses.' . . . [T]he testimony sought to be elicited from the witness goes to the core of the accused's defense. It supports his explanation of his conduct, which constitutes a denial of the specific intent necessary to suport a finding of larceny. It was both material and necessary. . . . Accordingly, we conclude that the denial of the accused's request for a subpoena was prejudical."

(2) *United States v. Harvey*, 8 USCMA 538, 543, 25 CMR 42, 47 (1957). It was not error to deny the request of defense counsel for a subpoena to compel the attendance of witnesses to testify as to the violent character of the victim of the alleged aggravated assault where trial counsel offered to stipulate to such testimony and defense counsel made no showing that the expected testimony would be higly important to the defense case, in that the defense did not produce any other evidence which would make such testimony relevant to the defense's claim of self-defense. "Several critical distinctions exist between the case at bar and the Thornton case, supra. First, and most important, is that the expected testimony of the witness in *Thornton* went to 'the core of the accused's defense,' whereas here, the expected testimony of the defense witnesses related to the victim's turbulent character and addiction to violence. The admissibility of such testimony would depend upon whether the accused presented evidence raising the issue of self-defense. Secondly, in the Thorton case it was the acting staff judge advocate who denied the request for subpoena, whereas here, it was the convening authority. We believe these distinctions control the present situation."

4. Use by the defense. There is no limitation as to the kind of case in which the defense may offer a deposition.

5. Use by the prosecution. *a. General.* With but two exceptions, each of which requires the consent of the accused, the prosecution may not offer a deposition in a "capital case."

b. Capital case. A "capital case" is any one in which the death penalty is authorized. This does not mean that any offense for which Congress has authorized the death penalty is thereby rendered

capital. The test is whether at the time of trial the court may adjudge the death penalty for the offense with which the specific accused appearing before it is charged. For this reason, any of the following factors will render a case "not capital" even though Congress may have authorized the death penalty for the offense concerned.

(1) *Direction of convening authority.* Whenever the convening authority of the court directs that the case be treated as not capital the court is thereby denied the authority to adjudge a death sentence and the case is, in fact, not capital. Such a directive ordinarily should be included in the indorsement on page 3 of the charge sheet but any indication that the directive was issued will suffice.

Illustrative case.

United States v. Anderten, 4 USCMA 354, 15 CMR 354 (1954). Where the pretrial advice of the SJA recommended that the otherwise capital offense of wartime desertion in Japan be treated as non-capital, a notation on the advice indicating the approval by the convening authority of the recommendations contained therein was sufficient to render the case non-capital and authorize the use of depositions by the prosecution.

(2) It is apparent that *any case tried by an inferior court-martial* cannot be a capital case inasmuch as such a court lacks authority to adjudge the death sentence in any case whatsoever.

(3) *Table of maximum punishments prescribes less than death.* If the maximum punishment prescribed in the Table of Maximum Punishments, MCM, for a particular offense is less than death, the offense is non-capital. In this connection, it is necessary to be aware of the probability that in wartime or periods of armed hostilities the President will, by Executive Order, suspend the limitations placed by the Table on punishments of certain offenses.

(4) *Rehearings of other than death cases.* A rehearing of a case in which the death sentence was not adjudged at the original trial is, of necessity, not a capital case.

c. Meaning of the term "case."

(1) *General.* For Article 49 purposes the term "case" means "specification." Therefore, where an accused is charged with two or more offenses, of which one is non-capital, a deposition which is relevant only to such non-capital offense may be used by the prosecution. Furthermore, a deposition which is relevant to both a capital and a non-capital offense may be used if the two offenses do not involve the same criminal transaction

and the court is specifically instructed that it may not consider the deposition as bearing on the capital offense.

(2) *Illustrative case.*

United States v. Gann, 3 USCMA 12, 11 CMR 12 (1953). Where an accused is charged with the capital offense of desertion in Korea with intent to avoid hazardous duty and the non-capital offense of willful disobedience of an NCO, a deposition which is relevant only to the latter offense is admissible against him. The provision of paragraph 145*a*, MCM, that "In a trial upon several specifications, the proceedings as to each constitute a separate 'case' " is not inconsistent with Article 49. The argument that a court may adjudge a death sentence because of evidence offered in support of a non-capital offense fails to consider the fact that this possibility is inherent in military law which permits the joinder of capital and non-capital cases in any situation. Furthermore, there is no requirement that the court be instructed as to the limited purpose for which the deposition is admitted unless it is relevant to both offenses.

