

MILITARY JUSTICE HANDBOOK

THE TRIAL COUNSEL AND THE DEFENSE COUNSEL



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MILITARY JUSTICE HANDBOOK

THE TRIAL COUNSEL AND THE DEFENSE COUNSEL

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Chapter 1

GENERAL

1. PURPOSE AND SCOPE

a. General. This handbook has been designed as a practical guide to assist trial counsel, defense counsel, and pretrial investigation counsel in the performance of their duties. It is not considered a substitute for the *Manual for Courts-Martial, United States, 1969* (Revised edition) or as superseding any of the provisions thereof, and should not be cited as legal authority. In this handbook, counsel will find a description and discussion of the duties which he is to perform prior to, during, and after the trial. The handbook suggests workable solutions for many specific problems which may arise both before and at the trial. Much of the discussion contained in chapters 3 and 4 is mutually applicable to trial and defense counsel. These chapters should be carefully studied by both counsel.

b. User's comments. Users of this pamphlet are encouraged to submit recommended changes and comments to improve the publication. Comments should be keyed to the specific page, paragraph, and line of the text in which the change is recommended. Reasons will be provided for each comment to insure understanding and complete evaluation. Comments should be prepared using DA Form 2028 (Recommended Changes to Publications) and forwarded direct to The Judge Advocate General, ATTN: JAGL, Department of the Army, Washington, D.C. 20310.

2. QUALIFICATIONS OF COUNSEL

a. General. Figure 1-1 lists the legal qualifications of counsel of general and special courts-martial, as well as the factory which disqualify a person from acting as counsel in a particular case. The authority convening a court-martial is responsible for detailing properly qualified counsel. Upon assembling, the court is required by subparagraphs 61e and f of the Manual, and the trial procedure guide (MCM, app 8), to ascertain: (1) that properly qualified personnel were detailed as trial and defense counsel; and (2) that counsel conducting the prosecution and defense have the requisite legal qualifications, and are not dis-

Figure 1-1. Qualifications of Counsel.

	Legal qualifications						Disqualifying factor
	General court-martial		Special court-martial BCD authorized		Special court-martial BCD not authorized		General or special court-martial
	Detailed counsel	Counsel conducting trial	Detailed counsel	Counsel conducting trial	Detailed counsel	Counsel conducting trial	May not act if—in the same case—
P R O S E C U T	(1) TC must be a judge advocate of the Army, Navy, Air Force, Marine Corps or a law specialist of the Coast Guard, who is a graduate of accredited law school or member of bar of Federal court or highest court of a State or a commissioned officer of the Army, Navy, Air Force, Marine Corps or Coast Guard who is a member of the bar of a Federal court or	Must have same legal qualifications as detailed TC. (Art. 38(d)).	(1) TC need not have legal qualifications. (MCM 6c). (2) Assistant TC need not have legal qualifications. (MCM 6d).	Need not have legal qualifications. (MCM 45b).	(1) TC need not have legal qualifications. (MCM 6c). (2) Assistant TC need not have legal qualifications. (MCM 6d).	Need not have legal qualifications (MCM 45b).	He has acted ⁴ for the defense or as pretrial counsel for the accused, or as investigating office court member or military judge. (MCM 6a).

the highest court of a State and an officer certified competent to perform such duties by the Judge Advocate General of the armed force of which he is a member. (Art. 27(b)(2)).

(2) Assistant TC need not be legally qualified. (MCM 6d).

(1) DC must have same legal qualifications as detailed TC. (Art. 27(b)).

(2) Assistant DC need not be legally qualified but his experience and legal qualifications should be comparable to assistant TC. (MCM 6d).

Must have same legal qualifications as detailed DC except that individual counsel need not be certified under Article 27(b).³

DC must be certified under Article 27(b) (MCM 15b).¹ Assistant DC need not be legally qualified but his experience and legal qualifications should be comparable to assistant TC. (MCM 6d).

Must have same legal qualifications as detailed DC except that individual counsel need not be certified under Article 27(b).²

(1) Counsel certified under Article 27(b) must be provided if requested by accused. (MCM 6c). See para. 2-14, AR 27-10.
(2) If TC or assistant TC qualified to act before GCM, DC must be similarly qualified. (MCM 6c).

(1) Counsel certified under Article 27(b) must be provided if requested by accused. See para. 2-14, AR 27-10.
(2) Accused may elect to be represented by individual counsel or a detailed assistant defense counsel whether or not

(1) He has acted for the prosecution.
(2) He is the accuser, or has acted as investigating officer, court member or military judge—unless expressly requested by accused. (MCM 6a).
(3) He is designated to defend

Figure 1-1. Qualifications of Counsel—Continued

	Legal qualifications						Disqualifying factor
	General court-martial		Special court-martial BCD authorized		Special court-martial BCD not authorized		General or special court-martial
	Detailed counsel	Counsel conducting trial	Detailed counsel	Counsel conducting trial	Detailed counsel	Counsel conducting trial	May not act if—in the same case—
D E F E N S E					(3) If TC or assistant TC is a Judge Advocate law specialist, or member of the Bar of a Federal court or highest court of a State, DC must also be one of foregoing. (MCM 6c). (4) If TC and assistant TC have no legal qualifications, DC need not be legally qualified. (MCM 6c). (5) Assistant DC need not be legally qualified but his experi-	such counsel are legally qualified. ³	two or more accused at a joint or common trial and there is a conflict of interest in the conduct of their defense. (MCM 48c).

ence and legal qualifications should be comparable to assistant TC. (MCM 6d).

¹ The requirement for counsel will be satisfied when counsel qualified under Article 27(b), and not otherwise disqualified, has been detailed and made available, even though the accused may choose not to cooperate with, or utilize the service of, such detailed counsel, (MCM 15b).

² Only a person qualified under Article 27(b) or otherwise qualified as a lawyer may act as individual counsel or represent an accused before a general court-martial or a special court-martial at which a BCD may be adjudged. However, an accused may conduct his own defense without assistance of counsel. In any case, whether represented by counsel or by himself, an accused may have a non-lawyer present and seated at the counsel table and may consult with him. (MCM 48a).

³ The legal qualifications of the detailed DC must be equal to or exceed, those of the detailed TC and assistant TC; however, the accused may elect to have his case conducted by counsel whose qualifications are not equal to the TC or assistant TC and may expressly decline the presence of the DC. This is true even where the detailed TC and DC are both legally qualified. (MCM 61f).

⁴ In the absence of evidence to the contrary, a person who, between the time the case has been referred for trial and the trial, has been detailed counsel or assistant counsel of the court to which the case has been referred, shall be deemed to have acted as a member of the prosecution or the defense, as the case may be. (MCM 6a).

qualified because of their prior participation in the same case, or in a closely related case.

It is important that each person detailed as counsel or assistant counsel examine the order convening the court to ascertain whether the statement of his legal qualifications or lack of legal qualifications is correct. If the statement is not correct, the person concerned should report the error to the convening authority at once so that corrective action can be taken. Similarly, if a person detailed as counsel discovers that he is disqualified from acting in a particular case because of his prior participation therein, or in a closely related case, he not only should refrain from acting as counsel in the case, but he should promptly advise the convening authority of his inability to act. When for any reason the convening authority cannot be notified of counsel's disqualification, the person concerned should advise the military judge, or president of a special court-martial without a military judge, of the matter prior to the time the court is called to order. If these rules are followed, the court will not be called to order for the trial of a particular case unless counsel for both sides are properly qualified.

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

(1) *Matters affecting the jurisdiction of the court.*

(a) In a case referred to a non-BCD special court-martial, the accused has declined the opportunity to be represented by counsel certified under Article 27(b). The special court-martial convening order states that the trial counsel and the defense counsel have no legal qualifications, but in fact the trial counsel is a member of the bar of the highest court of Iowa. *Action:* As the court is not legally constituted, the trial counsel should advise the convening authority of the error so that he can detail as defense counsel an officer with legal qualifications equivalent to those of the trial counsel or can replace the legally qualified trial counsel with an officer having no legal qualifications.⁵

(b) A non-BCD special court-martial convening order shows that trial counsel is a judge advocate officer certified in accordance with Article 27(b). Detailed defense counsel is a member of the bar of a Federal court but is not certified in accordance with Article 27(b). *Action:* The trial counsel should

⁵ MCM 6c.

advise the convening authority of the error so that he can replace the trial counsel with an officer whose qualifications do not exceed those of the defense counsel or provide the accused with counsel having legal qualifications equivalent to those of the trial counsel.⁶

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

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

Captain X, who is named as assistant trial counsel of this court, was named as assistant defense counsel of the court which originally tried this case; however, he did not act for the defense in any capacity at the prior trial. He was absent on leave from the time of referral of the charges to the court until after the trial had been concluded.

This statement should be made even though Captain X is not to act for the prosecution at the rehearing.⁷

(b) In a case referred to a special court-martial for a rehearing, the defense counsel discovered that he had acted as trial counsel of the court which first tried the case. *Action:* The defense counsel must take no action in the case except to notify the convening authority of his inability to act; the convening authority should detail a new defense counsel. For the reasons indicated in the preceding example, newly detailed counsel for defense must announce at the trial that the disqualified defense counsel did not act for the defense.⁸

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

⁶ ACM S-2109, Lamar, 2 CMR 731 (1951).

⁷ CM 382964, Betts, 20 CMR 398 (1955).

⁸ MCM 6c.

Captain Y, who is named as the assistant trial counsel, acted as the pretrial investigating officer in this case. I have not conferred with him concerning the prosecution of this case except to advise him that he would not be eligible to act for the prosecution. He has not acted for the prosecution in this case.⁹

(d) Detailed trial counsel served as defense counsel at the separate trial of another accused who was tried for the same offense committed jointly with the accused. *Action:* Under such circumstances, trial counsel would be ineligible since he had previously acted as defense counsel in what must be considered to be "the same case" within the meaning of Article 27(b). Accordingly, trial counsel should take no action in the case except to advise the convening authority of his inability to act. His replacement must announce at the trial that the disqualified trial counsel did not act for or assist the prosecution.¹⁰

(e) An officer was detailed to defend an accused charged with purchasing a stolen pistol. Counsel had previously defended the prosecution's principal witness who was tried on charges of stealing and selling the same pistol. *Action:* Under such circumstances, detailed defense counsel would be placed in the legally precarious position of having to safeguard the interests of the accused and at the same time retain the confidence derived from his attorney-client relationship with the prosecution witness. Under such circumstances, accused would be deprived of the effective assistance of counsel. Detailed defense counsel must inform accused of his inability to act and report the matter to the convening authority.¹¹

3. DUTIES IN GENERAL

a. Personal preparation. The trial counsel and the defense counsel should give priority to the serious duties which they perform. To prepare themselves adequately for their duties counsel must acquire a sound working knowledge of those paragraphs of the Manual which pertain to courts-martial procedure (MCM 52 through 81), the attendance of witnesses and the taking of depositions (MCM 115, 117), the rules of evidence (MCM 137 through 154), and the punitive articles (MCM 156 through 213). The principal provisions of the Manual pertaining to the duties of the trial counsel will be found in paragraphs 44, 45, 61, and 82; those pertaining to the duties of the defense counsel will be found primarily in paragraphs 46, 47, and 48. Careful study of these

⁹ U. S. v. Stringer, 4 USCMA 494, 16 CMR 68 (1954).

¹⁰ MCM 6a.

¹¹ U. S. v. McCluskey, 6 USCMA 545, 20 CMR 261 (1955).

paragraphs by the officers concerned is essential. Both the trial counsel and the defense counsel should be thoroughly familiar with the various appendices of the Manual, especially 2, 8, 9, and 10. Care should be exercised in using the Manual, however, to insure that its provisions have not been altered by decisions of the United States Court of Military Appeals or Executive Orders promulgated by the President. Reference should always be made to those sources. Nonlawyer counsel should consult the local staff judge advocate for an explanation of changes which are not readily understood.

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

The military judge is the military equivalent of a United States district court judge. As such, he is entitled to the respect and courtesy normally extended to his civilian counterpart. He should be addressed by all parties to the trial as "your honor," "sir," or "the court."

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

c. Professional conduct. The trial counsel and the defense counsel are expected to exert themselves to the utmost on behalf of the Government and the accused, respectively. Partisan zeal, however, is never an excuse for any impropriety or unethical conduct in or out of court. A counsel guilty of such misconduct may be subject to disciplinary action, and he may be prohibited from ever again acting as counsel (MCM 43) (chap 4, AR 27-10). Moreover, a court-martial may punish counsel for contempt if he uses any menacing words, signs, or gestures in its presence or if he disturbs the proceedings by causing any riot or disorder (MCM 118). Fear of official disapproval should not, however, deter counsel in the proper and vigorous presentation of a case.

Rules of conduct for counsel who appear before courts-martial are found in various paragraphs of the Manual, particularly in paragraphs 42, 44, 46, 48, and 72. These rules may be summarized as follows: Counsel should be courteous and respectful to all

parties to the trial. They should avoid wrangling, exhibit candor and fairness and refrain from knowingly misquoting or citing "bad law" or from discussing the case with the news media unless so authorized by the convening authority. It is improper for counsel to assert in argument his personal belief in the guilt or innocence of the accused or to tolerate any manner of fraud or other improprieties by the accused. Counsel are prohibited from engaging in private communications with the court members or the military judge regarding an assigned case. Counsel should scrupulously avoid any suggestion calculated to induce the witness to suppress evidence or deviate from the truth while testifying at trial. Unless it involves purely formal matters, or is essential to the ends of justice, testimony by counsel on behalf of his client is improper. The primary duty of the prosecution is to see that justice is done, rather than solely to convict. The trial counsel, after serving a copy of the charges on the accused, will communicate with the accused only through his counsel. Defense counsel will perform such duties as usually devolve upon counsel for a defendant before a civilian court in a criminal case. He will guard the interests of the accused by all honorable and legitimate means known to law. The convening authority, the Army Court of Military Review, The Judge Advocate General, and the Secretary of the Army perform judicial functions under the UCMJ. Attempts at improper influence upon these officials is as professionally reprehensible as like conduct upon a civilian appellate court. The military judicial system is a complete judicial system providing orderly and available methods of appeal, petition and redress. Counsel's duty extends to this system alone and all his energies should be so dedicated. It is his duty to undertake the defense regardless of his personal opinion concerning the guilt of the accused; to disclose to the accused any interest he may have in connection with the case, any grounds of possible disqualification, and any other matter which might influence the accused in the selection of counsel; to represent the accused with undivided fidelity; and not to divulge his secrets or confidence. Defense counsel owes a duty to obtain full knowledge of the case before advising the accused and he is bound to give the accused his candid opinion of the merits of the case.

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

a. Counsel and accused. It is not the duty of the trial counsel to advise or assist the defense in the preparation or conduct of

its case. After he has served a copy of the charge sheet on the accused and notified the detailed defense counsel of the service of charges, neither the trial counsel nor his assistants may deal with the accused except through the counsel representing him. For example, if the trial counsel desires to know how the accused intends to plead or whether an enlisted accused desires enlisted personnel on the court, he will ask counsel for the accused and in that manner obtain the desired information.

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

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

d. Right of defense to examine allied papers, records, and real evidence. Documents and objects in the custody and control of military authorities which are relevant to the issues at the trial normally must be made available to the defense upon proper request (MCM 115c). The trial counsel, convening authority, military judge or President of a special court-martial without a military judge, will, upon reasonable request, take action to produce for use in evidence, documents and other evidentiary materials in control and custody of military authorities. Unless restricted pursuant to 151(b)(3) of the Manual, the materials will be made available to the defense for examination or use as appropriate. Usually, the trial counsel receives the charge sheet and allied papers in duplicate. He should, therefore, provide the

defense with a duplicate copy of all documents in his possession while retaining the originals for his own use. If necessary to the preparation of his case, defense counsel should be allowed to inspect the originals. In addition, the defense will be furnished a copy of the orders convening the court and all amendatory orders.

5. PRELIMINARY CONSIDERATIONS IN PREPARING A CASE

a. Presentation of evidence. Counsel must be thoroughly familiar with the rules of evidence. They must know, in each case, what evidence can be used to prove each offense charged, how this evidence can be introduced, and what evidence of the opposing side they will attempt to exclude by appropriate objection during trial. Accordingly, counsel should familiarize themselves before trial with the rules of evidence which are most likely to arise at the trial. They should determine the order in which their witnesses will testify so that the case will be presented in the most understandable and effective manner. Generally, this result is obtained by presenting the evidence in chronological order. Counsel may advise the court of which charges and specifications particular evidence or testimony will concern. This may be done in his opening statement or before the evidence is introduced or the witness testifies. It is generally advisable to so advise the court in complex cases involving several specifications or where evidence will be introduced out of logical sequence.

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

When the locations of objects and matters of distance are important, suitable diagrams, sketches, or photographs should be prepared for use during the pretrial interrogation of witnesses and for possible use at trial. Inexperienced counsel frequently overlook the value of this kind of evidence. A single photograph, sketch, X-ray, map, or diagram—when properly used—may speak more clearly than hundreds of words of oral testimony and greatly assist the court in understanding the proceedings. In determining

how to prove a fact or a set of facts, counsel should ask himself this question: How can I best show this to the court and the reviewing authorities? He must remember that at the start of the case the court is completely ignorant of the facts!

To avoid having to testify as a witness in order to authenticate a diagram, sketch, photograph, etc., counsel should have these exhibits prepared by a qualified person who will be available to testify at the trial. If possible, the diagram, sketch, photograph, etc., should be large enough so that all the members of the court can see the details as they are pointed out by the witness. The exhibit usually can be reproduced photographically or by other reproduction means for inclusion in the record. If the trial counsel and the defense counsel have examined the scene of the alleged offense, they may be able to agree about distances and locations of objects and buildings. If such agreement is reached, they will be able to stipulate to those matters at the trial. Similarly, they may be able to stipulate to the authenticity of a map, diagram, sketch, or photograph of the scene. Unless conclusions concerning distances, directions and other facts are stipulated to, exhibits of this nature should not be printed or written upon prior to verification by a witness on a stand.

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

All witnesses should be interviewed as soon after receiving the case as possible. An interview with a witness should be very detailed. He should first be permitted to tell his own story with as little interruption as possible, and then be questioned ex-

haustively concerning the facts about which he is to testify. His answers should be checked against any prior statements he has made. When applicable, counsel should require the witness to locate, on a sketch or diagram of the area in question, the position of all persons and objects. In appropriate cases he should ask the witness to accompany him to the scene to determine whether the witness was in a position to see or hear what he says he saw or heard. During the interview, counsel should prepare adequate trial notes showing the competent testimony that he wants to elicit from the witness. Thereafter, he should prepare the witness carefully for his direct examination and advise him of the probable questions that he will be asked on cross-examination. This preparation is not, of course, for the purpose of inducing the witness to testify falsely but to enable him to testify truthfully, coherently, and accurately about the facts of which he has knowledge.

In certain instances it may be desirable to secure a signed statement from a witness prior to trial.¹² Such statements may be used for a variety of purposes:

(1) To permit the witness to refresh his recollection of the events before trial in case of delay between the interview and time of trial;

(2) To impeach a witness who, during testimony, deviates from the factual account previously rendered (MCM 153b);

(3) To corroborate the testimony of a witness attached on the basis of collusion, corruption, inconsistent statements or recent fabrication (MCM 153a);

(4) As evidence for the defense in extenuation and mitigation procedures (MCM 75c); and

(5) As the basis for a stipulation between trial and defense counsel with the consent of the accused (MCM 154b).

It should be recognized that this type of statement is hearsay and not admissible as evidence at trial except for the purposes outlined in (2), (3), and (4) above. If it is anticipated that a necessary witness will not be available to testify in person at the trial, action should be taken to obtain his formal deposition (MCM 117, 145a).

d. Pretrial interviews—manner of conducting. Counsel ordinarily should conduct the pretrial interview of a witness in the

¹² But see 18 USC 3500 (1964) (Jencks Act) regarding the right of the defense to examine statements of witnesses in the possession of counsel for the government.

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

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

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

After counsel is satisfied that the competency of such a witness can be established at the trial, he should then go into every detail of the expected direct and cross-examination of the witness. If the examination will involve questions that may cause the witness

to be unduly embarrassed, such as questions pertaining to sexual offenses, counsel must explain the necessity for full and truthful answers. In some instances, it may prove helpful to conduct the pretrial interview of a child in the presence of a parent. Care must be taken, however, that the parent does not attempt to shape the testimony of the witness but limits his assistance to adjurations to the witness to answer all questions fully and truthfully. Counsel must determine in each case just what procedure he will follow in preparing a witness of this type so that he will be able to testify fully and truthfully at the trial.

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

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

As indicated in paragraph 138e of the Manual, the relevant opinion of an expert witness is admissible in evidence if (1) it is based on facts of which the expert has personal knowledge, (2) it is based on an examination or study conducted by the expert, (3) it is based on an examination or study of reports of others of a kind customarily considered in the practice of the expert's specialty, or (4) it is based upon facts (either in evidence or later to be received in evidence) which have been made known to the expert by a hypothetical question. If the expert's opinion

is based upon personal knowledge of the facts, counsel should prepare him to specify at the trial the facts upon which his opinion is based. If the facts must be made known to the expert witness by a hypothetical question, counsel should seek the assistance of the expert witness in formulating the question. The expert will be able to advise counsel of the effect of the various facts upon his opinion and thus enable counsel to prepare questions which will be based upon the established facts that are most favorable to his theory of the case.

In preparing to cross-examine an expert witness, counsel should make every practicable effort to educate himself in the matters about which the expert will testify. This may be done by discussing the matter with the prospective witness or other experts and by studying treatises on the subject of the expert's specialty. Counsel should bear in mind that in cross-examining an expert the requirement on direct examination that hypothetical questions, and the answers thereto, shall be based on facts in evidence does not apply (MCM 149(b)(1)). Also, if the expert has based his opinion to some extent upon his reading of books or papers dealing with his specialty, he may be cross-examined by reference to other reputable works in his field.

Chapter 2

EVIDENCE

6. BASIC PRINCIPLES OF THE RULES OF EVIDENCE

Evidence is that which tends to prove or disprove any matter in question, or to influence the belief respecting it. It is the means by which any alleged matter of fact, the truth of which is submitted to inquiry, is proved or disproved. "Evidence" thus is any matter of fact from which an inference may be drawn as to another matter of fact. It includes all matters, except comment or argument, legally submitted to a court to enable it to decide the question before it—the ultimate fact.

The rules of evidence for courts-martial are contained in chapter XXVII of the Manual. These rules relate to the use of evidence before courts-martial and include the rules as to the exclusion of evidence and the rules which prescribe the manner of preventing evidence before a military tribunal. The discussion of evidence contained in this pamphlet is predicated upon the discussion in the Manual and in DA Pam 27-172, Evidence (see also DA Pam 27-173, Military Justice, Trial Procedure). It is not intended to be exhaustive. Those untrained in the law are not expected to have complete knowledge of these highly complex and often confusing rules, but if they are to function as counsel or otherwise they must know the general principles which apply to the case being tried.

Evidence, to be admissible in court, must be *relevant*. Evidence is not relevant when the fact it tends to prove is not part of any issue of the case, or when, though the fact intended to be proved is part of an issue of the case, the evidence itself is too remote to have any appreciable probative value for that purpose. "Material evidence" has the same meaning as "relevant evidence." See MCM 137.

A decision of a court-martial based on insufficient or legally inadmissible (incompetent) evidence cannot be upheld. The burden is on the government to *prove*, beyond a reasonable doubt, not only each and every element of an offense but also to do so by legal and competent evidence. It is incumbent upon trial counsel, prior to trial, to determine that there is available

evidence to support each element of the offense, and to produce such evidence at trial in accordance with established procedure and rules. If the usefulness of certain evidence is questioned at trial, counsel offering the evidence must be prepared to offer legal authority to support his contention that the evidence is properly admissible. It is unethical and improper to offer any matter into evidence knowing that it is inadmissible.

7. DIRECT EXAMINATION

a. General. The purpose of direct examination is to present testimonial evidence to the court to prove or disprove an issue in the case. Witnesses should testify comprehensively, clearly, briefly, and, normally, in a chronological manner about what has been seen, heard, or done. It is usually desirable to bring out all the facts known by the witness on direct examination even though some of them may be unfavorable to the side calling the witness. The complete disclosure of facts on direct examination is preferred, because unfavorable facts are usually more damaging when brought out for the first time on cross-examination.

The witness should be rehearsed and prepared by counsel calling him at a pretrial interview including the probable scope of cross-examination, but counsel must refrain from coaching a witness so that the testimony he gives in court is not his own. In preparing for the direct examination, counsel should outline the questions he intends to ask the witness and the expected replies, based upon pretrial interviews. Even if the witness is permitted to present his testimony at trial in narrative fashion, the list of questions will serve as a checklist to insure that all necessary and material points are covered.

b. Form of questions. Counsel may either elicit the testimony of the witness by a series of questions about specific facts or he may ask the witness to tell his story in narrative form. In the latter case the attention of the witness will be directed to the incident in question and he will then be requested to tell what he saw and heard on that occasion. With an intelligent witness, the narrative form of questioning is generally more effective than specific interrogation. The spontaneous relating of the story in the witness' own words will be more interesting and impressive than the same testimony elicited piecemeal from the witness by counsel. When placing evidence before the court in this fashion, however, counsel must be alert to assure that the witness does not give inadmissible testimony. Unless the witness is hostile,

timid, cannot express himself clearly, or becomes confused (MCM 149c), counsel should permit him to tell his story in his own way and in his own words without unnecessary interruption.

c. Witness' answers must be responsive. The testimony of the witness must be responsive to the specific questions asked. If a witness' answers are not responsive or exceed the scope of the question asked, the counsel questioning him may request that they be stricken from the record. The opposing counsel does not have this right (MCM 149a).

d. Leading questions. A leading question is one which either suggests the answer desired of the witness or which, embodying a material fact not as yet testified to by the witness, is susceptible of being answered by a simple "yes" or "no." The use of leading questions on direct or redirect examination is generally prohibited. Even on cross-examination a witness cannot be required to answer a question by a simple "yes" or "no" unless it is clear that such an answer will be a complete response to the question. The witness will always be permitted at some time before completing his testimony to explain such an answer. In certain cases, such as when questioning a witness on preliminary or introductory matters, when questioning a witness who appears hostile or adverse to the party calling him, when it appears that the witness has made an inadvertent error in his testimony, when the witness appears to be timid or embarrassed, when the witness is having difficulty in directing his mind toward the subject matter of the inquiry, or when memoranda are being used to refresh the witness' memory or as a record of his past recollection, leading questions may be used in the discretion of the military judge or the president of a special court-martial without a military judge. For further discussion of leading questions, see paragraph 149c of the Manual.

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

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

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

The privilege against compulsory self-incrimination extends to all witnesses; it is the privilege to refuse to respond to a question, the answer to which may tend to incriminate the witness. The privilege must be asserted personally by the witness and not by counsel.¹

Where it appears likely that a witness may invoke his privilege, counsel and the military judge should question the witness in an out-of-court hearing to determine whether he intends to avail himself of his right not to testify. If, however, a witness is called who properly invokes his privilege, extended interrogation of such a witness should be avoided.² Although an answer to a question apparently would incriminate or tend to incriminate a witness, he may be required to answer it if he can successfully object to being tried for the offense concerning which the privilege is asserted because of a grant of immunity,³ former jeopardy, the running of the statute of limitations, or some other reason. See MCM 150b.

9. THE ART OF CROSS-EXAMINATION

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

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

¹ U.S. v. Murphy, 7 USCMA 82, 21 CMR 158 (1956); MCM 150b.

² U.S. v. Bolden, 11 USCMA 182, 28 CMR 406 (1960).

³ U.S. v. Kirsch, 15 USCMA 84, 35 CMR 56, (1964). MCM 150b.

If counsel has prepared his case properly, he will, to the extent possible, have interviewed all the opposing witnesses, except the accused, and will know what their testimony should be. Accordingly, he should have little reason to go on a "fishing expedition" during his cross-examination, hoping to catch something favorable to his side of the case. A good rule to follow in cross-examining a witness is this: Do not ask a question of a witness unless you *know* what his answer will be. If the answer is unknown, it is especially dangerous to ask questions of the "how" or "why" variety, as they may give the witness an opportunity to bolster testimony that may already be damaging. It would be overly optimistic to expect a witness to make counsel's argument for him. If counsel elicits a discrepancy on cross-examination it is often better for him to wait and stress the inconsistency in argument than to press the witness with it. If there is an explanation, it is opposing counsel's responsibility to elicit this on re-direct examination.

If an opposing witness, whose testimony at the trial was damaging, made a statement (or engaged in other conduct) prior to trial inconsistent with portions of his testimony on the stand, counsel should prepare to attack his credibility by laying the necessary foundation for the introduction of the prior inconsistent statement. See MCM 153b(2)(c). Immaterial or inconsequential discrepancies between the testimony and a prior statement will not generally support an attack on the witness' credibility.

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

Cross-examination should be confined to those portions of the direct testimony which can be successfully attacked. A point damaging to the case of the opponent which is clearly established on cross-examination is more impressive standing alone than the same point obscured by a mass of futile testimony. For example, if it is planned to attack only the credibility of the witness, the cross-examination should be confined solely to that matter. If

counsel wishes only to bring out testimony favorable to his side on a particular point, he usually should lead the witness directly to the point involved, elicit the desired information, and release the witness.

10. CROSS-EXAMINATION OF ACCUSED

a. Scope, generally. The accused may testify or not, in his discretion. If he does not testify, neither comment on that fact nor an inference therefrom as to his guilt is permissible. If he does testify, he becomes subject to cross-examination under oath like any other witness, except that cross-examination of the accused may be wider in scope.⁴ When the accused testifies in denial or explanation of any defense for which he is being tried, his cross-examination may cover the whole subject of his guilt or innocence of that offense. Any fact relevant and material to the issue of the accused's guilt or to his credibility as a witness is properly the subject of cross-examination, and the accused, having taken the stand, cannot avail himself of the privilege against self-incrimination to escape proper cross-examination concerning an offense about which he has testified. See paragraph 149b(1) of the Manual for scope of cross-examination of accused in a case involving multiple offenses, and in a case where accused testifies for a limited purpose.

b. Character of the accused, evidence of other offenses. If the accused has testified as a witness, his credibility is in issue and is subject to attack. Where the accused has not testified, it is a general rule that evidence that the accused has a bad moral character or has committed other acts of misconduct may not be introduced for the purpose of raising an inference of guilt. This is to avoid any tendency to find him guilty simply because of his bad record. Such evidence may, however, be introduced for the purpose of rebutting evidence of good moral character introduced by the defense, or it might be introduced if the accused committed an offense or act of misconduct which tends to prove a fact relevant to guilt of the offense being tried (MCM 138g).

In order to show the probability of his innocence, the accused may—whether he testifies or not—introduce evidence of his own good character, such as evidence of his military record and evidence of his general character as a moral and well-conducted

⁴ U.S. v. Kelly, 7 USCMA 218, 22 CMR 8 (1956); MCM 149b(1).

person. He may not introduce evidence as to some specific trait of character unless proof of that trait would have a reasonable tendency to show that it was unlikely that he committed the particular offense charged. For example, evidence of good character for peaceableness would be admissible in the prosecution for an offense involving violence, but would be inadmissible in a prosecution for a nonviolent theft. After the accused introduces evidence concerning his good character, the prosecution may introduce evidence regarding his bad character. Specific acts of bad conduct may not be used to rebut general testimony as to good character.⁵ The character evidence in rebuttal will be limited by the scope of the character evidence introduced by the accused. Thus, in a prosecution for larceny, if the accused has introduced evidence of his honesty, the prosecution must limit its rebuttal evidence to proof of his bad character as to honesty. Reputation or opinion regarding efficiency may be rebutted by evidence of inefficiency but not by evidence of bad moral character.

11. CROSS-EXAMINATION OF WITNESSES OTHER THAN ACCUSED

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

Another important purpose of cross-examination is to test the extent to which the witness can be believed. Very few witnesses will consciously distort the truth and still fewer will commit

⁵ U.S. v. Dodge, 14 USCMA 440, 34 CMR 220 (1964); U.S. v. Baldwin, 17 USCMA 72, 37 CMR 336 (1967).

deliberate perjury or falsehood, but witnesses do sometimes tend to "take sides" in a case and unconsciously incline their testimony toward the side they conceive themselves to be on. Also a witness' ability to see or hear is often restricted. The cross-examiner should stress defects of observation, and inconsistencies between the testimony of the witness and any former statements he may have made. He should also seek to expose any hostility or bias that may have affected the testimony of the witness. The cross-examiner's manner, however, should always be that of a man who is trying to establish that the witness is honestly mistaken in one or more material features of his testimony. A hostile or aggressive manner, or one which gives the impression that the cross-examiner thinks he has a duty to expose a liar, may serve only to gain sympathy for the witness and ordinarily should not be adopted.

b. Cross-examination generally limited to issues covered on direct examination. Except when impeaching a witness, cross-examination is generally limited to issues concerning which the witness testified on direct examination. Of necessity, however, the cross-examiner may have to question the witness concerning matters not touched upon by the direct examination. The extent of cross-examination with respect to a legitimate subject of inquiry is within the sound discretion of the military judge or president of a special court-martial without a military judge.

c. Use of leading questions. Generally, leading questions may be used on cross-examination. Their value is that they permit counsel to focus the attention of the witness and the court on the exact point he desires to emphasize. Such questions should be phrased so that they will require the witness to give the specific information desired and prevent him from emphasizing damaging testimony already given on direct examination. Be fair with the witness. Do not misquote him or attempt to mislead him by basing a subsequent question upon an answer which he did not give. Such tactics are not only unethical but also unworthy of an officer. Counsel who engage in such practices, even when they are not stopped short by the court, are likely to prejudice the court against themselves and the side they represent.

12. IMPEACHMENT

Impeachment signifies the process of attempting to convince the triers of fact that all or part of the testimony of a witness is unworthy of belief. Any witness, including an accused who

testifies, may be impeached by the adverse party. In a few instances a party may impeach his own witness, such as when the witness proves to be unexpectedly hostile or when the witness is made indispensable by the law or circumstances of the case (MCM 153b).

In general, a witness other than the accused may be impeached by showing that he (1) has a bad character as to truth and veracity, (2) has been convicted of a felony by a civil court, or by a court-martial of any type of an offense for which the maximum punishment prescribed in the Manual is confinement in excess of 1 year or a dishonorable discharge provided that the offense also is of such a nature as logically to cast some doubt upon the veracity of the witness, (3) has been convicted of any offense involving fraud, deceit, larceny, wrongful appropriation or the making of a false statement, regardless of the punishment imposed,⁶ (4) has made a statement or engaged in other conduct inconsistent with his present testimony respecting a material issue, or (5) has reason to be prejudiced or biased. Evidence of the commission of the offenses listed in (2) and (3) above not amounting to a conviction is admissible to impeach only if admitted upon cross-examination (MCM 153b(1)(b)).

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

13. DESCRIBING WITNESSES' GESTURES

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

14. HEARSAY RULE

a. Definition. The hearsay rule provides that a statement which is offered in evidence to prove the truth of the matters stated therein, but which was not made by the author when a witness

⁶U.S. v. Kelleher, 14 USCMA 125, 33 CMR 387 (1968).

before the court at the hearing in which it is so offered, is hearsay (MCM 139a). Thus, in a prosecution for stealing property from a footlocker, testimony of A that B said "I saw the accused take the property from a footlocker" is not admissible to prove that the accused took the property. The fact that such statement was in writing, sworn to, notarized, authenticated or in some other manner formalized would not change the result.⁷

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

b. Exceptions to the hearsay rule. There are certain well-established exceptions to the hearsay rule. These exceptions are based on the principle that, under certain circumstances, a statement (oral or written) of a witness made out of court is as trustworthy as if it had been made under oath in open court where he was subject to cross-examination, scrutiny, and confrontation. This trustworthiness usually stems from circumstances showing that the out-of-court statement ordinarily would not have been made unless it were true. The exceptions to the hearsay rule are discussed in detail in paragraphs 140 through 146 of the Manual, and in the following paragraphs 15 through 22.

15. ADMISSIONS AND CONFESSIONS

a. Definitions. One of the principal exceptions to the hearsay rule is that which permits admissibility of evidence of voluntary admissions or confessions made out of court by the accused. The defense cannot generally offer exculpatory statements of the accused under this exception. A confession is an acknowledgement of guilt, whereas an admission is an incriminating statement falling short of a confession. The practical distinction between confessions and admissions in military law has been for the most part eliminated.⁸

⁷ James, CM 410090, 84 CMR 503 (1968).

⁸ U.S. v. Tempia, 16 USCMA 629, 87 CMR 249 (1967); U.S. v. Lincoln, 17 USCMA 330, 88 CMR 128 (1967).

Confessions or admissions are admitted into evidence as an exception to the hearsay rule even though they are declarations made out of court, not subject to cross-examination, and received as evidence of the truth of the matters contained therein. The rationale is that an accused cannot complain of being denied an opportunity to test his own credibility by cross-examination and the reasonable inference that a person generally will not make an untrue admission of criminal misconduct, either under oath or otherwise.

The rules regarding the admissibility of admissions and confessions generally apply only to hearsay statements of the accused. An accused may completely acknowledge his guilt by a plea of guilty or in his testimony as a witness. Similarly, his testimony may contain damaging admissions. In such circumstances, such statements are, of course, not hearsay. Prior to trial, counsel should make a detailed inquiry concerning the circumstances surrounding the making of the admission or confession. The purpose of the inquiry should be to determine whether the confession or admission is subject to objection at the trial on the ground that it was improperly obtained. See Article 31 and MCM 140a.

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

In order for a confession to be admissible, the government must establish, by affirmative evidence that the accused was properly warned in accordance with Article 31(b), that he understood the warning, that he was not compelled or induced to make a statement in violation of Article 31(d), and that the warning requirements of paragraph 140a(2) of the Manual, regarding right to counsel, were complied with. There must be a showing of an affirmative waiver of the right to counsel.⁹ When there is a dispute concerning whether the above requirements were complied with, the military judge, or president of a special court-martial

⁹ U.S. v. Tempia, 16 USCMA 629, 37 CMR 249 (1967).

without a military judge, must, after considering the evidence, either exclude the confession or receive it into evidence. This ruling is based upon a *preponderance* of the evidence; if he receives it, he must then instruct the court members that they must disregard it unless they find *beyond a reasonable doubt* that it was voluntary.¹⁰ Appendix VIII shows a method of offering a confession into evidence.

c. Corroboration. An accused cannot be convicted upon his uncorroborated confession. A confession or admission of the accused cannot be considered as evidence against him unless evidence, apart from the confession, has been introduced which corroborates the confession sufficiently to justify an inference of its truth; that is, independent evidence must be sufficient so that one will reasonably be assured that the confession is not false (MCM 140a(5)). Normally, this can best be accomplished by presenting evidence which corroborates the essential facts admitted sufficiently to justify an inference of their truth. Thus in a prosecution for larceny, independent evidence that the property alleged to have been stolen was taken under circumstances showing it was taken without the consent of the owner, that the property had some value, and that the accused never intended to return the property (for example, evidence that he attempted to sell the property to a third party), would be sufficient corroboration of a confession of larceny. Evidence of a 10-day period of AWOL, however, is not alone sufficient to corroborate a confession to desertion. This is so because showing a short period of unauthorized absence without more does not satisfy the requirement that there must be some evidence to support an inference of the truth of a confessed intent to abandon the service permanently. Such intent to desert may be shown, however, by circumstantial evidence from which the probable existence of the intent may be inferred. For example, evidence that accused lived, worked, and acted as if he were a civilian would be sufficient to corroborate the essential element of intent. If the corroborative evidence is insufficient to raise an inference of the truth of all the essential facts admitted, then the hearsay statement may be admitted only with regard to those essential facts whose truth may be inferred from the independent evidence (MCM 140a(5)).

16. DOCUMENTARY EVIDENCE

All pertinent documentary evidence must be carefully examined.

¹⁰ U.S. v. Odenweller, 13 USCMA 71, 32 CMR 71 (1962); U.S. v. Mewborn, 17 USCMA 43, 88 CMR 229 (1968).