6. Use by the prosecution in capital cases. *a. General.* The prosecution may make use of depositions, or portions thereof, in capital cases in only two situations.

b. Express consent of the accused. Paragraph 145*a*, MCM, provides that "With the express consent of the accused made or presented in open court" the prosecution may use depositions in capital cases. In such a case there is, of course, a waiver of the right of confrontation reserved to the accused by Congress in capital cases.

Illustrative case.

United States v. Aldridge, 4 USCMA 107, 110, 15 CMR 107, 110 (1954). The mere silence of the defense counsel cannot be considered as a sufficient consent to the use of depositions in a capital case (wartime sentinel offense in Korea). "We do not believe the record establishes any affirmative act on the part of the accused or his counsel which could be constructed as a consent to the admission of these depositions. It is not shown clearly that they consciously intended to waive a substantial right granted to the accused. While defense counsel objected to the specific questions propounded in the deposition, he neither objected nor consented to the admission of the more important of these depositions as a deposition. He merely stated, 'No objection,' when queried by the law officer concerning the second deposition. We do not interpret such an answer as meeting the requirements for admissibility set out in the Manual. Its language narrows admissibility to those instances when the accused expressly consents in open

court and counsel's comment of no objection falls far short of that requisite."

c. The rule of completeness. There is a well established principle of evidence, frequently referred to as the rule of completeness, which enables a party to litigation, when his opponent has put in evidence portions of a writing, conversation or similar event, to demand that those other portions which serve to further explain or illuminate the offered portions also be placed before the court. Therefore, if the defense chooses to put in evidence in a capital case only a portion of a deposition, the prosecution can require that all other portions of the same deposition which are relevant to the portion offered by the defense also be introduced. In such a situation the defense by its actions will be deemed to have consented to the further introduction of the other portions or, in the negative, to have waived its right to object to such further evidence.

7. Requirements for admissibility. In order for a deposition to be admissible it must have been taken in substantial compliance with the procedural requirements of the Manual and the Code, the deponent must be "unavailable" to appear and testify as a witness, the testimony contained therein must be competent and it must, like any other writing, be properly authenticated.

8. Procedural requirements. *a. General.* Not every failure to comply with the procedural requirements involved in the taking of a deposition will render it inadmissible. However, there are certain such requirements which are deemed of sufficient importance that the failure to comply therewith will serve to exclude an otherwise admissible deposition. Furthermore, an accumulation of procedural violations, each of which is innocuous in itself, may be deemed to rise to a deprivation of due process.

Illustrative case.

United States v. Valli, 7 USCMA 60, 21 CMR 186 (1956). Where the record of trial is completely silent as to the manner in which the depositions of the victim of the larceny, a city detective and the pawnbroker who bought the stolen property were taken, there is an accumulation of error which renders the depositions inadmissible despite the failure of defense counsel to object thereto at the trial. Although such silence is, by virtue of paragraph 145*a*, MCM, a waiver of the lack of a showing that the depositions were taken on reasonable notice and before a proper officer, it cannot be deemed to waive" . . . every statutory condition and restriction imposed by the Code. The taking of a deposition by the prosecution is not permitted in most American civilian jurisdictions, but, because of the necessities of the services, military law has permitted their use in military courts. We have upheld the right of Congress to authorize their use, but we have ap-

preciated that for the most part they are tools for the prosecution which cut deeply into the privileges of an accused, and we have, therefore, demanded strict compliance with the procedural requirements before permitting their use." (At p. 64, 190.) "The right to take and use the deposition of a witness is statutory, and the procedure prescribed for its taking must be substantially followed in order to make the deposition competent and admissible. . . . We are not reluctant to impose a waiver, and we have done so in many fields. However, we have not gone so far as to permit a waiver to equal total abandonment. . . . We could take time to consider the detrimental effect of each procedural error and discuss the possibility of a conscious waiver of each one, but little good would be served." (At p. 66, 192.) Under the circumstances here present the failure to object cannot rise to the level of "a conscious waiver of the combined deficiencies shown by this record. Perhaps our theory could be likened to the doctrine of cumulative error. One or two errors, or maybe more, might be cured by a simple failure to object, but as the number increases, the total becomes so large that they should not all be remedied by the one omission." (At p. 67, 193.)

b. Qualifications of defense counsel.