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

17. OFFICIAL RECORDS

a. General. An important exception to the hearsay rule is that which permits the use in evidence of official records. See MCM 144. These documents must be made as a record of a certain fact or event by an officer or other person in the performance of duty to record such fact or event. Additionally, such officer must be duty bound to know or ascertain through appropriate and trustworthy channels the truth of the matter recorded. Any such record, if properly authenticated, is competent evidence of the facts or events recorded without calling as a witness the officer or other person who made it.¹¹ For example, enlistment papers, morning and guard reports, and service records are usually competent evidence of the facts and events recited in them. See paragraph 143b(2) of the Manual concerning authentication of official records.

b. Admissibility. An official record, whether in a regular series of records or a report, made as a record of a certain event, is admissible as evidence of the fact or event if made by an officer or other person in the performance of an official duty to record such fact or event and to know, or to ascertain through appropriate trustworthy channels of information, the truth of the matter recorded. It must be recorded in the manner prescribed. For example, if a morning report entry does not contain the signature of the officer responsible for submitting the original report as required by regulation, it is not admissible in evidence as an official record. In the case of an official record made in conformity with applicable law or regulation and prepared by one charged with the official duty of doing so, it may be inferred

¹¹ U.S. v. Masusock, 1 USCMA 32, 1 CMR 32 (1951).

that such record reflects the truth. When trial counsel has a duly authenticated document, or admissible copy thereof which apparently satisfies the requirements of an official record, he may rely on the inference that the record was properly prepared by an authorized person. The fact that there was a lapse of time between the happening of an event, and the execution of a record concerning it, does not render the report inadmissible but merely affects credibility. Similarly, the fact that an entry or an official record was corrected does not affect admissibility. For machine, electronic or coded official records, see paragraph 144b of the Manual.

Assuming that a record otherwise qualifies as an official record, but some defect in its preparation renders it inadmissible as such, it may still be admissible as a business entry. See 18.

c. Records prepared for prosecution. The fact that a document is an official record does not in itself make it admissible in evidence if it was made *principally* with a view to prosecution. Thus, the written report of an investigating officer concerning what a witness said at the investigation, or a written statement or affidavit by a military policeman that an accused was apprehended, would be inadmissible. The key word is "principally." Even though *one* of the purposes was for prosecution, a legitimate purpose for preparation apart from prosecution will render it admissible.

18. BUSINESS ENTRIES

a. General. Any writing or record, whether in the form of entry in a book or otherwise, made as a memorandum or record of an act, transaction, occurrence, or event is admissible as evidence of the fact or event if it was made in the regular course of business and if it was the regular course of such business to make such an entry at the time of the occurrence or within a reasonable time thereafter (MCM 144c). Such entries are admissible even though they are not made or kept pursuant to any law or regulation. It must be shown, however, that the business entry was a record made for the systematic conduct of the business. The rules discussed in 21 concerning the introduction of documentary evidence are applicable to the introduction of business entries. The custodian of the records is generally used as the authenticating witness. See MCM 143.

b. Military records. Records kept by military activities, if the requirements of paragraph 144c and d of the Manual are met,

may be offered into evidence as business entries. Accordingly, counsel should be aware of the possibility of introducing into evidence a record which does not qualify as an official record because of defective preparation.^{11a}

19. MAPS AND PHOTOGRAPHS

Maps, photographs, X-rays, sketches, and similar projections of localities, objects, persons, and other matters are admissible for the purpose of showing the truth of the matters depicted therein when they are verified by a witness who can state from his personal knowledge or observation that they actually represented the appearance of the subject matter in question without regard to who made or took them (MCM 144e).¹² For example, in a prosecution for damaging a Government jeep, a photograph of the jeep taken after the alleged damage was sustained may be admitted in evidence. From an examination of the photograph, the court may find that the jeep was then in a damaged condition. If it necessary to make markings on the maps, photographs, or X-rays in order to make them meaningful, care should be exercised to have the markings made by a person who has personal knowledge of and will be available to testify to the facts represented by the markings.

20. AFFIDAVITS, MEMORANDA

a. Affidavits. An affidavit generally is not admissible to prove the truth of the matters therein stated, for it is a hearsay assertion. Affidavits may be considered by the military judge, or the president of a special court-martial without a military judge, in determining certain procedural questions, such as whether or not a recess or continuance should be granted because of the absence of a witness. Similarly, on interlocutory matters relating to the propriety of proceeding with the trial, as when a continuance is requested, or to the availability of witnesses, the rules of evidence may be relaxed to the extent of receiving affidavits. Additionally, the defense, if it so desires, may introduce affidavits or other written statements concerning the character of the accused on the merits of the case in chief. When this occurs the prosecution may introduce similar evidence in rebuttal. See MCM 146b.

^{11a} Robinson, ACM 5561, 12 CMR 768 (1953).

¹² Flescher, CM 414673, 37 CMR 669 (1966) per den 38 CMR 441; U.S. v. Field 3 USCMA 182, 11 CMR 182 (1953).

b. Memoranda. A memorandum may be used by a witness to refresh his memory. When used for this purpose the memorandum is not admissible in evidence, but the witness may refer to it during his testimony. These memoranda must be shown to opposing counsel. For example, a military policeman, while testifying, might refer to a memorandum made by him concerning the circumstances surrounding his apprehension of the accused. It should be noted that these memoranda may be in any type of format.

Counsel may also consider the use of a memorandum to supply facts once known by the witness but now forgotten. In such a case, however, the witness must be able to testify that the memorandum (*e.g.*, an old diary) accurately represented his knowledge either at the time of the making or at the time he saw it. A memorandum of this type is admissible in evidence to show the truth of the matter therein stated. See MCM 146a.

21. INTRODUCTION OF DOCUMENTARY EVIDENCE

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

(a) The document should be marked for identification and shown to opposing counsel. It should then be shown to the military judge, or president of a special court-martial without a military judge.

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

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

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

(e) The military judge, or president of a special court-martial without a military judge, must make a ruling on each offer of evidence. The document must be offered and admitted in evidence before it may be considered by the court.

(f) If the document is admitted in evidence, it may be read to the court by the side which introduced it. Depositions and former testimony, when admitted in evidence, should be read to the court so that opposing counsel will have an opportunity to object to any questions and answers therein. Depositions, stipulations of testimony, and former testimony may not be shown to the court, nor taken into closed session.¹³

(g) If the document is not admitted in evidence, the counsel who offered it may request that it be appended to the record for the consideration of reviewing authorities (MCM 54d). Appendix VII sets forth examples of how the more common types of documentary and real evidence may be introduced. Ordinarily, identification of documents and rulings on their admissibility into evidence should be accomplished at an Article 39(a) session, if one is held.

22. DEPOSITIONS

If a witness cannot testify in person for any of the reasons stated in Article 49(d), counsel may consider the possibility of presenting his testimony by deposition. It should be noted, however, that an accused cannot be forced to present the testimony of an essential defense witness by way of a deposition.¹⁴ The rules which must be followed in the taking and using of depositions are stated in paragraphs 117 and 145a, respectively, of the Manual. They provide, among other things, the following: that the qualification of counsel (and the accused's rights to counsel) are equal to that of the type court in which the deposition is offered; that the party wishing to take the deposition must give the opposing party and his counsel reasonable written notice of the time and place for the examination; counsel must furnish opposing counsel a list of points to be covered by the examination; and that the deposition must be taken before a person who has the authority (Art. 136) to administer oaths—usually this should be a commissioned officer. The accused has the right to confront and cross examine the witnesses against him; therefore, a deposition taken out of his presence cannot be admitted in evidence over his objection, although he can knowingly waive his right to confrontation.¹⁵ Accordingly, whenever it appears that a deposition may be necessary in the trial of a

¹³ MCM 145; NCM 57-02301, Jakaitis, 25 CMR 724 (1957).

¹⁴ U.S. v. Manos, 17 USCMA 10, 37 CMR 274 (1967).

¹⁵ MCM 145a; U.S. v. Jacoby, 11 USCMA 428, 29 CMR 244 (1960).

case, the advice and assistance of the local staff judge advocate should be obtained.

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

A deposition may be taken at any time after charges have been signed unless it is forbidden by the convening authority, the military judge, or the president of a special court-martial without a military judge for a good cause; therefore, normally a request similar to that appearing in appendix XVI (A) should be used. If the convening authority grants permission to take the deposition, over objection of opposing counsel, the objection may be renewed at the trial. If application is made to the other judicial officials it is made after "trial" has commenced.

The attendance of a military witness at the taking of the deposition may be arranged by notifying the witness and his commanding officer. If the witness is a civilian, however, he must be subpoenaed or, if he will appear voluntarily, formally requested to appear. If it is necessary to subpoena a civilian witness, the officer taking the deposition will cause the subpoena to be served (MCM 117b(5)). A subpoena may be used only after the charges have been referred to trial. In either case he is entitled to travel pay and allowances as computed under chapter 13, AR 37-106 as appropriate, and the subpoena or request should be accompanied by a statement to that effect. See 35.

At the taking of a deposition by oral examination, the witness is examined by counsel who will use his testimony and be cross-examined by the opposing counsel. Unless the accused has waived his right to confrontation the examination must be conducted in his presence. The questions and answers are recorded verbatim for use at the trial.

If the oral examination cannot be conducted personally by the trial or defense counsel who will try the case, they should prepare a memorandum of the points to be covered by the deposition. This will enable the counsel who actually conducts the examination to examine the witness fully and effectively. In this connection if a deposition is taken after the case is referred to trial, the accused must be given the opportunity to accept or reject

the officer designated to represent him at the taking of the deposition if that officer has not been accepted by him.

Appendix XVI(B) sets forth the form used in the taking of a deposition upon oral examination.

23. THE TAKING OF AN ORAL DEPOSITION

a. Mechanics. After securing authority to take a deposition, counsel who has requested the deposition should give to every other party reasonable written notice of the time and place for the taking of the deposition (MCM 117b(4)). This may be accomplished by furnishing opposing counsel with a copy of the request and authorization shown in Appendix XVI(A). The defense must always be afforded an opportunity to object to the taking of a deposition.

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

b. Procedure. Before commencing oral examination, it should be determined that the opposite party, including the accused if the deposition is being taken in behalf of the Government, has had ample opportunity to interview the deponent. The deponent and other personnel will be sworn in the same manner and under the same conditions as a trial. The examination of the witness will follow the usual courtroom procedure. See 7-9, 11-13. The questioning of the witness, however, is the prerogative of counsel, accordingly, the officer appointed to take the deposition will not question the witness. Objections by counsel and the accused should be recorded but no ruling may be made by the officer taking the deposition. The witness will be directed to answer and the objection is later ruled upon at trial by the military judge, or the president of a special court-martial without military judge, in the event the deposition is ultimately used at trial. At the con-

clusion of the witness' testimony, the stenographer should read the testimony back to assure correctness of questions and answers. The record of the proceedings, as soon thereafter as possible, should be transcribed and presented to counsel for both sides, the accused, if present, and the deponent for a final check. The deponent need not sign the transcript. It is normally authenticated by the deposing officer.

If the case has not been referred to trial, the completely authenticated deposition should then be forwarded to the convening authority for inclusion with the allied papers in the case. If the case has been referred to trial, a deposition, when authenticated, is left in the custody of the trial counsel. The opposite party, however, must be given an opportunity to examine it.

24. THE ENTERING OF A DEPOSITION INTO EVIDENCE

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

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

The party offering the deposition, however, is not required to prove the deponent's precise whereabouts on the day of the hearing. Proof of the deponent's residence, if it is the requisite distance away, is generally sufficient to render the deposition

admissible. Additionally, counsel may wish to make use of inferences such as that of continuation of residence or that a person who was given a mileage allowance to travel to his place of enlistment has returned to that place. In the latter case, it must also be shown that the witness has departed the station. If nonamenability to process is relied on as the foundation for admission of the deposition, the inability or refusal of the witness to attend the trial must also be shown.

Counsel should be aware that the military judge or president of a special court-martial without a military judge may in his discretion relax the rules of evidence to the extent of receiving affidavits, certificates and other writings of similar apparent authenticity for the purpose of establishing the unavailability of a witness. Also, stipulations may be admitted to save time and expense where neither side cares to make an issue of a witness' absence.

b. Objections. As the deposition is read to the court, each side may renew objections which were made at the time the interrogatories were recorded or submitted for approval. Each side may also object to the testimony in the same manner as if the witnesses were testifying in person. A failure to object at the oral examination of a deponent or when the interrogatories were prepared is considered a waiver of those errors which could have been removed or corrected by the opponent if a timely objection had been made.¹⁶

25. STIPULATIONS

A stipulation is an agreement between the trial counsel and the defense counsel made with the consent of the accused. It is an agreement between opposing counsel as to the existence or non-existence of a fact, to the testimony of an absent witness, or to the contents of a document. It may be either oral or written and is used to expedite the trial when there is agreement between opposing counsel as to the matters stipulated and the actual proof thereof is considered dispensable. For example, the parties may stipulate that if a certain witness were present he would testify to certain facts. A stipulation that a witness, if present, would testify in a certain manner is a stipulation of testimony and does not admit the truth of the testimony but merely that the witness would so testify if present. A stipulation of *fact* is

¹⁶ U.S. v. Gerlach, 16 USCA 388, 37 CMR 3 (1966); MCM 154b(1).

conclusive as to the fact or facts agreed upon therein.¹⁷ The stipulated testimony of a witness is subject to contradiction and impeachment the same as if the witness were testifying in person, and it is subject to all rules of evidence.

A stipulation of fact may also be used in a case in which the accused pleads guilty, in order, after findings, to give the court sufficient facts upon which to make an intelligent and informed determination of sentence.

A written stipulation of fact may be retained by the court during deliberations; a stipulation of testimony may not (MCM 154b(2)). See appendix XVII for examples of stipulations.

26. JUDICIAL NOTICE

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

27. OFFER OF PROOF

a. General. When the military judge, or president of a special court-martial without a military judge, refuses to permit defense counsel to introduce testimony or real evidence in behalf of the accused, defense counsel may make a concise oral statement for the record setting forth the substance of the expected testimony or a description of the item of real evidence (MCM 154c). The offer of proof is made for the purpose of assisting reviewing agencies in determining whether the action of the military judge, or president of a special court-martial without a military judge, was proper in excluding the evidence in question; it is not to be considered by the court as proof of the matters contained therein. An offer of proof is properly made after an objection to evidence offered by the accused has been sustained. See appendix XIX for an example of an offer of proof.

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

¹⁷ U.S. v. Gerlach, 16 USCMA 383, 37 CMR 3 (1966).

the request of the party offering it or upon direction of the military judge.

28. PROOF OF VALUE OF PROPERTY

In certain cases involving offenses against property, such as larceny or wrongful appropriation, it is necessary to prove that the property had some value or, in some cases, that it had a particular value. The amount of punishment for many of these offenses depends on whether the property was of a value less than \$50, more than \$50 but less than \$100, or more than \$100. Generally, the value of property for purposes of these offenses is the legitimate retail market value of the item at the time and place of the offense. Methods of proving the value of property are discussed in paragraph 200a(7) of the Manual.

Chapter 3

THE TRIAL COUNSEL

Section I. INTRODUCTION

29. DUTIES AND RESPONSIBILITIES—GENERAL

The duties of the trial counsel are similar to those of any prosecuting attorney. He prosecutes in the name of the United States those cases referred to him for trial (MCM 44*d*). It is the trial counsel's duty to see that justice is done. He must insure that all the relevant and admissible facts and evidence available are presented to the court in such a manner as to enable it to reach a proper conclusion and avoid a miscarriage of justice. He must not be a party to any course of action tending to suppress the truth concerning the matter before the court—whether favorable to the prosecution or the defense (MCM 44*g*(1)).

When charges are referred to him for trial, he will see that they are tried promptly before the court indicated in the indorsement referring the charges for trial (MCM 44*d*). Unnecessary delay in the disposition of any case must be avoided or it may result in dismissal of the charges on the basis that accused's right to a speedy trial has been denied (MCM 215*e*). The trial counsel should be given wide latitude in the manner in which he accomplishes his professional mission. In general, he is free to prepare each case as he deems proper and to bring to trial in the most expeditious order the cases which he has on hand (MCM 44*d*). The following material suggests the procedure to be followed by the trial counsel after a case has been referred to him for trial.

Section II. DUTIES PRIOR TO TRIAL

30. EXAMINATION OF CHARGE SHEET

After the trial counsel has received the charge sheet and allied papers, he should examine them carefully. As a preliminary matter, the trial counsel should check the charges and allied papers to assure that the file is complete. He must ascertain from the indorsement on the charge sheet and the order convening the

court whether the charges are in the hands of the trial counsel of the proper court. By examining the charges and allied papers he can determine whether any member of the prosecution or defense is disqualified because of prior participation in the same case or otherwise. If so, the disqualified counsel may not act in the case, and the matter should be reported to the judge advocate or, if none, to the convening authority. See 2.

The trial counsel then should make certain that the data on the charge sheet are free from errors of substance or form. He should compare the name and description of the the accused in each specification with the corresponding data on page one of the charge sheet and determine whether the charges and specifications set out on the charge sheet are in accord with the requirements of appendix 6c of the Manual. See MCM 28.

Trial counsel should note any discrepancies in the orders convening the court. He should examine the orders convening all courts to which the case has been referred, the charge sheet, and the accompanying papers to determine whether the military judge and counsel for the prosecution and the defense have the necessary legal qualifications and whether any facts appear which disqualify the military judge from acting in the case. If the military judge is not qualified, the court is not legally constituted. The trial counsel will notify the judge advocate or if none the convening authority. See 2.

If the trial counsel discovers a minor error in the charge sheet, for example a misspelled word, a transposition of words, or an error of similar nature, he should correct it and initial the charge sheet adjacent to the correction (MCM 44f(1)). Thus, if he finds that the accused is described by one name on page one of the charge sheet and by another name in the specification, the trial counsel should reconcile and correct this discrepancy after conducting the necessary inquiry. Errors of a substantial nature in the charges and specifications, in the orders convening the court, or in the accompanying papers should be reported immediately to the staff judge advocate of the general court-martial convening authority or to the representative of the special court-martial convening authority (MCM 44f(1)). For example, a specification which varies materially from the approved form in appendix 6 of the Manual should be called to the attention of the above authorities immediately, so that the specification may be amended if necessary and required additional pretrial procedures, to include additional investigation, conducted.

The trial counsel should then examine the record of previous convictions for completeness, admissibility, and freedom from errors of form and substance. If the file contains an "Extract of Military Records of Previous Convictions" showing any inadmissible previous convictions, he should secure a new extract (MCM 53b).

31. SERVICE OF CHARGES

After insuring that the charge sheet is in proper form, the trial counsel will cause a copy of it to be served on the accused (MCM 44h). Prompt service of the charges is important since the accused must be given a reasonable period of time in which to prepare his defense. Service of charges is accomplished by the trial counsel or one of his assistants personally delivering to the accused a copy of the charges and specifications upon which he is to be brought to trial, identifying himself to the accused, and reading to him the contents of the charge sheet. Normally this should be accomplished in the presence of the defense counsel. If this cannot be done, the trial counsel should advise the accused of the name of the detailed defense counsel and inform the accused that the defense counsel will communicate with him in the near future concerning the case. Trial counsel then completes and signs the statement of service on page three of the original and all copies of the charge sheet. Under no circumstances should trial counsel interrogate or otherwise discuss any matters concerning the facts of the case with the accused.

After a copy of the charge sheet has been served on the accused, the detailed defense counsel if he was not present should be notified that charges have been served on the accused and he should be furnished with copies of the charge sheet and all accompanying papers. The date of service begins the running of the five-day period for general courts-martial and three-day period for special courts-martial within which, in time of peace, the accused may object to being tried (MCM 58c), or being brought before an Article 39(a) session (Art. 35).

32. RELATIONS WITH ACCUSED AND HIS DEFENSE COUNSEL

a. General. After the trial counsel has served the charges on the accused, neither the trial counsel nor any other Government official or agent will thereafter communicate with the accused

concerning the case.¹ All subsequent communications with the accused will be made through and with any counsel the accused may have (MCM 44h).

b. Disclosure to defense of prosecution witnesses. Prior to any Article 39(a) session or other session, the trial counsel should advise the defense of the probable witnesses to be called by the prosecution. The failure to do so may be a ground for a continuance (MCM 44h).

c. Accused's right to representation by counsel. Article 38(b) provides that an accused has the right to be represented before a general or special court-martial by a civilian attorney if provided by the accused, or by a military counsel of his own selection, if reasonably available, or by the defense counsel detailed under Article 27. The trial counsel will insure that the record in *each* special or general court-martial contains the accused's *personal response* to the direct questioning of the military judge, or if none is detailed, the president of the special court-martial, incorporating each of the elements of Article 38(b), as well as the accused's understanding of his entitlement thereunder.² See MCM, appendix 8b; section III, DA Pam 27-15, Trial Guide for the Special Court-Martial.

33. INITIAL PREPARATION FOR TRIAL

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

¹ CM 399759, Grant, 26 CMR 692, 696 (1958).

² U.S. v. Donohew, 18 USCMA 149, 39 CMR 149 (1969).

- (1) The offense was committed;
- (2) The accused committed it; and
- (3) The accused had the requisite criminal intent.

Trial counsel must be prepared to be able to establish jurisdiction over the accused and the offense if an attack on such jurisdiction is reasonably expected (MCM 44f(3)). Likewise, the trial counsel must be prepared to present evidence establishing the chronology of events from the date the charges were preferred or the date the accused was placed in pretrial restraint of any kind, whichever is earlier, to the date of the Article 39(a) session or trial, if it appears that a speedy trial issue will be raised. The prosecution has the burden of accounting for the time it took to bring the accused to trial (MCM 215e).³

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

To be prepared on the law of the case requires:

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

(2) Becoming familiar with the elements of proof of each offense alleged and lesser included offenses (DA Pam 27-9, The Military Judge's Guide, chap 4);

(3) Anticipating the defenses of intoxication, lack of intent, mistake, unlawful search and seizure, and knowing the legal requirements thereof;

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

³ U.S. v. Parish, 17 USCMA 411, 38 CMR 209 (1968).

It is the responsibility of trial counsel to anticipate and be fully prepared to meet the objections which the defense might raise by motions to dismiss or motions for appropriate relief (MCM, chap XII). He must be prepared to introduce pertinent evidence and to present arguments to the military judge. See appendix IV.

34. MATTERS AFFECTING DESIRABILITY OF PROCEEDING WITH TRIAL

When the trial counsel is preparing a case for trial, he may discover information that causes him to conclude that trial of the case is inadvisable. Such information may have been unknown to the convening authority at the time he referred the case for trial and, therefore, should be brought to his attention with appropriate recommendations (MCM 44f(5)). Some matters which affect the desirability of proceeding with the trial of a case are: insanity of the accused at the time of the offense, at the time of the investigation, or at the time the case is ready to be tried (MCM 120-124); the disappearance or nonavailability of a material witness or his repudiation of previous statements concerning the offense; and the discovery of evidence of an offense not charged.

Other matters which may not preclude trial but should be reported to the convening authority or his representative include: discovery of substantial evidence favorable to the accused; a prejudicial failure to substantially comply with the provisions of Article 32 in a general court-martial; and a substantial variance between the allegations in the specifications and the proof of such allegations. As an example of the latter, assume that the accused is charged with wrongful appropriation of nine items. The available evidence supports the wrongful taking, obtaining or withholding of only four of the nine items. The trial counsel should report this fact to the convening authority so that the specifications may be amended to conform to the expected proof.

When matters such as those discussed above are referred to the convening authority, the trial counsel may make such recommendations as he deems proper. Thus, when the circumstances require it, he should not hesitate to recommend that all or certain charges or specifications be withdrawn, dismissed, or amended. Only the convening authority can withdraw a charge or specification from trial (MCM 56a). When withdrawal of a specification is ordered before trial, the trial counsel will line out and initial

the withdrawn specification on the charge sheet, will renumber the remaining charges and specifications as appropriate (MCM 56d) and have retyped the copies of the charges and specifications for presentation to the court at trial.

35. ADMINISTRATIVE DUTIES

a. General. Although the trial counsel is responsible for the execution of the administrative duties discussed in this paragraph, he may have the assistance of an assistant trial counsel or a clerk provided by the convening authority. The trial counsel is responsible for the physical arrangements for the trial. A guide for an acceptable courtroom arrangement is located in appendix 8b of the Manual for general courts-martial and in DA Pam 27-15 for special courts-martial. It is his duty to locate an appropriate and convenient place to be used as a courtroom. He should see that suitable furniture is provided, as well as other items such as stationery and pencils. Prior to the opening of court, he should prepare a typewritten copy of the charges and specifications on which the accused will be arraigned for each member of the court, the military judge and the accused.

b. Furnishing military judge with charges and specifications; findings and sentence work sheets. Trial counsel should furnish the military judge with a copy of the charges and specifications as soon as copies are made. This will enable the military judge to analyze the charges and specifications in advance of trial and to prepare tentative instructions. This practice should not be followed in special courts-martial without a military judge, as the president of the court should not be given a copy of the charges and specifications prior to arraignment. In this connection, see paragraph 56d of the Manual. See appendices B and C, DA Pam 27-9, The Military Judge's Guide; and appendixes A and B of DA Pam 27-15, Trial Guide for the Special Court-Martial, for examples of findings and sentence work sheets for use by the court which should be procured by trial counsel prior to trial.

In trials by general courts-martial, the trial counsel must insure that no member of the court has access to the Manual or other legal authorities during the trial. In trials by special court-martial without a military judge, he must insure that no member of the court except the president has access to legal authorities during open sessions of the court. Legal authorities may not be used by the president or members of a general court-martial dur-

ing closed sessions. The president of a special court-martial without a military judge may, however, have access to DA Pam 27-15 during closed session (para 2-21(4), AR 27-10).

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

The trial counsel should coordinate with the military judge, or the president of a special court-martial without a military judge (MCM 59), in fixing the time and place of trial. He should ascertain from the president of the court the uniform to be worn at all sessions with members (MCM 40b). A court-martial should not meet at unusual hours except under extraordinary circumstances. As a practical matter, the trial counsel must coordinate the desires of the defense counsel, the military judge and the president in fixing a trial date which will be acceptable, feasible, and otherwise agreeable. While both sides must be allowed a reasonable time to prepare for trial, it usually is possible to arrange a date for trial even though either or both counsel have not fully prepared their cases if it appears that such preparation will be completed before the date set. If either side will require an unusually long period of time to prepare for trial, the trial counsel should report the matter to the convening authority, setting forth the reasons for the delay. The defense counsel may request a postponement of the time for assembly of the court in order to secure the attendance of a witness, to take depositions, or for any other proper reason (MCM 58a). The trial counsel should require that each request on accused's behalf for any delay or continuance be in writing and attached to the record of trial so that accused cannot thereafter claim that he was prejudiced by the delay or that the trial counsel was negligent in failing to bring the case to trial promptly. When the date of trial is finally agreed upon, the trial counsel must notify the members of the court and the other parties to the trial of the time and place of trial and the uniform to be worn. The notice may be written or oral, depending upon the circumstances. Generally, a telephone call followed by a written memorandum is the best procedure.

d. Attendance of the accused. The trial counsel should make arrangements to insure the presence of the accused at any Article 39(a) session and the trial (MCM 44f(2)). If the accused is not in confinement, notice to his commanding officer is all that is necessary; however, if the accused is in confinement, the

officer in charge of the confinement facility must be notified. Although the practice varies in different commands, the commanding officer of the accused usually arranges for the appearance of the accused and can provide whatever physical restraint may be deemed proper. The trial counsel should inform the officer who is responsible for the attendance of the accused of the uniform which has been prescribed for the court. An accused will wear the insignia of his rank or grade and should wear any decorations, ribbons, or emblems to which he is entitled.

e. Constitution of the court. Prior to the assembly of the court for the trial of a particular case, the trial counsel should take steps to assure that the trial will not be interrupted because of the improper constitution of the court. He should insure that all members not properly excused by the convening authority will be present so that the court will not be reduced below a quorum in the event some of the members are excused by challenge (MCM 41c). If excusals will affect the legal constitution of the court, the trial counsel will make an immediate report of such absences to the convening authority (MCM 41d).

f. Request for enlisted personnel on court. If an enlisted accused desires enlisted persons on the court which will try his case, it is the duty of the defense counsel to submit to the convening authority a written request for such members signed by the accused. Such requests usually are submitted through the trial counsel (Art. 25(c)). In order to avoid any delay which might be caused by a last-minute request, the trial counsel should ask the defense to notify him as soon as possible whether the accused desires enlisted members on the court. A prompt request will make it possible for the trial counsel to take timely action to have the requisite number of enlisted persons detailed to the court and present for the trial. An accused who has previously requested enlisted personnel on the court-martial should be permitted to tender a written withdrawal of such request prior to trial. He may, after the court-martial is called to order and prior to assembly, insert into the formal proceedings a withdrawal of his request. The record should clearly show that the accused was fully advised of his rights and was in no way misled into withdrawing his request merely for the convenience of the Government (MCM 36c(2)).

g. Excusing members from attendance. In the event a member of the court asks the trial counsel's permission to be excused

from attendance at a particular trial, the trial counsel should advise the member that his request to be excused from attendance must be addressed to the convening authority (MCM 37). The trial counsel has no authority to excuse a member from attendance and such authority may not be delegated to him by the convening authority. In some cases, the trial counsel and the defense counsel can reach an agreement, prior to the convening of the court, that meritorious grounds exist for challenging a particular member of the court for cause. Where such is the case, the trial counsel can save considerable trial time by recommending to the convening authority that the questioned member be excused from attendance at the trial.

h. Use of reporter. The trial counsel supervises the keeping of the record of the proceedings on behalf of the court (MCM 44d). A reporter is required in all general courts-martial to take a verbatim record of all proceedings had in open sessions of the court, all sessions held by the military judge, and hearings held out of the presence of members. Exceptions to this rule are set forth in paragraph 82b(1) of the Manual and chapter 2, AR 27-10. In special courts-martial in which a bad conduct discharge is adjudged, the record must contain a verbatim transcript of all proceedings held in open session and all sessions and hearings held by the military judge out of the presence of the members (MCM 83a). See also DA Pam 27-15, Trial Guide for the Special Court-Martial. In special courts-martial, the trial counsel may assume that a reporter is not authorized unless the convening authority exercises general court-martial jurisdiction and has directed that a reporter be detailed (MCM 7). The convening order should not contain any reference to a reporter (MCM 36b).

i. Obtaining reporter. In all general courts-martial (and in special courts-martial if a reporter is authorized), the trial counsel should consult the staff judge advocate of the command in advance of trial and make arrangements for a reporter. In some instances, however, the trial counsel may be faced with the problem of locating and procuring a court reporter for the trial. Where military personnel or Government employees are not available to act as reporters, the trial counsel may have to secure a civilian reporter from the nearest civilian community to report the trial on a contract basis. See chapter 13, AR 37-106. If the trial counsel cannot obtain the services of a qualified court reporter, he should try to locate a skilled stenographer to act as

reporter. In the latter event, it usually will be necessary to slow the tempo of the proceedings down considerably so that the stenographer can record the proceedings accurately and completely.

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

36. SECURING ATTENDANCE OF WITNESSES

a. General. Each party to a trial has the same basic right to obtain witnesses and other evidence (MCM 115a and b). The trial counsel has the duty to insure the presence of all witnesses who are necessary to the determination of the issues involved in the case (MCM 44f(2)). Thus, the trial counsel has the power to compel witnesses to appear and testify before courts-martial (MCM 115a), including any Article 39(a) sessions (MCM 53d(1) (d)). Before subpoenaing a witness who is not readily available, the trial counsel should determine whether the expected testimony of the witness can be presented by a stipulation or deposition. Generally speaking, the testimony of a witness who appears in person before a court is more effective than testimony presented by deposition or by stipulation because it usually makes a stronger impression on the court members.

b. Advance notification of expected witnesses. When the trial counsel first receives the charges in a case, he should check the file to determine what witnesses—defense and prosecution—probably will be needed at the trial. He should communicate with these witnesses, by telephone if possible, and advise them of the probable date of the Article 39(a) session and trial. He should inform them that their presence as witnesses probably will be required. At the same time, the trial counsel should submit

the same information in writing to the commanding officer of any military witness with the request that he notify trial counsel if it becomes necessary for the prospective witness to leave the area prior to the Article 39(a) session or trial date. Additionally, trial counsel should notify defense counsel of the probable witnesses. If the trial counsel follows this procedure, he will avoid unnecessary and embarrassing delays which may result when a witness goes on leave or is transferred before the case can be brought to trial.

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

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

e. Defense witnesses. It is the duty of the trial counsel to take timely and appropriate action to secure the attendance of all necessary witnesses requested by the defense. In order to perform this duty and to avoid the possibility of error, trial counsel

should, if possible, honor every reasonable request from the defense. If there is a disagreement between the trial counsel and the defense counsel as to whether the testimony of the requested witness will be necessary, the matter should be referred for decision to the convening authority or to the court, depending upon whether the question is raised prior to or during the trial. In such cases, the defense counsel must submit to the convening authority or the court, as appropriate, a written request for the attendance of the witness, together with a signed statement containing (1) a summary of the testimony expected from the witness, (2) the reasons why the personal appearance of the witness is necessary, and (3) any additional matters showing that the expected testimony is necessary to the ends of justice (MCM 115a). Where a requested defense witness is an essential witness, and within the reach of process, his presence at the trial may not be denied to the accused on the basis that the trial counsel is willing to stipulate his testimony or to take his deposition.⁴ Every effort should be made to assist. This is also true of witnesses requested by the accused in extenuation and mitigation.⁵

f. Vouchers. If the trial counsel prepares vouchers for fees and mileage of civilian witnesses before trial, the vouchers can be signed by the witnesses as soon as they are excused from further attendance at the trial. This practice minimizes correspondence and delay in paying the witnesses. For instructions as to the proper method of paying court-martial expenses, reference should be made to chapter 13, AR 37-106. The trial counsel will find it helpful to confer with the local finance officer with respect to the procurement and use of the proper vouchers. In any instance where it is desired to utilize the services of a civilian expert witness, the finance officer should be consulted prior to engaging his services. See MCM 116.

37. FINAL REVIEW OF CASE

When the trial counsel has carefully investigated the facts surrounding every offense charged, has interviewed all available witnesses both for the prosecution and the defense (other than the accused) (MCM 42c), has become fully acquainted with the appearance, mannerisms, intelligence, and attitude of each witness, has become familiar with the scene of the crime, if possible, and has examined thoroughly the documentary and other

⁴ U.S. v. Manos, 17 USCMA 10, 37 CMR 274 (1967).

⁵ U.S. v. Sweeny, 14 USCMA 599, 34 CMR 379 (1964).

evidence, he is ready to consider the best method of placing it before the court. He again should carefully review the essential elements of each offense charged and determine what testimony or other evidence will prove each element. This review will enable him to prepare trial notes for use at the trial.

38. PREPARATION AND USE OF TRIAL NOTES

Trial notes, which are sometimes referred to as a "trial brief" or a "trial memorandum," are nothing more than an outline of the plan to be followed by the trial counsel in presenting his case to the court. As a minimum, the trial notes should include a list of the elements of each offense charged, an outline of the evidence which will be presented to prove these elements, and a concise statement of the law applicable to both of these matters. Properly prepared trial notes will enable the trial counsel to present his case in a clear and logical manner without inadvertent omissions of evidence pertaining to material issues in the case. Appendix III is an example of a reasonable trial brief.

Section III. DUTIES DURING TRIAL

39. ARTICLE 39(a) SESSIONS

a. General and special courts-martial with a military judge. If the convening authority has referred charges for trial to a court-martial composed of a military judge and members, the military judge should call the court into session without the presence of the members to dispose of interlocutory questions, arraign the accused and receive his plea. Although Article 39(a) sessions may be conducted prior to, during, or subsequent to the trial (MCM 53d(1)), these proceedings are generally called prior to the assembly of the members so that requests for trial by the military judge alone (MCM 53d(2)(c)), questions of admissibility of an accused's out of court statement (MCM 140) or other evidence (MCM, chap XXVII), challenges for cause against the military judge or court members (MCM 62d), speedy trial issues (MCM 215e), or similar matters, may be ruled upon. This procedure eliminates the need for court members to spend considerable time waiting while the military judge resolves interlocutory questions or questions of law. The proper use of an Article 39(a) session will result in a smooth, efficient trial before the assembled members. An Article 39(a) session procedural guide for gen-

eral courts-martial is contained in appendix 8a of the Manual. A guide tailored for the Army special court is in DA Pam 27-15, Trial Guide for the Special Court-Martial.

b. Special courts-martial without a military judge. There are instances in special courts-martial without a military judge in which the president of the court will or may conduct hearings out of the presence of other members of the court. See *d*(2) below, and DA Pam 27-15, Trial Guide for the Special Court-Martial.

c. When called.

(1) *Prior to assembly.* The military judge may conduct the session any time after five days, if referred to a general court-martial in time of peace, or three days, if referred to a special court-martial in time of peace, following the date of service of the charges upon the accused (Art. 35). In computing these time periods, the date of service of charges on the accused and the date of the session are excluded. Holidays and Sundays are not excluded (MCM 58c).

(2) *During open sessions of the court.* If it appears to the military judge that an offer of proof (MCM 154c), or preliminary evidence or argument with respect to the admissibility of offered evidence, or any other proceeding not requiring the presence of the members, may contain matter prejudicial to the rights of the accused or Government, he should, on his own volition or on request of counsel, direct that members of the court be excluded during these proceedings (MCM 57g(2)). The request for such proceedings is usually by counsel at a conference held in open court but out of the hearing of the members. Such a conference, conducted in low voices, is called a "side-bar" conference. It is attended by the military judge, counsel for both sides, the accused, and the reporter (Art. 39(a)).

The admissibility of a pretrial statement or the admissibility of evidence obtained by search and seizure or electronic eavesdropping should be argued during a pre-assembly Article 39(a) session, if at all possible.

(3) *Subsequent to trial.* If, after announcement of sentence, appellate authorities remand the case for consideration of matters which do not require the presence of court members, the military judge will conduct the session without members to dispose of those issues (MCM 53d(1)).

d. Nature and scope.

(1) *General and special courts-martial with a military judge.* The military judge may order the session for any of the following purposes: (1) to hear and determine interlocutory motions which raise defenses or objections or any other matter that may legally be ruled upon by the military judge, whether or not the matter so ruled upon is appropriate for later consideration or decision by the assembled members of the court; (2) to hold the arraignment, receive the accused's pleas, and enter findings of guilty upon an accepted plea of guilty (other than a plea of guilty to a lesser included offense) (MCM 70b); and (3) to perform any other procedural function which may or must be performed by the military judge and which does not require the presence of the members of the court. See MCM 53d and appendix 8a.

The session will be recorded as noted in 35h. The military judge will prescribe the uniform to be worn during the sessions.

(2) *Special courts-martial without a military judge.* Although not an Article 39(a) session, the president of the court will conduct a hearing out of the presence of other members of the court to hear and rule on instructions and any issue, as requested by the defense, on which the president rules finally. Such a hearing may be held by the president to dispose of any other interlocutory matter on which he rules finally (MCM 57). These hearings, attended by the president, counsel for both sides, and the accused, will be reflected in the record of trial. See DA Pam 27-15, Trial Guide for the Special Court-Martial.

e. Duties of trial counsel.

(1) *Notice to opposing counsel.* In requesting an Article 39(a) session, counsel should give opposing counsel adequate notice and opportunity to prepare. Notice should include the matters intended to be raised, but matters other than those contained in the notice may be raised and disposed of. See paragraph 2-28, AR 27-10.

(2) *Presentation of Government's case.* Having thoroughly investigated and reviewed the case, the trial counsel should anticipate any interlocutory question which will be raised by the defense in a pre-assembly Article 39(a) session, or during the open sessions. Further, he should be prepared to call witnesses, introduce competent evidence and argue the law to support the Government's position on the various issues. Particular care

should be taken in preparing to meet defenses and objections raised by the defense counsel.

(3) *Preparation of the record.* When a side-bar conference or an Article 39(a) session is held, the trial counsel must insure that the record of trial reflects these proceedings (MCM 82b(1), 83a). Records of trial should be prepared so that proceedings in side-bar conferences or Article 39(a) sessions appear in the body of the record as they occur. To insure that appellate authorities may clearly distinguish between these proceedings and open court sessions, the heading "ARTICLE 39(a) SESSION" or "SIDE-BAR CONFERENCE" as may be appropriate, should be inserted immediately preceding the report of such transactions. The parenthetical phrase "(END OF SESSION)" or "(END OF CONFERENCE)" should be inserted on the page at the termination of the proceeding.