(1) *Legal qualifications.* A deposition may not be used against the accused in a general court-martial unless he was represented at the taking of the deposition by counsel legally qualified in the sense of Article 27, UCMJ (*United States v. Sutton*, 3 USCMA 220, 11 CMR 220 (1953)).

(2) *Need not be the trial defense counsel.* Although desirable, it is not essential that the counsel who represents the accused at the taking of the deposition be the same individual who actually defends him at his trial.

Illustrative case.

United States v. Sutton, 3 USCMA 220, 226 11 CMR 220, 226 (1953). Where a qualified lawyer represented the accused at the time the interrogatories were prepared, the deposition is not rendered inadmissible merely because such lawyer was relieved of his defense counsel duties prior to the trial and the accused was defended at the trial by a different individual. "Here again we run into the necessities of the service. Members of the legal profession must be moved and so the personnel of a court is changing constantly. There is no contention that bad faith or an ulterior purpose brought about this change."

(3) *Need not be sworn.* There is no requirement that counsel participating in the taking of depositions be sworn. (*United States v. Parrish*, 7 USCMA 337, 22 CMR 127 (1956).)

(4) *Must be accepted by the accused.* The counsel who represents the accused must have been accepted by the latter in such a manner as to create an attorney-client relationship. The mere designation of an individual as appointed defense counsel is not sufficient.

Illustrative case.

United States v. Miller, 7 USCMA 23, 28, 21 CMR 149, 154 (1956). In a sodomy case where, during the absence of the accused from the installation, assigned military defense counsel acts in his behalf for the taking of an oral deposition from a witness who is scheduled for immediate discharge from the Army, the deposition is inadmissible over the objection of the defense in the absence of any showing that the accused consented to such representation. Furthermore, the failure to notify the accused of the taking of the deposition deprived him of the right to be represented thereat by the civilian attorney whom he had already retained for his defense. "There is more to creating the relationship of attorney and client than the mere publication of an order of appointment. . . . The relationship between an attorney and client is personal and privileged. It involves confidence, trust and cooperation. Where counsel is appointed to represent one charged with an offense, the offender is entitled to protest, if the lawyer selected is objectionable to him. In the military system, if an accused has just cause for complaint against his defender, such as hostility or incompetency, he is entitled to request the appointment of another counsel. Furthermore, he is entitled to reject the services of appointed officer and employ, at his own expense, the services of civilian counsel. It may be that where an accused does not retain the services of civilian counsel, or prevail upon individual counsel to undertake his defense, or object with good cause to the representation by counsel appointed for him, he is deemed to have concurred in the appointment. . . .

We are convinced the relationship of attorney and client was not truly created and . . . the accused was not represented within the fair extent of the Code. It is, therefore, immaterial that appointed defense counsel, who purported to act for him, may have cross-examined the witness. Such examination cannot be said to have been made for and on behalf of the accused, and we refuse to accord it the status of legal confrontation. . . . To bind the accused, we feel there must be some semblance of acceptance on his part, as representation by total strangers is neither desirable nor fair."

(5) *Cannot be substituted for existing counsel.* As a corollary of the principle discussed above, once the accused has established an attorney-client relationship with a specific defense counsel, another counsel cannot be designated to represent him at the taking of a deposition unless the accused specifically consents to such representation either personally or through his counsel. Therefore, so much of paragraph 117*g*, MCM, as purports to authorize the convening authority to designate defense counsel *after* charges have been referred for trial is invalid.

Illustrative case.

United States v. Brady, 8 USCMA 456, 24 CMR 266 (1957). An oral deposition is inadmissible over the objection of the defense when taken under the following circumstances: the charges (of desertion) had been referred to a general court-martial in Germany and the accused had accepted the services of the appointed defense counsel; thereafter, the prosecution decided to take depositions from certain witnesses in Paris where the accused had been apprehended; the defense counsel objected and requested that either the witnesses be brought to Germany or counsel and the accused be sent to Paris; his request was denied, a general court-martial convening authority in France designated Captain F to represent the accused at the taking of oral depositions; "under protest," defense counsel forwarded to Captain F a memorandum of points to be covered which he believed inadequate because of ignorance of the expected testimony. Article 49, UCMJ, empowers a convening authority to appoint defense counsel for depositions only *before* charges have been referred for trial. After such referral, such an appointment is invalid unless expressly consented to by either the accused or his existing counsel. Herein, there was no such consent.

o. Reasonable notice to defense. Article 49(*b*), UCMJ, requires that "reasonable written notice" of the taking of a deposition be given to all parties. The failure to give such notice will, of course, enable a party to raise the issue that he was denied the opportunity to protest to the convening authority the taking of the deposition or the opportunity to adequately prepare for the taking. However, the failure to object at the trial on the ground of a lack of notice will be deemed to be a waiver of any deficiency in this regard. Where an oral deposition is to be taken after referral of charges the notice must include the giving of information to the opponent concerning the points to be covered.