40. PRE-ASSEMBLY PROCEDURE

a. *Use of trial guide.* At the trial, the trial counsel should always use a procedural guide for trials before general and special courts-martial. See appendix 8b of the Manual. For special courts-martial with or without a military judge, see DA Pam 27-15, Procedural Guide for the Special Court-Martial. If such a guide is used, counsel will have no difficulty in complying with the formalities of any proceeding before a court-martial. Prior to trial, the trial counsel should read through the trial guide and lightly check or underscore the parts of the guide that are applicable to the case.

b. *Swearing the personnel of the court.*

(1) *The military judge.* In the unlikely event that the convening order shows that the military judge has not previously taken the oath required by paragraph 114a of the Manual (MCM 36b), then the trial counsel will administer the oath to the military judge. The oath may be administered at an Article 39(a) session (MCM 53d), during the informal inquiry immediately preceding assembly of the court (MCM app 8b), or during the open session (MCM 61i).

(2) *Members of the court.* The trial counsel will administer the oath in appendix 8b of the Manual to court members at every court-martial, except where, in the discretion of the convening authority, court members take one oath for all cases convened by the order detailing them to the court. The trial counsel will note for

the record that court members who were not sworn at the trial were previously sworn (para 5-5, AR 27-10).

(3) *Reporters and interpreters.* The trial counsel will administer the required oath to the reporter and interpreter at every court-martial, unless, in the discretion of the general court-martial convening authority to which the reporter or interpreter is detailed, the reporter or interpreter has previously been sworn. Such oath, however, will expire when the reporter or interpreter is no longer assigned to the general court-martial convening authority who authorized the oath. The trial counsel will note for the record that the reporter or interpreter who was not sworn at the trial has previously been sworn (para 5-6, 5-7, AR 27-10).

41. CHALLENGES

a. General. After the court is assembled, the trial counsel will advise the court of the general nature of the charges. This advice should be sufficiently detailed so that members of the court and the military judge can identify the case and determine whether they have had any previous disqualifying connection with it. Ordinarily, trial counsel will state the general nature of the charges and the name of the accuser, the investigating officer, the officer or officers forwarding the charges to the convening authority, and the name of any court member or military judge who has participated in any prior proceedings. He will then disclose in open court every ground for challenge believed by him to exist in the case. A safe rule for him to follow is this: If the name of a member or the military judge is mentioned in the file—except in the convening orders—the trial counsel should disclose the fact. The trial counsel will then call upon the military judge and court members to state any facts which they believe may be a ground for challenge against them. If the defense counsel consents, the trial counsel should distribute to the members and military judge copies of the charges and specifications upon which the accused is to be arraigned. After any disclosures have been made, the trial counsel will be ready to exercise his right to challenge for cause.

The members and the military judge of general and special courts-martial may be challenged by the accused and the trial counsel for cause stated in court. Each accused and the trial counsel are entitled to exercise one peremptory challenge, but the military judge may not be challenged except for cause. Ordinarily,

the prosecution will make challenges for cause and any peremptory challenge, in that order, before the defense makes its challenge (MCM 62a). As each challenge is made it should be disposed of by the court before any further challenges are made. All challenges should be made immediately following assembly, but the court may permit a challenge for cause at any stage of the proceedings. When the court is reduced below a quorum, or when the number of enlisted personnel on the court is reduced below one-third (in those cases where the accused has requested that enlisted personnel be included on the court), or when a challenge to the military judge is sustained, the court will be adjourned and the trial counsel will immediately report the matter to the convening authority (MCM 62h(4)).

When a member is successfully challenged, trial counsel should insure that the record reflects: (1) that the member withdrew; (2) that he took no further part in the proceedings; (3) that the court resealed itself to eliminate the vacated seat.

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

c. Action upon challenges for cause. The military judge, or if none has been detailed, the court members, shall determine the relevancy and validity of challenges for cause (MCM 62a). Before the matter is decided, both sides must be given an opportunity to introduce evidence and to make appropriate argument. The burden of proving disqualification rests upon the challenging party but a tie vote will disqualify the challenged member (MCM 62h(2)). If the challenger so desires, he may question the chal-

lenged person under oath concerning the subject matter of the challenge. Ordinarily the person against whom a challenge for cause has been made will take no part in the hearing upon such challenge except when called upon to testify or to make a statement as to his competency. The military judge, or if none is detailed, the president of a special court-martial will continue to rule upon interlocutory questions arising during the hearings even though the challenge is directed against him and he is testifying under oath. In the latter event, the ruling should be prefaced by a statement such as, "As military judge (president) I rule that . . ." (MCM 62h(2)). For limitations on the inquiry as to the eligibility of the military judge, see paragraph 62g of the Manual.

When the hearing on a challenge for cause has been completed, the military judge will rule finally on the challenge, even if the challenge is lodged against him. If undisputed facts establish that the military judge or a member is subject to challenge on any of clauses (1) through (8) of paragraph 62f of the Manual, the military judge or member will be excused forthwith (MCM 62c). In special courts-martial without a military judge, the president will instruct the court on the applicable law and procedure for voting on the challenge (MCM 62h(3)). Then the court will close to deliberate and vote in closed session on whether to sustain the challenge. The challenged member will be excluded from the closed session. A majority vote is controlling on whether the challenge should be sustained. A tie vote will disqualify the person challenged. After the court has finally voted, it will open and announce whether the challenge is sustained. If the challenge is sustained, the person challenged will be excused and participate no further in the trial.

d. Peremptory. A peremptory challenge does not require that any reason or cause therefor exist or be stated. While the Government and each accused are entitled to one peremptory challenge, it is seldom exercised by the trial counsel. One such occasion might arise when the trial counsel has unsuccessfully challenged a member for cause. If the trial counsel believes that he may have antagonized a member by an unsuccessful challenge for cause, or believes that his challenge for cause was improperly denied, it would be reasonable for the trial counsel to challenge such member peremptorily. A peremptory challenge cannot be used against a military judge.

42. ARRAIGNMENT

The arraignment consists of reading the charges and specifications to the accused and asking him how he pleads. The plea itself is not a part of the arraignment (MCM 65a). In open sessions, the arraignment takes place immediately after the disposition of challenges. When the military judge is ready to proceed with the arraignment, the trial counsel should furnish each member of the court, the military judge and the defense counsel with a copy of the charges and specifications upon which the accused is to be arraigned unless previously distributed prior to challenges. He should exercise care to assure that these copies do not include charges and specifications which have been withdrawn or dismissed (MCM 56d). Trial counsel must carefully avoid informing the court in any manner that other charges were at one time pending against the accused. It is customary for the trial counsel to suggest that, with the consent of the accused, the reading of the charges and specifications be omitted. The accused usually waives the reading of the charges, and the trial counsel merely summarizes the matter contained on the third page of the charge sheet to indicate to the court and the accused that the charges were properly signed, sworn to before an officer of the armed forces authorized to administer oaths, and referred to the court for trial. The trial counsel then announces the name and grade of the convening authority who referred the charges for trial, and announces the date of the service of charges. If the arraignment was held at an Article 39(a) session, the trial counsel, in the open session, may present the court members with copies of the charges and specifications immediately after assembly (MCM 65a).

43. PRESENTATION OF CASE

a. Duty to present competent evidence. Canon 22 of the American Bar Association Canons of Professional Ethics provides: "A lawyer should not offer evidence which he knows the Court should reject, in order to get the same before the jury by argument for its admissibility. . . ." The trial counsel must also insure that his papers are protected against inadvertent examination by members of the court (MCM 44g). The trial counsel must not express his personal opinion of the accused's guilt or innocence to the court (MCM 44g).

b. Opening statement. The trial counsel has the right to make an opening statement immediately prior to the introduction of

prosecution evidence. The purpose of the opening statement is to explain to the court-martial the issues to be tried. Trial counsel has a right to state in his opening statement the facts which he intends to prove. He may not, however, discuss any facts which he cannot or does not intend to prove by admissible evidence (MCM 44g(2)). Trial counsel has discretion to ascertain whether an opening statement is necessary. In simple cases, opening statements generally are not necessary. If, however, the case is complicated and involves an unusual factual situation, many charges and specifications, or a difficult question of law, such a statement may be helpful to the court. Trial counsel should prepare a detailed outline of such an opening statement so that it may be concisely and clearly presented to the court.

44. QUESTIONS OF LAW

a. Preparation of legal brief. If a complicated legal question is expected to arise at the trial, counsel usually should prepare or at least outline a legal brief on the question. Then, when the question arises at the trial, by using this brief he can present readily to the military judge or if none detailed, the president of a special court-martial, a clear, concise and accurate argument as to the solution of the question. A legal brief prepared for use at the trial need not be formal in nature. To be of assistance, however, it should include, in orderly fashion, (1) a summary of the facts pertinent to the question, (2) a statement of the legal question created by the facts, (3) a summary of the legal authorities that are applicable, and (4) a summary of the argument showing how the law should be applied to the facts.

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

him in determining whether to hold an Article 39(a) session to dispose of the anticipated issues.

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

An argument on a question of law properly may include the citation and reading of legal authorities, including pertinent decisions and opinions of civil and military judicial tribunals. An argument on a question of law in a special court-martial without a military judge is made in open court. An argument on a question of law in a general or special court-martial with a military judge may be made either in open session or outside the presence of the court members, or both, as determined by the military judge. When an argument is made in open court, however, factual comparisons with reported cases should be avoided. If the subject matter of the argument is prejudicial to the accused, the defense is usually entitled to be heard outside the presence of the court members as a matter of right. In this connection, see 39.

45. INSTRUCTIONS TO A COURT-MARTIAL WITH MEMBERS

a. General. The chief purpose of instructions to members of the court is to provide a framework of law to which the court can relate its determinations of fact in the case and, applying the standards of proof given them in the concluding charge, reach a final conclusion as to the guilt or innocence of the accused. In a case in which the military judge or president of a special court-martial without a military judge has any doubts as to the elements of a principal offense charged or of a lesser included offense which has been put in issue by the evidence, the definition of a legal term, or the law applicable to an affirmative defense which has been put in issue by the evidence, he may request counsel for both sides to furnish him information in this regard. In a special court-martial without a military judge, counsel, upon request, will present their views as to the elements of the offense

to the president, out of the hearing of other members. See 39d(2). In a general court-martial or a special court-martial with a military judge, the information should be submitted to the military judge at a side-bar conference or Article 39(a) session.

For assistance in drafting instructions, see DA Pam 27-9, The Military Judge's Guide. The trial counsel may include with his trial notes those instructions which he believes the military judge, or president of a special court-martial without a military judge, should give to the court. These instructions will not be a part of the trial notes proper. They should be prepared in triplicate so that copies may be furnished to the military judge, or president of a special court-martial without a military judge, and counsel for the accused.

b. Proposing instructions: general court-martial and special court-martial with a military judge.

(1) *General.* Counsel are encouraged to propose instructions to the military judge even though the latter has made no request therefor. Generally speaking, counsel should propose instructions on any matter which is legally relevant and which will assist the court in fitting the evidence to his legal theory of the case. Instructions proposed by counsel will be presented in writing, with a copy to opposing counsel, prior to the final arguments. Each proposed instruction should indicate by whom it was submitted and should be marked for identification and attached to the record of trial as an appellate exhibit. After considering the proposed instructions and the arguments of counsel thereon, the military judge will advise counsel, upon request, of the additional instructions which he intends to give the court.

(2) *Trial counsel's proposed instructions.* Generally, trial counsel should propose an instruction on the elements of the offenses charged and on any lesser included offenses embraced within the evidence. This practice will tend to assist the military judge in giving complete instructions. When the trial counsel anticipates that the defense will propose an instruction on a particular point of law, he may also prepare an instruction on the same point, or prepare argument opposing or modifying such proposed instructions. This practice will assist the military judge in evaluating properly the instructions proposed by the defense. Trial counsel should consider that the defense counsel may include a proposed instruction on the elements of the offense charged and on any lesser included offense that probably will be in issue.

Also the defense counsel may include an instruction on a defense which he intends to raise, *e.g.*, self-defense, mistake of fact, intoxication or good character if in issue.

(3) *Manner of preparation.* Ordinarily, counsel can determine in advance of trial whether additional instructions (other than those required by Art. 51(c)) will be necessary or desirable. Before trial, he can prepare with due care and pertinent citations those additional instructions which will be consistent with his theory of the case. These proposals, with copies for opposing counsel, should be available for presentation to the military judge at an Article 39(a) session called during the trial after all the evidence has been received. Counsel may request orally that an instruction along certain lines be given.

c. Proposing instructions: special court-martial without a military judge. The rules with respect to proposing instructions to the president of a special court-martial without a military judge are substantially the same as those set forth in *b* above. Inasmuch as the president of a special court-martial usually is not a lawyer, it is important that counsel be prepared to submit proposed instructions covering the elements of each offense, defenses, and definitions of words having special legal connotation. These proposed instructions usually are presented in writing to the president out of the hearing of other court members with a copy to opposing counsel. Any discussion should be held out of the hearing of the other members of the court.

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

In cases in which a memorandum of instructions is delivered to the president, it should be appended to the record of trial for the information of the convening and supervisory authorities.

46. DRAFTING INSTRUCTIONS ON THE ELEMENTS OF AN OFFENSE

The elements of most offenses are listed and discussed in chapter XXVIII of the Manual. Statements contained therein are necessarily couched in broad general terms to cover most offenses violative of a particular article of the Code, or violative of a particular section or other subdivision of an article of the Code. Reference must also be made to DA Pam 27-9, The Military Judge's Guide, for assistance in drafting instructions. In general, it states the elements of those offenses more specifically than does the Manual. For specifications drafted in accordance with appendix 6 of the Manual, the form instructions are keyed to show where the deletions and insertions are to be made. For example, if the accused is charged with sleeping on post as a sentinel at Fort Blank, Missouri, on or about 27 October 1968, an instruction on the elements of the offense (modeled after an instruction in DA Pam 27-9) would be—

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

(2) That, at Fort Blank, Missouri, on or about 27 October 1968, the accused [was found (~~drunk~~) (~~sleeping~~) while on his post]. [~~left his post before being regularly relieved~~]. If the offense appears to come under the first or second clause of Article 134, the following should be included as the final element of the offense:

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

47. LESSER INCLUDED OFFENSES

a. General. In determining whether a lesser offense is included in the offense charged, counsel should initially refer to paragraph 158 of the Manual and the Table of Commonly Included Offenses in appendix 12 of the Manual. Even if an offense is not listed in the Table, it may be a lesser included offense under the allegations and proof of the particular case. It should be noted in this regard that an attempt to commit an offense is usually included in the offense charged.

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

(1) A lesser included offense will be in issue when there is evidence before the court which, if believed, would reasonably tend to establish that the lesser included offense, and not the principal offense charged, was committed. For example, in a housebreaking charge in which the prosecution's evidence established every element of the offense, but the accused testified that when he entered the room in question, he did so only because he was curious about its contents and did not decide to steal anything until he had been in the room for five minutes, the lesser included offense of unlawful entry would be in issue, and it would be error for the court not to be instructed on the offense of unlawful entry.⁵ This is true because the credibility of the accused's testimony is a question of fact for the court, which if believed, could result in the court not finding the intent element necessary in the housebreaking charge.

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

(3) Unless the rules stated in (1) or (2) above are applicable, the fact that the defense presents evidence contradicting some of the prosecution's evidence does not necessarily mean that a lesser included offense is in issue. For example, in a murder case, if the prosecution presented uncontradicted evidence of all the essential elements of the principal offense charged, and this evidence does not raise any lesser offense, but the defense presented evidence to the effect that the accused was elsewhere at the time the offense was shown to have been committed, a lesser included offense would not be in issue.

48. DEFENSES AND ADDITIONAL INSTRUCTIONS

a. When defenses are in issue. Prior to trial, the trial counsel should study the expected testimony and other evidence to deter-

⁵ U.S. v. Kuefler, 14 USCMA 136, 33 CMR 348 (1963).

mine what affirmative defenses, if any, might be placed in issue. Chapter XXIX of the Manual contains a discussion of the more commonly raised affirmative defenses. A defense will be in issue whenever there is some evidence, whether introduced by the prosecution, the defense, or the court, from which there might be drawn a reasonable inference which, if believed by the court, would constitute a defense. For example, in a case charging assault with a dangerous weapon, the victim and four eye witnesses testified that the accused shot the victim in the arm for no apparent reason during an argument. A firearms examiner testified as an expert witness that, due to the absence of powder marks on the target, the weapon was fired 40 inches or farther from the victim. The accused, on the other hand, testified that there was no argument between the victim and him. He stated that the weapon was discharged accidentally when he was handing it to the victim and the victim snatched the weapon from his hand. Under this evidence, the defense of accident would be in issue and must be instructed upon, for the accused's testimony tends to raise the elements of that defense.⁶

If there is evidence before the court which would constitute a defense if accepted by the court, the defense should be considered to be in issue even though in the particular case it may be unlikely that the court actually will give it such weight as to require a finding of not guilty. Thus where the accused is charged with wrongfully possessing certain prohibited goods in his wall locker and the prosecution's evidence is strong and convincing that the accused knew the prohibited goods were in his locker, testimony by the accused that he had no knowledge of the goods being there or how they came to be found among his personal items in a laundry bag in his locker, will result in the defense of lack of knowledge being in issue and necessitate an instruction on this defense. This is true, however implausible, unreliable, or incredible the accused's testimony is.⁷

b. Additional instructions. The military judge or president of a special court without a military judge may request counsel for both sides to submit proposed instructions in addition to those pertaining to the elements of the principal offense charged and the elements of each lesser included offense that may be in issue. These additional instructions usually will involve a particular

⁶ U.S. v. Tucker, 17 USCMA 551, 38 CMR 349 (1968).

⁷ U.S. v. Meador, 18 USCMA 91, 39 CMR 91 (1969).

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

Counsel should include with his trial notes any additional instructions he believes will aid the court in making its findings, including instructions on issues likely to be raised by the defense. See DA Pam 27-9. These additional instructions should be prepared even though counsel does not anticipate that the military judge, or president of a special court-martial without a military judge, will request him to submit additional instructions. The prospect of the court's making a finding correct in law and fact is enhanced by counsel's awareness of all elements of the case.

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

49. SPECIAL FINDINGS

The military judge, when sitting alone, makes general findings of the accused's guilt or innocence, and pronounces a sentence, if appropriate (MCM 74i, 76e). Upon request of either party, the military judge will make special findings of factual matters reasonably in issue, such as the elements of the offenses of which the accused was convicted, mental responsibility of the accused, if raised, or special defenses. The military judge may require the request to be in writing. The request must be made prior to the announcement of general findings, and must specify the matter to be specially found by the military judge. See MCM 74i.

The trial counsel should prepare suggested findings for consideration of the military judge whenever the accused requests such findings or when it appears in the best interest of the Government for the trial counsel to make such a request, *e.g.*, there is an untried co-accused or the accused may subsequently be tried for perjury. Appendix 8b, MCM, appendix III, DA Pam 27-15, and appendix G, DA Pam 27-9, should be of assistance in drafting such findings. They should be as complete and as carefully considered as the preparation of instructions discussed above.

50. ABSENCE AND EXCUSE OF COURT PERSONNEL

a. Excusing attendance of members. After the court has been assembled for the trial of the accused, members may be excused only because of physical disability, as a result of a challenge, or by order of the convening authority for good cause (MCM 37b).

b. Military judge. When it appears from the circumstances that the military judge is physically unable to continue in the case, the trial counsel should notify the president of the court and then report the matter to the convening authority (MCM 39d).

c. Court members. When the court is reduced below a quorum (five members for a general court-martial, three members for a special court-martial, one-third enlisted members when they have been requested), the court must adjourn. In such event, the military judge, or president of a special court-martial without a military judge, ordinarily will direct the trial counsel to report the circumstances to the convening authority. The report should include a full statement of the reasons for the absence.

If a member is absent after the court has been assembled for the trial of the accused, the trial counsel is required to report the matter to the court after making an informal inquiry to determine the cause of absence. If the absence reduces the court below a quorum or does not result from a challenge, physical disability, or the order of the convening authority for good cause, the trial may not proceed. The military judge, or president of a special court-martial without a military judge, ordinarily will direct the trial counsel to report the circumstances, including the reasons for the absence, to the convening authority. In this connection, see paragraph 41d of the Manual.

d. Parties to the trial. When the court assembles after recess, adjournment, or closing of the court, the trial counsel shall state

in open court whether all parties to the trial who were present when the court recessed, adjourned, or closed are again present. See paragraphs 41 and 61c, and appendix 8b of the Manual.