Illustrative case.

United States v. Brady, 8 USCMA 456, 460, 24 CMR 266, 270 (1957). The failure of trial counsel to comply with the provision of paragraph 117*g* MCM, that the defense be provided with a written indication of the points to be covered in the oral deposition is fatal error when defense counsel is not otherwise aware of the proposed scope of the deposition. "As a matter of fact, the record does not show that the names of the witnesses whose depositions were actually taken were submitted in advance to the accused or his attorney. As a result, neither the accused nor his attorney could prepare possible impeachment matter. Practically, from the accused's standpoint, a substantial part of the case against him was made by nameless witnesses. A procedure of that kind is incompatible with a fair trial."

d. Proper authority must act on objections to taking or using depositions. If the defense objects to taking a deposition or to having it read at the trial, the objection must be passed upon by a proper authority, *viz.*, the convening authority or, if the court is in session, the law officer. It is error if the objection is overruled by anyone other than the proper authority.

Illustrative cases.

(1) *United States v. Brady*, 8 USCMA 456, 24 CMR 266 (1957). Where prior to trial the defense counsel objects to the taking of oral depositions unless he and the accused can be present thereat, it is improper for the Staff Judge Advocate to reject the objection and deny the defense counsel's request.

(2) *United States v. Thornton*, 8 USCMA 446, 24 CMR 256 (1957). An acting Staff Judge Advocate has no authority to deny the request of defense counsel for the personal attendance of a defense witness. Such action can only be taken by the convening authority, or, if the court is in session, the law officer.

e. Charges must be preferred. Article 49, UCMJ, authorizes the taking of a deposition only after charges have been preferred. Obviously, a party cannot adequately conduct or prepare his cross-examination of the deponent unless he has a particular specification as a frame of reference. A purported deposition taken before charges are signed is, therefore, a nullity and inadmissible.

Illustrative case.

ACM 13003, *Tatmon*, 23 CMR 841 (1957). Where a written deposition was taken upon sworn charges of forgery, the subsequent redrafting of the specifications which did not add any new matter did not make the deposition inadmissible. However, the deposition could not be used as to an additional charge of making a false official state-

ment which was not preferred until after the deposition had been taken.

9. Unavailability of the witness. *a. General.* Article 49, UCMJ, lists three types of circumstances any one of which will render a witness "unavailable" and thereby permit his testimony to be introduced by way of a deposition. The party offering the deposition must show affirmatively the existence of such unavailability but a failure to object to the lack of such a showing will constitute a waiver of any defect in this regard. Furthermore, the law officer may in his discretion relax the rules of evidence to the extent of receiving affidavits, certificates and other writings for the purpose of establishing the unavailability of witnesses (par. 137, MCM). It must be noted that it is the unavailability of the witness at the time of the trial which is at issue. The mere fact that a witness was "unavailable" at the time the deposition was taken does not conclude the matter. The fact that a witness is "available" at the time a deposition is taken does not furnish valid grounds for objecting to its being taken and the failure to so object would not waive the right to require proof of unavailability at the time it is offered in evidence. Depositions are always taken *de bene esse*, *i.e.* on condition that the need for their use exist at the time of trial.

b. Geographical unavailability. A witness is unavailable if, at the time of the trial, he resides or is beyond the State, Territory or District in which the court is sitting *or* is more than 100 miles from the place of the trial. The former provision applies only when the court is sitting in the United States or within a territory of the United States. In establishing the location of a witness at the time of the trial use may be made of the ordinary inferences such as that of continuation of residence or that a person who expresses an intent to travel to a certain place and thereafter leaves his former location has gone to such place—but the probative value of such inferences may be weakened in the case of military personnel by the well-known fact that they are moved about frequently by military authority. The place of duty is deemed the "residence" of military personnel for purposes of these rules.

Illustrative cases.