51. NEW MEMBERS OR MILITARY JUDGE DETAILED TO COURT DURING TRIAL; SWEARING; READING OF RECORD OF TRIAL

When a new military judge or a new member is detailed to the court during the trial of a case, it is the duty of the trial counsel to ascertain the status as to oaths, to administer any necessary oath, and to insure that the accused has an opportunity to exercise his right to challenge (see 41). An accused being tried by a military judge alone has the right to request trial by the new military judge alone or be tried by a court composed of the military judge and members.

In the case of a new military judge, the trial may then proceed as if no evidence had previously been introduced, unless a verbatim record of the evidence previously introduced or a stipulation thereof has been read and shown to him in the presence of the accused and counsel for both sides (MCM 39e).

In the case of a new member of a general court-martial, the trial may then proceed after the recorded evidence previously introduced in open session has been read to him in the presence of the military judge, the accused, counsel, and other members of the court (MCM 41e).

In the case of a new member of a special court-martial, the trial may then proceed as if no evidence had previously been introduced, unless a verbatim record of the evidence previously introduced is read, or a stipulation thereof is read to him, in the presence of the military judge, if any, the accused, counsel, and the other members of the court (MCM 41f).

52. FINAL ARGUMENTS

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

b. Content. Trial counsel has the duty of prosecuting the case, and he is permitted to comment on the evidence and any inferences which are reasonably supported by the testimony. The testimony, conduct, motives, and evidence of malice on the part of any witnesses may be commented upon. When evidence has been offered and declared inadmissible, the trial counsel must not refer to such evidence in final argument. Additionally, trial counsel may not convey to the court-martial a false impression or inference as to the character or credibility of a witness when no evidence has been presented to support such argument. In argument, trial counsel may not advance a theory which is based upon an erroneous principle of law. In deliberating and voting upon the findings, the court is guided by the instructions on the law given to it by the military judge or president of a special court-martial without a military judge. Consequently, when counsel make their final arguments prior to the findings, it is improper for them to read or cite decisions or opinions of civil or military judicial tribunals, except when arguing before the military judge sitting alone. For example, if the accused were charged with using disrespectful language toward his superior officer, it would be improper for trial counsel in his argument to invite the court's attention to a judicial decision holding that similar language has been held disrespectful. Prior to making their final arguments, counsel may request the military judge, or president of a special court-martial without a military judge, to inform them of the instructions he intends to give the court, so that, if appropriate, they may refer to these instructions during their final arguments.

Trial counsel may not comment on the accused's failure to take the stand and testify⁸ nor may he in any manner draw attention to the fact that the accused has not testified.⁹ In this connection, he should be very careful not to make any comment on the failure of the defense to present evidence on a certain point which might be construed as a comment on the failure of the accused to testify. Trial counsel must not refer in his argument to any matter which was not admitted in evidence at the trial. Furthermore, if evidence was admitted at the trial for a limited purpose only, he must limit his comment on that evidence to the purpose for which it was admitted. For example, if evidence of a conviction of the accused is introduced before findings to impeach his credibility

⁸ U.S. v. Hickman, 10 USCMA 568, 28 CMR 134 (1959).

⁹ U.S. v. Stegar, 16 USCMA 569, 37 CMR 189 (1967).

as a witness, as is provided for in paragraph 153b of the Manual, trial counsel must not argue that the court should consider this evidence for any other purpose. Likewise, trial counsel may not comment on evidence which was offered and excluded or thereafter withdrawn. He should always be careful not to assert before the court his personal belief concerning the innocence or guilt of the accused.¹⁰ The trial counsel should never comment concerning the probable effects of the court's action upon community relations either on the merits or on the issue of sentence.¹¹ For additional advice on arguments, see paragraph 72 of the Manual.

53. PRESENTENCING PROCEDURE

a. General. After findings of guilty have been announced, the trial counsel will read to the court the personal data concerning the accused and the data as to restraint, if any, set forth on the first page of the charge sheet. This information should be carefully examined prior to trial and coordinated with defense counsel to insure accuracy. In this way, defense objections to the personal data and data as to restraint can be largely avoided at the trial. For the procedure to be followed where there is such an objection, see appendix 8b of the Manual.

b. Previous convictions. The trial counsel will next introduce evidence of admissible previous convictions of the accused. To be admissible, the previous convictions must relate to offenses committed during the six years next preceding the commission of any offense of which the accused stands convicted (MCM 75b(2)). Ordinarily, the evidence of previous convictions is contained in DD Form 493 (Extract of Military Records of Previous Convictions). This evidence must be introduced, subject to the usual rules of evidence, just as any other item of evidence. If DD Form 493 is correctly completed by the official custodian of the accused's military personnel records, it is admissible under the official records exception to the hearsay rule. See MCM 143. If DD Form 493 is to be used to prove the accused's previous convictions, trial counsel should carefully examine the document prior to trial to assure that it has been accurately completed and that it is properly authenticated.

For an illustration of how to introduce a document such as DD Form 493, see 21 and appendix VII. When the accused is being

¹⁰ U.S. v. Long, 17 USCMA 383, 38 CMR 121 (1968).

¹¹ U.S. v. Cook, 11 USCMA 99, 28 CMR 323 (1959).

tried by a court-martial constituted with a military judge, the trial counsel may also introduce authenticated copies of DA Form 20 for enlisted members, DA Form 66 for officers, records of punishment under Article 15, required by regulation to be retained in the accused's field Military Personnel Records Jacket, and other records in rebuttal. See MCM 75*d*, appendix 8*a*, and paragraph 2-20 AR 27-10.

c. Matters in aggravation. During the presentencing procedure, in the absence of a plea of guilty, the prosecution may bring out matters in aggravation only to rebut matters in extenuation or mitigation presented by the defense. If, however, the findings of the court are predicated on a plea of guilty, trial counsel may introduce evidence showing aggravating circumstances after the findings are announced. "Aggravating circumstances" include only those matters which would have been admissible on the merits of the case. See MCM 75*b*(3).

54. ARGUMENT ON SENTENCE

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

b. Argument by trial counsel. It must again be emphasized that at the trial the trial counsel represents the United States and his function is to present the evidence fairly. He must not inject command influence into the sentencing procedure. See MCM 75*f*. For instance, an argument by trial counsel that the court had the duty to discharge accused because those who brought and referred the charges to trial thought that he should be punitively discharged would be an improper argument.¹² Trial counsel must also refrain in negotiated guilty plea cases from any mention of the fact that the plea has been negotiated and from mentioning the maximum sentence which the convening authority has agreed to approve. In a rehearing the military judge will inform the court of the maximum impossible sentence (the sentence which was imposed by the original court-martial); but trial counsel cannot state that the case under consideration is a rehearing. See MCM 81*d*. He is permitted to be critical of an accused provided

¹² U.S. v. Lackey, 8 USCMA 718, 25 CMR 222 (1958).

such remarks are based on the evidence or may be reasonably inferred therefrom. As previously stated in 52, he must not comment on the probable effect of the sentence on community relations.

c. Argument by trial counsel before a special court-martial. Trial counsel, when arguing for a maximum sentence at a special court-martial, is not permitted to refer to the maximum penalty authorized by the Table of Maximum Punishments for the offenses committed by the accused if that maximum exceeds the jurisdictional limitation of a special court-martial. See MCM 75f. Furthermore, trial counsel may not argue that by referring an accused's case to a special court-martial the convening authority has already minimized the impossible confinement and that the accused is not entitled, in light of the nature of his crimes, to any further reduction.¹³

55. MAINTENANCE OF RECORD OF TRIAL

a. Responsibility. On behalf of the court, the trial counsel supervises the keeping of the record of the proceedings. If a reporter is present, the trial counsel will maintain close liaison with the reporter at all times during the trial to make sure that the record accurately reflects everything that takes place in open court. See paragraphs 82 and 83 of the Manual for instructions on the preparation of the record of trial and conditions under which transcripts need not be verbatim. See also 59 and paragraph 2-6b, AR 27-10.

b. Summarized record of special court-martial. If a reporter is not present at a trial by special court-martial, the trial counsel will take appropriate action to assure that he will be able to prepare an accurate summarized record of trial at the conclusion of the case. He should take notes during the trial or have the assistant trial counsel or a clerk take such notes. A simple method of maintaining notes for use in preparing the summarized record of trial is for the trial counsel to amend his trial notes during the course of the trial so that they accurately reflect the proceedings. If available, a stenographer who is not sworn as a court reporter should be used to assist the trial counsel to prepare and record a summarized record of trial. See paragraph 2-21, AR 27-10.

¹³ U.S. v. Crutcher, 11 USCMA 483, 29 CMR 299 (1960).

56. EXAMINATION OF THE RECORD OF TRIAL BY THE DEFENSE

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

57. IRREGULARITIES AND ILLEGALITIES IN PROCEEDINGS

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

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

If he has in his possession any papers that pertain to the case but which are not in evidence, the trial counsel should take every precaution to insure that they will not inadvertently be examined by any member of the court (MCM 44g). At the time a documentary exhibit is introduced in evidence, the trial counsel should make certain that only the papers which constitute the exhibit are offered in evidence. In cases which are before the court on rehearing, it is proper for the trial counsel to permit the military judge, or president of a special court-martial without a military judge, to examine that part of the record of any prior proceedings which relates to errors committed at the former proceedings when necessary to enable him to decide the admissibility of offered evidence or other questions of law involved (MCM 81c).

Section IV. DUTIES AFTER TRIAL

59. REPORT OF RESULT OF TRIAL

Upon final adjournment of the court after the trial of a case, the trial counsel must notify the accused's immediate command-

ing officer of the result of the trial (MCM 44e). This notification shall be in writing and shall include any findings reached and any sentence imposed by the court. The report will enable the commanding officer to release the accused from confinement, arrest, or restriction in the event of an acquittal or to take other appropriate action in the event of conviction. A copy of the notification should be sent to the convening authority for his information and, if the accused is in confinement, to the commanding officer responsible for the confinement facility. The form of this report should be prepared and partially completed in advance of trial. At the conclusion of the trial, the trial counsel readily can fill in the necessary additional data and dispatch the report immediately. See appendix XX.

60. PREPARATION, AUTHENTICATION, AND DISPOSITION OF THE RECORD

a. General. The rules governing the preparation, authentication, and disposition of records of trial are set forth in paragraphs 82 and 83 and appendices 9 and 10 of the Manual. It is the responsibility of the trial counsel to see that the record is accurate, that it is prepared in the proper form, that the required number of copies are made, and that the preparation thereof is not delayed. See 54 and AR 27-10.

b. Preparing verbatim records. Complete instructions for the preparation of a verbatim record of trial are contained in paragraph 82 and appendix 9 of the Manual. DD Form 490 (Verbatim Record of Trial) should be used in preparing the record. A verbatim record will be prepared in the following cases:

- (1) In all general court-martial cases affecting a general or flag officer.
- (2) In all general court-martial cases where the accused received a sentence which included a discharge or dismissal.
- (3) In all general court-martial cases where the accused received a sentence in excess of that which can otherwise be adjudged by a special court-martial.
- (4) In all special court-martial cases where the accused received a sentence which included a bad-conduct discharge.

c. Summarized record. Complete instructions for the preparation of a summarized record of trial are contained in paragraph

83b and appendix 10 of the Manual. If available, DD Form 491 (Summarized Record of Trial), should be used in preparing such a record. A summarized record will be prepared in the following cases:

(1) In all special court-martial cases resulting in a conviction where a bad-conduct discharge was not adjudged.

(2) In all general court-martial cases, except those involving a general or flag officer, where the accused was convicted of some offense but received a sentence not including a discharge and not otherwise in excess of that which could be adjudged by a special court-martial.

d. Abbreviated record. If the accused is acquitted of all charges and specifications, or if the proceedings are terminated prior to findings with prejudice to the government, the record must contain sufficient information to establish lawful jurisdiction over the accused and the offenses. Further, the record will include a summary of the trial proceedings up to pleas and the disposition of the case. See paragraphs 2-6, AR 27-10.

e. Authentication. The rules governing the authentication of records of trials by general and special courts-martial are contained in paragraphs 82f and 83, respectively, of the Manual. See appendix 9b of the Manual for forms of authentication. These forms must be followed strictly. For example, when a person authenticates a record of trial for another person, one of the reasons listed in the authentication form must be used. Notations such as "TDY," "Maneuvers," etc., are not acceptable. See also paragraphs 2-6, AR 27-10.

f. Disposition. The rules governing the disposition of records of trial by general and special courts-martial are contained in paragraph 82g of the Manual. Trial counsel should pay particular attention to completion of a Court-Martial Data Sheet (DD Form 494). It is important that the trial counsel expedite the preparation and authentication of each record of trial in order that he or his representative can promptly serve a copy on the accused and deliver the original to the convening authority. If the accused has been transferred or has moved to another station prior to the time he has been served with a copy of the record, the trial counsel will mail the accused's copy to him, get his receipt therefor, and forward the receipt to the convening au-

thority. The delivery of the record to the convening authority should not be delayed, however, pending the return of this receipt. A certificate of the manner in which delivery has been attempted, together with a statement that the receipt will be forwarded as soon as it is received, may be inserted in the record in lieu of the accused's receipt.

Chapter 4

THE DEFENSE COUNSEL

Section I. INTRODUCTION

61. DUTIES AND RESPONSIBILITIES

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

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

c. Utilizing services of the assistant counsel. All duties performed by the assistant defense counsel will be performed under the direction of the counsel in charge of the defense. There are two important reasons why assistant defense counsel are detailed and thereafter utilized to the maximum extent possible. First, effective use of the assistant defense counsel will enable the defense counsel to devote additional time to the more important aspects of preparation and trial of the case. Second, it is desirable to train potential defense counsel by on-the-job training as assistant defense counsel. The extent of utilization and on-the-job training, however, is restricted in general courts-martial and in special courts-martial authorized to adjudge a bad conduct discharge. If the assistant defense counsel is not legally qualified he is prohibited from actively participating in the trial itself except as an advisor to the defense counsel (MCM 47), but his utilization outside the court room, both prior and during trial, should be as extensive as possible.

Section II. DUTIES PRIOR TO TRIAL

62. INITIAL CONSIDERATIONS

a. General. Upon receipt of notice (usually accompanied by copies of all papers allied to the charges) that he has been detailed to represent an accused, the defense counsel should interview the accused. At this initial interview, the defense counsel will inform the accused that he has been detailed to defend him at the trial, will explain his general duties, and will advise him of his rights to counsel, civilian or military. See MCM 46d.

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

c. Conflicting interests of co-accused. In a joint or common trial each accused normally is afforded a separate detailed defense counsel. If, however, one defense counsel is detailed to defend two or more accused in a joint or common trial, he should examine the allied papers before consulting with any of the accused to determine if, in his opinion there is a possibility of a conflict in the interests of the accused. If such a possibility is evident to the defense counsel, he should report it to the convening authority so that separate defense counsel may be detailed for each accused. If no conflict is apparent but after consulting with the accused, the defense counsel perceives a possible conflict of interest, he should so advise the accused and then report to the Judge Advocate or convening authority whether or not he can defend any one of the accused at the trial without acting to the prejudice of the remaining accused (MCM 48c).

d. Previous connection with the case. The defense counsel must advise the accused of any previous connection with the case or a related case and give the accused the choice either of continuing the relationship with him or of securing other counsel.

If the defense counsel has previously acted for the prosecution, however, he may not act for the defense, even though the accused expresses a desire for his services (Art. 27(a)). If the defense counsel is an accuser or has acted as a court member, military judge, or investigating officer in the case, he may serve as counsel for the accused only if the latter expressly requests his services (MCM 6a). If the accused with knowledge of all the facts states that he wants the defense counsel to defend him despite his prior participation in the case, the defense counsel should have the accused sign a statement to the effect that he is aware of the defense counsel's prior participation in the case but that he expressly requests his services as defense counsel. The statement should be appended to the record of trial as an appellate exhibit.

e. Accused's right to counsel of his own choice. The accused must be provided with counsel qualified in accordance with Article 27(b) in all general courts-martial and in all special courts-martial in which a bad-conduct discharge may be imposed. He must be afforded the opportunity to be represented by such counsel in all special courts-martial. See Article 27(b) and (c). If a special court-martial's detailed defense counsel is not qualified under Article 27(b), he must inform the accused of his right to request legally qualified counsel to represent him. See MCM 6c, 46d and 48a. The advice and the accused's election in this regard will be recorded in writing and signed by the accused in the presence of defense counsel. See figure 4-1.

In all cases, the defense counsel will advise the accused of his right to be defended by individual counsel of his own selection, either civilian at no expense to the government, or military if reasonably available, in addition to detailed defense counsel (Article 38(b)). If the accused indicates that he desires to accept the services of the detailed defense counsel, the latter will immediately commence the preparation of the case for trial. In those cases in which the accused desires individual civilian or military counsel, the detailed defense counsel will aid the accused in obtaining such counsel. If the accused requests civilian counsel, the detailed defense counsel must advise the accused that such counsel cannot be retained at government expense. If the accused desires individual military counsel to represent him at the trial, the certified detailed defense counsel will prepare a written request for the detail of the individual requested. See figure 4-2. After the request is signed by the accused, it will be forwarded,

STATEMENT CONCERNING COUNSEL AT SPECIAL COURT-MARTIAL	
For use of this form, see AR 27-10; the proponent agency is Office of The Judge Advocate General.	
United States	) Special Court-Martial convened by
v.	)
	)
	)
	)
(Accused's Name and Unit)	) (Name of Command)
I am the defense counsel detailed by the convening authority to defend you. I am not a lawyer. (Neither is the assistant defense counsel.)* As an accused before a special court-martial you have these rights: 1. You may hire at no cost to the Government a civilian lawyer of your choice. If you do, I will serve as associate counsel if you want. In addition, 2. You may be defended, free of charge, by military counsel of your choice, lawyer or non-lawyer, if he is reasonably available. I will serve as associate counsel if you want. In addition, 3. You may be defended, free of charge, by a detailed military lawyer certified by The Judge Advocate General. If you use this right I, (and the assistant defense counsel)* may be relieved by the convening authority and I (we)* may no longer defend you. If you do not use any of the rights listed above, you will be defended by me, your detailed counsel. *(Note: Line out inapplicable words) _____ Signature of Detailed Defense Counsel ACKNOWLEDGEMENT AND DECISION On _____ 19 __, at _____ hours, at _____ detailed counsel informed me of my rights as set out above and explained them to my complete understanding. I have made my request by placing my initials in the appropriate <u>box</u> or <u>boxes</u> below. <input style="width: 40px; height: 20px; margin-right: 10px;" type="checkbox"/> I want to hire a civilian lawyer. <input style="width: 40px; height: 20px; margin-right: 10px;" type="checkbox"/> I request that _____ of _____ (Name) (Unit) be made available to defend me. <input style="width: 40px; height: 20px; margin-right: 10px;" type="checkbox"/> I request that the convening authority detail a military lawyer to defend me instead of the presently detailed counsel. <input style="width: 40px; height: 20px; margin-right: 10px;" type="checkbox"/> I want to be defended by my detailed defense counsel. _____ Signature of the Accused (Image size 7" x 10"; paper size 8" x 10½")	

DA Form 3498-R, 1 May 69

(Image size 7" x 10"; paper size 8" x 10½")

Figure 4-1.

10 September 1969

SUBJECT: Request for Individual Counsel

TO: Commanding Officer
Headquarters, Fort Blank Special Troops
Fort Blank, Missouri 63899

1. Reference is made to the case of United States v. Robert G. Cline, Private (E-2), Headquarters Company, Post Special Troops, Fort Blank, Missouri, referred on 8 September 1969 for trial to the special court-martial convened by court-martial convening order number 5, Headquarters, Fort Blank Special Troops, Fort Blank, Missouri, dated 1 August 1969.

2. Having been advised of my rights to be represented by military counsel of my own choice, I hereby request to be represented by:

Captain Thomas J. Donley, Inf, 089517
20th Administration Company
Fort Blank, Missouri

ROBERT G. CLINE
Private (E-2) US 53171033

Figure 4-2.

through the trial counsel, to the convening authority. Unless disqualified, the detailed defense counsel will continue to represent the accused unless the accused desires otherwise (MCM 46d). If the accused obtains individual counsel, detailed defense counsel will act as associate counsel if the accused so desires.

In all cases the detailed defense counsel will carefully advise the accused of his right to counsel. If special courts-martial counsel is not certified he will record the accused's desires on DA Form 3498-R and present it to the court at the trial. See figure 4-1 and DA Pam 27-15.

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

g. Right to remain silent. The accused should be advised not to talk to anyone about the facts of the alleged offense or offenses except in the presence of and on advice of his defense counsel.

63. PRELIMINARY PREPARATION OF CASE

a. General. Before the case is discussed with the accused, the defense counsel should analyze carefully the charges and specifications, the allied papers, and the report of the pretrial investigation. It is essential that the defense counsel consider the facts of the case, the offenses, and the various elements of proof of those offenses and ascertain whether any defenses may be available to the accused. For discussions of various offenses under the Uniform Code of Military Justice, see chapter XXVIII of the Manual. For the elements of the offenses, see DA Pam 27-9, The Military Judge's Guide.

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

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

b. Confessions or admissions of the accused. If the accused has confessed or made an admission concerning his guilt of any offense charged, the defense counsel must fully inquire into the circumstances surrounding the making of the confession or admission. The accused should be asked to relate in detail what occurred. It is particularly important that he disclose the identities of the persons who were present immediately before and during the time of his making of the confession or admission. Each of these witnesses should be interviewed to obtain his version of the circumstances surrounding the making of the admission or confession. The purpose of this inquiry is to determine whether the confession or admission is subject to objection at the trial on the ground that it was improperly obtained. See Article 31 and MCM 140a; *U. S. v. Tempia*, 16 USCMA 629, 37 CMR 249 (1967).

c. Interview of witnesses. To fully develop his case, it is imperative that counsel conduct a thorough examination of *all* prospective witnesses. The defense counsel must know the limitations of his witnesses, the possible personal interest of each witness in the case, and the nature of previous associations which any witness may have had with the accused or with an alleged victim of the accused's misconduct. Witnesses should be questioned concerning the possibility of any previously undisclosed witnesses.

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

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

belief and the reasons therefor, through the trial counsel, to the convening authority, or to the military judge, so that an inquiry into the accused's mental condition may be conducted before trial. See figure 4-3.

The accused is presumed initially to be sane and to have been sane at the time of the alleged offense (MCM 122a). The presumption of sanity and responsibility for the natural and probable consequences of acts intentionally committed remains valid at the time of trial until, from the evidence, a reasonable doubt of the accused's sanity appears. When, however, any competent evidence has been introduced tending to show that the accused is insane, the sanity of the accused is placed in issue. In their consideration of this issue the court may consider the presumption of sanity, all evidence before it, the justifiable inferences to be drawn therefrom in the light of common sense, and the general human experience in matters of this kind.

15 September 1969

SUBJECT: Request for Inquiry into Mental Condition of Accused

TO: Commanding Officer
Headquarters, Fort Blank Special Troops
Fort Blank, Missouri 63899

1. Reference is made to the case of United States v. Robert G. Cline, Private (E-2), Headquarters Company, Post Special Troops, Fort Blank, Missouri, referred on 8 September 1969 for trial to the special court-martial convened by court-martial convening order number 5, Headquarters, Fort Blank Special Troops, Fort Blank, Missouri, dated 1 August 1969.
2. It is requested that an inquiry into the mental condition of the accused under the provisions of paragraph 121, Manual for Courts-Martial be made and that a medical board be appointed if the preliminary inquiry indicates a need therefor.
3. Although his service records contain excellent conduct and efficiency ratings, several members of his unit, including two witnesses to the alleged incident, have stated that for the past few months the accused has been sullen, uncommunicative, and evasive, in marked contrast to his prior gregarious and cooperative demeanor. Moreover, at the time of the alleged offense he unaccountably kept shouting "you ain't gonna run the Indians out!"
4. Under the circumstances, his mental responsibility and capacity to stand trial are in doubt.

FINIS JONES
Captain, JAGC
Defense Counsel

Figure 4-3.

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

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

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

b. Right to counsel. See 62*e*.

c. Right to trial by Military Judge alone. Before a court-martial to which a military judge has been detailed is assembled, the accused may request in writing that his case be decided by the military judge alone. Before making such a request the accused is entitled to know the identity of the military judge. In explaining this right, counsel should advise the accused that the request is subject to approval by the military judge and may be made prior to trial, at an Article 39(a) session, or after the court has been called to order but prior to assembly. Counsel may wish to defer his recommendation to the accused until after an Article 39(a) session. Examples: (1) Accused made a confession and counsel moves to exclude it from evidence because the accused was not properly warned of his rights. Other evidence in the case is not compelling. The military judge, after hearing evidence on the confession, determines against the accused on the issue. With the knowledge that if the issue is thereafter raised in open court, the military judge will allow the confession into evidence, counsel may consider it advisable for the accused to be tried by the military judge alone. (2) If, however, under the above facts, the military judge excludes the confession, counsel may consider it advisable for the accused to be tried by the members, considering that under the circumstances they would be more likely to acquit the accused on the balance of the facts.

Whether or not to request trial by a military judge sitting alone is an individual decision that depends on many factors. If the accused's crime and the victim are well known, consideration should be given to waiving the presence of the court members. If the accused desires to plead guilty and defense counsel has no reason to prefer court members over judge, consideration should be given to seeking a sentence from a judge whose determination is more predictable than the collective judgment of a court.

If the accused expresses his desire to be tried by the military judge alone, counsel should have a written request prepared and submitted in a timely fashion. (See app 8e of the Manual for the form of the request.) The request may be withdrawn by the accused at any time prior to assembly of the court in the discretion of the military judge. See MCM 53d(2).

d. Right to have enlisted persons on the court. If accused is an enlisted person, he should be advised of his right to request the presence of enlisted personnel on the court convened to try the charges against him. Whether an accused should be advised by his defense counsel to request enlisted members on the court will depend upon an appraisal of all the facts and circumstances bearing on this question. If the accused decides that he wants enlisted persons on the court, a written request signed by him should be forwarded by the defense counsel, through the trial counsel, to the convening authority. In this connection, see Article 25(c) and MCM 48f.

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

The defense counsel should ask the accused to examine the orders convening the court to ascertain whether he knows of any facts which may constitute a ground of challenge for cause against any of the persons listed. Interrogation of the accused by the defense counsel concerning any objection the accused may have to each of the persons listed, may bring out facts constituting proper grounds of challenge for cause. When a proper ground exists, it should be noted by the defense counsel so that it will not be overlooked at the trial. If the accused objects to a member

as to whom no ground for challenge exists, that member ordinarily should be challenged peremptorily. In this respect, however, the defense counsel should bear in mind that a challenge for cause may not be sustained by the court, and it may be advisable to use the peremptory challenge against a member who has been unsuccessfully challenged for cause. Although all challenges ordinarily should be made at an Article 39(a) session or immediately prior to assembly, challenges for cause may be made at any stage of the proceedings if the ground for such challenge was previously unknown to the defense. Challenges are discussed at length in paragraph 62 and appendix 8b of the Manual. See also 39.

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

g. Rights concerning pleas; pretrial agreements. The accused has the absolute right to plead not guilty and thus require the prosecution to prove his guilt beyond a reasonable doubt. For a discussion the various pleas, see 72. Before trial, however, counsel should consider all of the facts and circumstances surrounding the case to determine whether it is appropriate and desirable for the accused to enter a plea of guilty. If the case against the accused is clear, a plea of guilty, coupled with evidence in extenuation and mitigation and/or with a pretrial agreement with the convening authority, may serve the best interests of the accused. The plea of guilty may encourage the court to adjudge a lighter sentence and, in the absence of a pretrial agreement with the convening authority, influence the latter to reduce the sentence or to suspend the execution of all or a part of it.

Pretrial agreements with the convening authority are of various types, the more common of which are the following: (1) where it is agreed that the offense charged will be reduced to a lesser offense to which the accused will plead guilty and then will submit to the judgment of the court the question of the appropriate punishment; (2) where it is agreed that if the accused pleads guilty and is sentenced by the court, the convening authority will approve a sentence not in excess of that agreed upon by the parties concerned; and (3) where it is agreed that if the accused pleads

guilty to certain specifications, the convening authority will withdraw the remaining specifications. Figure 4-4. A pretrial agreement has the effect of obviating the necessity on the part of the government of preparing and introducing evidence on the issue of guilt or innocence and of permitting the accused to know in advance of trial one or more of the following: (1) that he will be found guilty of an offense of a less serious nature than that initially charged; (2) the maximum punishment that will be ap-

UNITED STATES

Place _____

v.

Date _____

I, _____, the accused in a court-martial now pending have had an opportunity to examine the charges preferred against me, the investigating officer's report and all statements of witnesses attached thereto, and, after consulting with my defense counsel, _____, and being fully advised that I have a legal and moral right to plead Not Guilty to the Charge(s) and Specification(s) under which I am about to be tried and to place the burden of proving my guilt upon the prosecution, offer to plead Guilty to (all) the Charge(s) and Specification(s), to wit:

and agree upon acceptance of this offer to enter into a written stipulation with the trial counsel of facts as to the circumstances of the offense(s). This stipulation is to be used only in pursuance of this agreement to inform the members of the court of matters pertinent to an appropriate sentence [provided the Convening Authority will (reduce certain charges) (dismiss certain charges) and] provided the Convening Authority will not approve a sentence in excess of: (type of discharge, reduction in grade, extent of forfeitures, and limit of confinement).

In offering the above agreement I should like to state that:

I am satisfied with the Defense Counsel who has been detailed to defend me;

This offer to plead guilty originated with me and no person or persons have made any attempt to force or coerce me into making this offer or to plead guilty;

My Defense Counsel has advised me of the meaning and effect of my guilty plea and I understand the meaning and effect thereof;

I understand that I may withdraw the plea of guilty at any time before sentence is adjudged;

I understand this offer and agreement and the fact that I have agreed to enter into the stipulation of facts as set out above. If my plea is not accepted, this offer to stipulate is null and void. I further understand that

Figure 4-4.

this agreement will be automatically cancelled upon the happening of any of the following events:

1. Failure of agreement with the trial counsel on the contents of the stipulation of facts;
2. The withdrawal by either party from the agreement prior to trial;
3. Modification at any time of the agreed stipulation of facts without the consent of all parties to the stipulation;
4. The changing of my plea by anyone during trial from guilty to not guilty;
5. The refusal of the court to accept my plea of guilty.

(Signature of defense counsel)

(Signature of accused)

Recommend (approval) (disapproval)

Trial Counsel

HEADQUARTERS (etc. of Convening Authority)

Date: _____

The foregoing offer is accepted (not accepted).

(Signature, Rank, and Title of
Convening Authority)

Figure 4-4—Continued.

proved by the convening authority for the offense to which the accused agrees to plead guilty; (3) that he will be found guilty of fewer offenses than originally charged. Thus, in an appropriate case, a pretrial agreement may benefit the accused by resulting in punishment less than that which might be adjudged in the event of trial on a plea of not guilty. The accused should be advised that while the convening authority may be willing to make such an agreement in a proper case, the offer to enter such an agreement must be initiated by the accused.

After he has explained to the accused the meaning and effect of a plea of guilty and has advised him with respect to pretrial agreements, the defense counsel may make such recommendations to the accused as appear to be reasonable and proper in view of all the facts and circumstances surrounding the case. While the defense counsel should not urge the accused to attempt to procure a pretrial agreement or to plead guilty without such an agreement, a full performance by the defense counsel of his duty to safeguard the interests of the accused may, in a particular case, require him to recommend that one or the other of such

courses of action be taken. However, in no instance should an accused who indicates that he believes himself innocent of the offenses charged be permitted to enter a plea of guilty thereto.

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

h. Rights of the accused as a witness.

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

Counsel should consider the various courses of action open to the accused before advising him how to exercise his rights as a witness. Each case should be considered individually. What may be advisable in the case of one accused may not serve the best interests of another. If an accused is charged with several offenses, consideration should be given to the advisability of testifying as to one or more, but not to all, of the offenses. It is permissible for the accused to limit his testimony that he may not be cross-examined on other offenses to which he has not testified. Caution is indicated, however, for although an accused who has restricted his testimony to less than all of the offenses charged

is insulated from cross-examination to those remaining, it is the *content* of his testimony upon direct examination and not the announcement of his limiting of his testimony, that controls.¹ A tentative decision that the accused will or will not testify should be made prior to trial, but the final decision should be made only when the time arrives for the accused to make his choice in court. It may be necessary to change the tentative decision because the expected testimony of a witness may not have been weighed properly before trial or may not have developed as expected.

(2) *Testifying for a limited purpose.* There are a number of occasions in trials by courts-martial where it may prove advantageous for the accused to testify on matters not bearing on the issue of his guilt or innocence of any offense for which he is being tried. Most frequently, such limited testimony is useful in contesting the admission of a particular item of prosecution evidence. For example, such testimony may be offered to show that a confession or admission was not voluntarily made or that a search or seizure was unlawful. In such cases, if the accused testifies on direct examination only as to matters not bearing on his guilt or innocence of any offense for which he is being tried, he may not be cross-examined on the issue of his guilt or innocence. His cross-examination will be limited to the issues concerning which he has testified and to his credibility. Thus, if it is decided that the accused will testify for a limited purpose, the defense counsel must instruct the accused carefully as to the scope of the testimony he may give on the direct examination without subjecting himself to cross-examination on the question of guilt or innocence. In rare cases, the testimony of the accused, although intended to bear only upon matters not touching upon his guilt or innocence, will be so closely connected with the issue of his guilt or innocence that the accused will have great difficulty in limiting his direct testimony to matters other than his guilt or innocence. In determining whether to testify for a limited purpose in such a case, the accused must weigh the probable value of his limited testimony against the probable injury that will result if he opens up the cross-examination to matters affecting his guilt or innocence.

(3) *Testifying on the general issue.* Before advising the accused whether he should testify on the general issue of his guilt or innocence of a particular offense, the defense counsel should consider such factors as the expected evidence against the ac-

¹ U.S. v. Lovig, 15 USCMA 69, 35 CMR 41 (1964).

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

(4) *Right to remain silent.* If his pretrial consideration of the evidence, together with his pretrial interview of the accused, has convinced the defense counsel that any testimony which the accused could give would damage the defense, the defense counsel and accused should again discuss his right to remain silent. If the defense counsel is convinced that the accused's potential testimony would be damaging, the accused should be advised that the court might reach the same conclusion after hearing his testimony. Should the accused testify before findings, there is always the possibility that by an admission made on direct or cross-

examination he may supply a missing item of proof which the prosecution could not otherwise have placed before the court.

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

(5) *Matters in extenuation and mitigation.* If findings of guilty have been reached and formally announced, the defense has the opportunity to present matters in extenuation and mitigation of any offense of which the accused has been found guilty. See paragraph 75c(3) and (4) of the Manual for a detailed discussion of extenuating and mitigating circumstances. In many cases, especially those in which the accused has pleaded guilty, the defense counsel can render his most valuable service to the accused at this stage of the trial. There should never be an occasion, however, for presenting at this time matters which amount to legal justification or excuse for an offense, as such matters should have been presented prior to the findings if the defense counsel has properly discharged his responsibilities to the accused. Matters in extenuation and mitigation may be introduced into evidence in the regular manner or by means of affidavits or other written statements. See MCM 75c(1), 146b.

The accused may testify under oath, make an unsworn statement, or do both, but he may not file an affidavit executed by himself. The unsworn statement may be made by the accused personally or through his counsel, or it may be presented in part by the accused and in part by his counsel. The statement may be oral, in writing, or both. The prosecution will not be permitted to cross-examine the accused on an unsworn statement, but it may rebut by evidence any assertions of fact contained in the statement. See MCM 75c(2). When the accused testifies or makes an unsworn statement in extenuation or mitigation, he does not risk the possibility that he may supply an item of proof missing from the prosecution's case, for his testimony or unsworn statement may not be considered by reviewing authorities in affirming the correctness of the findings of guilty.

The defense counsel should explain to the accused his rights in this respect, and plans should be made for presenting matters in extenuation and mitigation, if any, in the event of a conviction. No matter how diligent the defense counsel has been in protecting the accused's rights prior to findings of guilty, he will have failed to fulfill his duty, not only to the accused but to the court as well, if he does not present all available and admissible

matter in mitigation and extenuation. In every case, therefore, the defense counsel should determine whether extenuating and mitigating circumstances exist and, if so, how they may best be presented to the court. After considering the accused's veracity, capabilities, appearance, and attitude, the defense counsel should recommend to the accused whether he should take the witness stand and testify under oath, make an unsworn statement personally or through counsel, or remain silent.

i. Right to apply for deferment of confinement. If the accused is convicted and his sentence includes confinement at hard labor, prior to the order of execution of the sentence the accused may apply to the appropriate authority for deferment of the confinement (Art. 57(d)). If approved, the deferment will exist until the sentence is ordered into execution. In most cases the defense counsel should have a formal written request prepared for the signature of the accused for submission immediately at the termination of the trial and should be prepared to offer compelling reasons for the deferment. It should be emphasized to the accused, however, that the right conferred is not one to deferment but to apply for deferment. See MCM 48k(4), 88f.

65. FINAL PREPARATION OF CASE FOR TRIAL

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

b. Selection of defenses.

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

fense exists. If so, the defense counsel, subject to the approval of the accused, must determine whether any one defense should be emphasized more than others, keeping in mind that a haphazard attack against every point of the prosecution's evidence may obscure a strong defense concentrated on the weakest point of the prosecution's case.

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

As an alternative, if the spectators at the trial are dressed in the same fashion as the accused, the defense counsel may request that the accused be permitted by the military judge or the president of a special court-martial without a military judge to sit with the spectators during the open-court identification proceedings. However, if the witnesses have had one or more opportunities to identify the accused prior to trial (for example, at the time of the formal investigation of the charges), it is not likely that they will experience any difficulty in identifying the accused in the courtroom. In such a case, it is better for the defense not to utilize one of the foregoing procedures, as an identification made under such conditions is extremely convincing.

(3) *Evidence of the accused's character.* Although the defense may not introduce evidence of the character of the accused for truthfulness in order to enhance his credibility as a witness unless the prosecution attempts to impeach him or truthfulness is material to the charge, the defense counsel may always offer evidence of the accused's general good character and military record to show the probability that he is innocent. Evidence of this nature is particularly valuable if the accused is charged with an offense requiring proof of a specific intent, such as the intent to steal. In determining whether evidence tending to show that the accused has a good character should be presented, consideration must be given to the possibility that the prosecution may introduce evidence in rebuttal, tending to show that the accused has a bad character. See 10.

c. Securing attendance of witnesses. At the earliest possible moment prior to the trial, the defense counsel should advise the trial counsel of the names and addresses of the witnesses he desires to have subpoenaed to testify at the trial. See 35. Although the right of an individual accused to the attendance of witnesses is not absolute and there is no intention to authorize carte blanche authority for the issuance of subpoenas in all cases, in weighing the relative responsibilities of the parties against the equities of the situation, it is important that all concerned be impressed with the undoubted right of the accused to secure the attendance of witnesses in his own behalf. Accordingly, they must seriously consider his requests for witnesses and take necessary measures to comply with such requests if such can be done without manifest injury to the service. These considerations apply equally to witnesses on the merits and witnesses in extenuation and mitigation.² If the trial counsel contends that the testimony requested of a witness by the defense counsel is not material or necessary or that a deposition would serve the purpose and preserve the rights of the accused, the question of whether the witness should be subpoenaed to appear personally may be referred to the convening authority or military judge, or the president of a special court-martial without a military judge, depending on whether the question arises before or after the court has assembled (MCM 115a). As a general rule, however, the trial counsel and the defense counsel, in the spirit of mutual cooperation, usually will be able to resolve any difficulties they may encounter in this regard without resort to a decision by either the convening authority or the court. See 35e.

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

e. Continuances. If for reasonable cause the defense counsel will not be ready to try the case on the date set for the trial or is unable to proceed during the course of the trial, he should request a continuance. If the court is in session, the request for continuance should be made to the court. Such a request may be made at an Article 39(a) session. If the court is not in session and the defense counsel desires a substantial delay in the trial of the case, he should present a written request, signed by the accused or himself, through the trial counsel, to the convening

² U.S. v. Manos, 17 USCMA 10, 37 CMR 274 (1967).

authority. The request should include the reasons for the continuance and should state the date when the defense counsel believes he will be ready to proceed with the trial. A sufficient reason for granting a delay or continuance may be the illness or temporary unavailability of a material witness, the need to take a deposition, or that additional time is required for the preparation of the case in view of its complicated nature. As a practical matter, the trial counsel and the defense counsel usually can agree upon a mutually satisfactory date of trial. For a discussion of the subject of continuances, see paragraph 58 of the Manual.

f. Trial notes.