(1) *United States v. Stringer*, 5 USCMA 122, 136, 17 CMR 122, 136 (1954). In the case of a court sitting in France the provisions of Article 49, UCMJ, concerning witnesses beyond "the State, Territory or District" are inapplicable. Furthermore where the residence of the witness at the time the deposition was taken was within 100 miles of the court "it must be presumed that she continued to reside there when the trial began. Manual for Courts-Martial, paragraph 138*a*."

(2) *United States v. Ciarletta*, 7 USCMA 606, 614, 23 CMR 70, 78 (1957). Where a trial is held in California, evidence that the deponent had been discharged two weeks prior to trial and assigned to a reserve unit in New York, from which he had enlisted and to which he had been paid mileage upon discharge, is a sufficient showing to permit use of the deposition since it may be assumed that New York was his residence and he had returned thereto. ". . . the prosecution is not required to prove his precise whereabouts the day of the hearing, for under Article 49*d*(1) of the Code, proof of his residence, if it is the requisite distance away, is sufficient to render the deposition admissible. So there will be no misunderstanding, we are only considering residence as it may govern those witnesses who are not in the Service. A man in the armed forces may be readily available anywhere American service men are stationed, regardless of his actual residence, providing he is on station. In this instance, however, the witness had returned to civilian life. . . ."

(3) CM 400641, *Story*, 28 CMR 492 (1959), *pet denied*, 28 CMR 414 (1959). For the purpose of determining geographic unavailability of a military witness the phrase "place of duty" may be substituted for "residence" in the portion of the *Ciarletta* opinion quoted in paragraph (2), *supra*. Therefore, a sufficient showing of unavailability is made by evidence of a Special Order transferring the witness from Missouri, the place of the trial, to New Jersey for overseas transportation and a morning report reflecting his departure in compliance with the order.

(4) *United States v. Dyche*, 8 USCMA 430, 24 CMR 240 (1957). In a forgery trial held at A, the deposition of a state banking official which had been taken at B was offered by the prosecution and objected to by the defense for lack of a showing that the witness was unavailable. The deponent's testimony gave his residence as being at C. A, B, and C are all in the same state. However, although B is over 100 miles from A, C is not. The mere fact that the deposition was taken at B two days before the trial does not warrant a presumption that the witness remained there in face of the evidence as to his residence being at C. There is no more reason to presume his presence at B than at C on the date of the trial and the unavailability of the witness was not shown.

c. Whereabouts unknown. A witness is unavailable if his whereabouts are unknown at the time of the trial. However, the party offering the deposition must show not only that he has been unable to

locate the witness but also that he has exercised reasonable diligence in attempting to do so.

Illustrative case.

United States v. Miller, 7 USCMA 23, 30, 21 CMR 149, 156 (1956). Where the only showing as to the nonavailability of a deponent is that trial counsel attempted to telephone him on the day before the trial and was informed by the operator that no telephone was listed in the deponent's name in the town of his presumed residence, the deposition is not admissible over the objection of the defense. In order to use a deposition on the grounds that the whereabouts of the witness are unknown ". . . trial counsel must establish that diligent, timely and thorough efforts were made to locate him. Mere failure to locate the witness is not sufficient. . . . When we pause to measure the performance of trial counsel to determine the whereabouts of the witness, we find it woefully inadequate. About all we find is a lack of diligence. There was no prior planning until the eve of trial, and before any action was taken by him, it was too late to exhaust the ordinary avenues of information concerning the location of the witness." Trial counsel made no effort to contact relatives or friends of the witness, to mail a letter to him or to inquire from official agencies in the town concerned. "Two inquiries made over the telephone on the day before trial strikes us as much too little and much too late."

d. Inability or refusal to appear.

(1) *General.* A witness is unavailable if by reason of death, age, sickness, bodily infirmity, military necessity, non-amenability to process, or other reasonable cause, he is unable or refuses to appear and testify in person at the trial. The application and effect of most of these conditions is apparent. Some of the special problems posed by the remainder are indicated below.

Illustrative case.

ACM S-18676, *Hoffman*, 29 CMR 795, 797 (1960), *pet. denied* 29 CMR 586 (1960). An important prosecution witness was hospitalized with a serious heart condition prior to trial. The convening authority directed that his deposition be taken, over the protest of the defense counsel who refused to participate in the taking. At the trial, defense counsel objected to the use of the deposition and demanded the personal attendance of the witness. The court directed that evidence be produced as to the deponent's availability and counsel stipulated "that the witness, on the advice of his doctor, declined to appear 'now or at any time in the