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

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

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

(3) *Motions to dismiss.* The trial notes should indicate any motions that the defense counsel has decided to make. For ex-

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

Appropriate references to the Manual for Courts-Martial or other legal authority in support of the particular motion should be incorporated in the trial notes for ease of reference when presenting the proposition to the court. The evidence which the defense counsel intends to offer in support of the motion should be outlined. For a discussion of motions to dismiss, see paragraphs 67 and 68 of the Manual.

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

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

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

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

(8) *Witnesses and documentary evidence for the defense.*

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

The testimony of each witness should be outlined in narrative form so that the counsel easily may interrogate the witness and be certain that essential portions of the testimony are not inadvertently omitted. When it is desired to lay a foundation by means of the testimony of a particular witness for the subsequent introduction of documentary evidence, a reference should be inserted in the notes as a reminder to have the exhibit marked for identification.

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

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

(10) *Instructions.* See 45-49. The trial notes should include a statement of the elements of each principal offense charged and of each lesser included offense which it is anticipated will be in issue under the evidence. The trial notes should include a statement of the law applicable to any affirmative defenses which may be in issue and the definitions of words used in the instructions which have special legal connotation. In addition, the trial notes should include any instructions which the defense counsel feels should be given to the court during the presentation of the evidence, as well as any additional instructions which should be

included in the final instructions to the court. It is good practice to have the elements of the offenses and any other instructions typed in triplicate on pages separate from the other trial notes so that, if necessary, they may be furnished to the military judge or president of a special court-martial without a military judge as proposed instructions. As a practical matter, the defense counsel may confer with the trial counsel in advance of trial to determine if there are any instructions both agree should be given to the court. If this practice is followed, the defense counsel often will find it unnecessary to prepare certain instructions because those the trial counsel will have available as proposals are acceptable.

(11) *Special findings.* See 49. If the court-martial is composed of a military judge alone, the accused may request, prior to the announcement of general findings, that the military judge make special findings of factual matters reasonably in issue. At the time the defense counsel prepares his trial notes, he should indicate those specific issues which he believes deserve special findings.

If the accused so requests, the military judge may announce his special findings prior to the presentencing procedure; otherwise the special findings may be attached to the record within a reasonable time after sentencing and before authentication of the record. For a discussion of the subject of special findings, see paragraph 74i of the Manual and appendix 8g, DA Pam 27-9. For an example of special findings, see appendix 8f of the Manual and appendix III, DA Pam 27-15.

(12) *Matter in extenuation or mitigation presented after findings of guilty.* For presentencing procedure, see 53. If the accused has previous convictions that are not admissible, the defense counsel should notify the trial counsel before trial. In order to avoid prejudice to the accused, the trial counsel should be requested to secure a DD Form 493 that reflects only admissible previous convictions. See paragraph 75b of the Manual for a discussion of evidence of previous convictions and rules pertaining to their admissibility.

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

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

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

When the court-martial is constituted with a military judge, prior to sentencing the following items relating to the past conduct and performance of the accused should be presented to the military judge by the trial counsel: (1) Authenticated copies of DA Form 20 for enlisted members and DA Form 66 for officers; (2) Authenticated copies of records of punishment under Article 15 required by regulation to be retained in the accused's field Military Personnel Records Jacket (DA Form 201). See MCM 75d and paragraph 2-20, AR 27-10. (3) Matters in rebuttal from official records.

In cases where court members determine sentence, the military judge may, in his discretion, admit information from the accused's DA Form 20 or DA Form 66 for the court's consideration. Defense counsel should go over all personal data with the accused to make timely objection at an Article 39(a) session or after

findings if the data are inaccurate, incomplete, misleading, or otherwise objectionable. Trial notes should aid in this process. See 68 and MCM 75d.

(13) *Visual aids.* Where the use of visual aids such as charts, maps, or diagrams will be beneficial to the presentation of the case, such material should be prepared prior to trial. The trial notes should contain a reference to the diagram, map, or chart at the point where it is proposed to identify and introduce it in evidence. In this connection, see 19.

66. INSTRUCTIONS TO ACCUSED

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

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

c. Testimony. If the accused is to testify, he should be instructed carefully about the proper method of answering questions asked by either the defense counsel, the trial counsel, the military judge or members of the court. He should be cautioned to "think before he speaks." A slight pause for reflection may prevent a costly misstatement, and when the accused is under cross-examination by the trial counsel or is being examined by the military judge or members of the court, a slight pause will give the defense counsel the opportunity to interpose a timely objection when that action is proper. The accused should avoid creating the erroneous impression that he is being prompted by the defense counsel. He is on his own when he is on the witness

stand. Care in conducting the pretrial practice cross-examination of the accused will prevent his being surprised by the questions asked him during the trial. In addition to the foregoing instructions, the accused should be impressed with the importance of answering only those questions that are put to him. He should neither volunteer information nor give the impression that he is trying to avoid giving full and truthful answers to each question.

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

Section III. DUTIES DURING TRIAL

67. PROCEDURE IN GENERAL

The defense counsel should use the procedural guides for trial set forth in appendices 8a and b of the Manual to insure compliance with the necessary formalities of a trial by general court-martial, both at the Article 39(a) sessions and after assembly of the court. Section III, DA Pam 27-15, sets forth the trial procedure for special courts-martial.

68. ARTICLE 39(a) SESSIONS

An Article 39(a) session may be called by the military judge or requested by counsel prior to assembly of the court to consider matters which the military judge may rule upon at that stage of the proceedings. See MCM 39b(2) and d; UCMJ, Article 39(a). These matters include requests for enlisted members on the court (MCM 46), requests for trial by military judge alone (MCM 4a), arraignment and receipt of pleas (MCM 65a), defenses and objections which are a bar to trial (MCM 67, 68, 215), motions for appropriate relief (MCM 69), admissibility of evidence (MCM 53d(1)) and any other interlocutory matters (MCM 39b(2), 53d(1)). The extent of the matters to be considered at the session is within the discretion of the military judge. Ordinarily defense counsel should attempt to present all matters which are capable of determination at such session. When, however, the matter to be raised would disclose a defense theory

better reserved for a later time, he may elect not to present it. Caution must be exercised in reaching such a determination as motions to grant appropriate relief are generally waived if not made by the defense prior to pleadings or at the conclusion of an Article 39(a) session held prior to assembly, whichever occurs earlier (MCM 69a). The defense should inform the trial counsel well in advance of the session of the matters which he will raise (para 2-28, AR 27-10). Failure to do so will only result in delays in the session to allow trial counsel time to prepare. Further discussion of these sessions is at 39.

69. CHALLENGES

a. General. See 41.

b. For Cause. Grounds for challenging court members and military judges are set forth in paragraph 62f of the Manual. The defense counsel may question the court, its individual members, and the military judge to discover whether there are grounds for a challenge for cause (MCM 62b). It is within the discretion of the military judge to allow questioning of himself or individual members outside the hearing of the rest of the court. The defense counsel should request that questioning be conducted outside the hearing of court members when information to be elicited by questioning may be derogatory to the accused (MCM 62b). This procedure does not exist in a special court-martial without a military judge and such questioning must be done before the entire court. Challenges for cause may be made at the Article 39(a) session, immediately after assembly, or any time during the trial that a ground for challenge becomes apparent (MCM 62d).

c. Peremptory. Each accused is entitled to one peremptory challenge (MCM 62a). This right is normally asserted to relieve a member of the court, who for reasons not amounting to a ground for challenge for cause, is believed not favorably disposed towards the defense case or to reduce the membership to a number which is mathematically favorable for a finding of not guilty. For example, a six-member court requires four votes to convict or three to acquit, while a five-member court still requires four votes to convict but only two to acquit. Thus the trial counsel must convince a large percentage of the five-member court beyond a reasonable doubt.

70. ARRAIGNMENT AND SERVICE OF CHARGES

a. *General.* This subject is discussed in 42.

b. *Action taken when charges are not timely served.* In time of peace a general court-martial may not, without his consent, try an accused until five complete days have elapsed between service of charges and date of the Article 39(a) session or assembly, whichever is earlier (MCM 58c); three complete days in the case of a special court-martial (MCM 58c). If, however, the defense counsel is fully prepared for trial prior to the required waiting period and the accused is willing to proceed, the accused may affirmatively waive this right at the time of trial. The waiver must be expressly stated for the record at the proper place in the trial. If trial is scheduled prior to the required waiting period and the defense does not intend to waive its rights, an objection to trial should be communicated to the trial counsel. Requests for continuances beyond the three- or five-day waiting period should be treated in the same manner, except that reasons for the requested delay should be set out in the request (MCM 58).

71. MOTIONS PRIOR TO PLEADINGS

See discussion in 68. Motions in bar of trial or for appropriate relief may be made at the Article 39(a) session or after arraignment but before pleading. Although not provided for in the Manual or the Code, in a special court-martial without a military judge the defense may request a proceeding before the president, outside the hearing of the other court members, on motions involving solely questions of law. The motion should be made in open court, together with the request for the out of court proceeding. If the request is granted, the president rules on the motion, and the defense counsel should request that he announce only his ruling in open court and not discuss the motion or any matters presented in support of the motion. No error ordinarily will occur if the president denies the request for such a closed session, except that the matters discussed may give grounds for a mistrial. A request for an out of court hearing should never be made if it concerns a motion on which the president's ruling is subject to objection by any member of the court. See DA Pam 27-15.

72. PLEAS

The accused may plead guilty, not guilty, or not guilty but guilty of a lesser included offense (MCM 70a). A plea of not

guilty or guilty, in the absence of a motion to grant appropriate relief, is normally a waiver of those objections that must be raised by motion before plea (MCM 67b). By standing mute, an accused does not waive any objections otherwise waived by a plea although the military judge or president of a special court without a military judge, will then enter a plea of not guilty for the accused. A plea of not guilty requires that the prosecution assume the burden of proving the accused's guilt beyond a reasonable doubt. Legally and morally, an accused has the right to plead not guilty in *any* case. The accused may plead guilty to any offense except an offense for which the court may legally adjudge the punishment of death upon a finding of guilty. After a plea of guilty, the military judge or president of a special court without a military judge, will determine whether to accept the plea. If a plea of guilty is accepted, the military judge or president of a special court without military judge properly may enter findings of guilty to the charges and specifications as to which the plea is made without vote or the introduction of any proof by the prosecution. This, however, does not prohibit the prosecution from presenting evidence concerning the offense at the discretion of the military judge or the president of a special court without a military judge. Legally, a plea of guilty means that the accused admits every element of the offense to which the plea relates. Therefore, an accused should never plead guilty to an offense unless he actually believes he committed it.

Even though he enters a plea of guilty, the accused may introduce evidence in extenuation and mitigation and the prosecution may introduce evidence in aggravation before the court closes to consider the sentence. Whenever an accused, at any time during the course of the trial, makes a statement to the court inconsistent with his plea of guilty, the court will make such explanation and statement to the accused as the circumstances may require. If, after such explanation, it appears to the military judge, or president of a special court-martial without a military judge, that the accused in fact entered the plea improvidently or through lack of understanding of its meaning and effect, or if the accused does not voluntarily withdraw his inconsistent statement, the trial will proceed as if he had pleaded not guilty even though findings of guilty have already been entered. In such cases, defense counsel should seriously consider moving for a mistrial so that the court members who heard the plea of guilty will not sit as members on the court that determines guilt or innocence.

When the accused pleads guilty to a lesser included offense, the above procedures are followed, except that findings of guilty are not made at that time. Instead, the decision as to guilt on the lesser included offense is reserved until after presentation of evidence and the court votes in closed and secret session upon the offense charged. A plea of guilty to a lesser included offense is an admission of guilt of each element of the charged offense that is an element of the lesser included offense. Thus, a plea of guilty to the lesser included offense of wrongful appropriation admits all the elements of the charge of larceny except the element of intent to permanently deprive the owner of his property. It is only with this element that the trial and the court when out on findings need concern itself.

73. CONDUCT DURING PROSECUTION'S CASE

a. General. Defense counsel must remain constantly alert during presentation of the prosecution's case in order to evaluate its strengths and weaknesses, interpose necessary objections, and conduct cross-examination which will expose those weaknesses and lay the groundwork for the presentation of the defense case.

b. Objections. Defense counsel must familiarize himself with chapter XXVII of the Manual as an understanding of the rules of evidence is essential to timely and correct objections to offered evidence. The military judge and the president of a special court without a military judge rule on objections to the admissibility of evidence, the former finally, the latter finally with certain exceptions. The rulings of a president of a special court-martial without a military judge, on interlocutory questions involving both law and fact, are subject to objection by any member of the court to that portion concerning issues of fact (MCM 57b and c). Objections to evidence offered by the prosecution or by the court should be made with care. Some defense counsel indulge in the practice of interposing incessant, trivial objections to questions asked by opposing counsel or the court or to answers given by witnesses. This practice has a tendency to weaken the force of meritorious objections. It also may give the court the impression that the defense counsel is trying to withhold pertinent facts. Many questions and answers may be technically improper; however, if they do not harm the accused's case, the practical thing to do is to make no objection. On the other hand, the defense counsel must be alert to object to all improper matters which are harmful to the accused's interests, especially when the

failure to object may amount to a waiver of the accused's rights. Such a waiver may preclude the accused from questioning the legality of the admission of such evidence at the time of the appellate review of his record of trial. The accused's rights on appellate review will be preserved by a timely objection coupled with a statement of the proper grounds for the objection. On many occasions, in addition to making a timely objection, the defense counsel must be prepared to present evidence or legal authorities in support thereof.

c. *Cross-examination.* This subject is discussed at 9.

d. *Motions.*

(1) *Motions for mistrial.* A motion for a mistrial is appropriate when error has been committed which is manifestly prejudicial and cannot be rendered harmless by cautionary instructions (MCM 56e). Such error might arise in any of the following situations: (1) where inadmissible testimony or other evidence of a highly prejudicial nature is presented to the court; (2) where an improper disclosure or comment is made by a member of the court; (3) where counsel, during argument or otherwise, prejudicially exceeds the bounds of fair comment; or (4) where the military judge departs from his role of impartial judge and through partisan comment or questioning unduly influences the members of the court. A motion for mistrial may be made at any time during the trial. It is an interlocutory matter addressed to the sound discretion of the military judge or special court-martial president without a military judge. Declaration of a mistrial only withdraws the case from that particular court and does not prevent a new trial before a new court. Thus, if the prejudicial effect of an improper comment can be eliminated by an instruction to the court to disregard the comment, a motion for mistrial will be denied. When it appears that instructions cannot render the error harmless and that the accused is not being given or cannot be given a fair hearing, the military judge, or president of a special court-martial without a military judge, will entertain a motion for mistrial or declare a mistrial on his own motion.

(2) *Motion for finding of not guilty.* Ordinarily, a motion for a finding of not guilty will be made at the close of the prosecution's case. It may be directed to some or all of the charges and specifications. Before a motion for a finding of not guilty is made, the defense counsel should assure himself that a serious

question exists as to the sufficiency of the proof presented by the prosecution. If the prosecution has produced substantial evidence which, together with all justifiable inferences stemming therefrom, as well as all applicable presumptions, fairly tends to establish every essential element of an offense charged or included in any specification to which the motion is directed, the motion will not be granted (MCM 71a). In cases where there is a military judge, he will rule finally on motions for a finding of not guilty. Consequently, counsel should consider making such a motion outside the presence of the court members. By doing so, the court will not be influenced in any way in the event the motion is denied.

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

74. PRESENTATION OF DEFENSE CASE

a. Opening statement. The defense counsel may make an opening statement at the conclusion of the prosecution's case before any defense evidence is introduced or after the prosecution has completed its case and rested. The purpose of the opening statement is to explain to the court-martial the issues to be tried. It should encompass a statement of the case and evidence and should emphasize the defense theory of the case. Defense counsel has a right to state in his opening statement the facts which he intends to prove, but he may not discuss any facts which he cannot prove by competent evidence. If the defense counsel determines that a statement would be helpful to the presentation of his case, he should prepare a detailed outline thereof prior to trial in the interests of clarity and conciseness. See 43b.

b. Examination of witnesses, evidence. The material found in chapter 2, dealing with the examination of witnesses and the

basic rules of evidence is applicable to defense counsel and should be referred to prior to trial.

c. Instructions. See 45, 46, 47, 48, 49, 65f(10).

d. Final argument. The defense counsel should always make a final argument when something concrete and of benefit to the defense will be accomplished. A comprehensive, well reasoned and forceful argument is an effective tool of trial advocacy. The primary purpose of final argument is to assist the court in reaching a logical and just decision on the basis of all the evidence presented. The defense counsel who can assist the court in reaching that decision by concisely summarizing the evidence, resolving conflicts in testimony, clearly presenting the theories of the defense and exploiting the weaknesses of the prosecution's case, has performed a most valuable service for his client. Before arguing, counsel should generally make a careful detailed outline of what he plans to say. Some trial counsel deliberately waive the prosecution's opening argument in order to receive the benefit of the defense argument before commenting on the case. If this procedure is followed by the trial counsel, defense counsel may decide not to make any argument to the court and thereby deprive trial counsel of the opportunity to sum up and emphasize the prosecution's case before the court closes. See 52.

e. Special findings. The defense counsel may and ordinarily should request the military judge sitting without court members to make special findings of fact in addition to findings of guilt or innocence (MCM 74i, app 8f; app G, DA Pam 27-9; app III, DA Pam 27-15).

75. PRESENTENCING PROCEDURE

a. General. When an accused has been found guilty, the procedure outlined in 53 is followed. Regardless of whether any evidence was offered by the defense on the issue of guilt or innocence, the accused may present matter in extenuation or mitigation before the court closes to vote on a sentence. In this connection, the accused may testify under oath or remain silent. Additionally, he or his counsel or both may make an unsworn statement. The making of an unsworn statement does not subject the accused to cross-examination, but the prosecution may present evidence in rebuttal.

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

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

Matter in mitigation is designed to lessen the punishment which may be imposed for an offense. An accused may show specific acts of good conduct or bravery in mitigation.³ Evidence of circumstances surrounding the offense tending to minimize the degree of criminality may be introduced.

Defense counsel should be aware, however, that the prosecution may rebut the matters in extenuation and mitigation presented by the defense. See MCM 75c, d, and e; paragraph 2-20b(3), AR 27-10.

c. Argument on sentence. Counsel for either side has a right to make a separate argument on the sentence. Counsel should insure that argument does not go beyond the bounds of fair and ethical comment. In essence, counsel for each side argue their view of all matters reasonably related to the question of an appropriate sentence for the individual before the court.

It is improper for defense counsel to concede the appropriateness of punishments which are detrimental to his client; *e.g.*, to concede the appropriateness of a punitive discharge.⁴

d. Responsibility of defense counsel. Defense counsel will take full advantage of his opportunity to present matter for the court's consideration in reaching an appropriate sentence. The selection of these matters is left entirely to the accused and his counsel. Counsel should, however, always find some favorable matters to offer. He may present documents, letters, witness reports, affidavits, and an unsworn statement of the accused. He can write to the accused's family requesting that they obtain letters from clergymen and other prominent citizens in the accused's hometown community. Affidavits from commanding officers pertaining to the accused's good character are also particularly appropriate. He can extract favorable materials from the accused's military records. Failure to do these things may result in a substantial disservice to the accused in a particular case and indicate inadequate representation by his counsel.⁵

³ U.S. v. Rowe, 18 USCMA 54, 39 CMR 54 (1968).

⁴ U.S. v. Garcia, 18 USCMA 75, 39 CMR 75 (1968); U.S. v. Richardson, 18 USCMA 52, 39 CMR 52 (1968).

⁵ U.S. v. McMahan, 6 USCMA 709, 21 CMR 31 (1956).

Section IV. DUTIES AFTER TRIAL

76. CLEMENCY

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

The recommendation for clemency will never be based upon a doubt as to the guilt of the accused. See MCM 48k(1), 77a. Nor should it be inconsistent with the sentence of the court so as to impeach the sentence.

If any members of the court are agreeable, the defense counsel should prepare a letter of clemency addressed to the convening authority, obtain the signatures of interested members, and submit the letter to the trial counsel for attachment to the record of trial prior to the time it is forwarded for review. In the event no members of the court desire to recommend clemency in the case, it is proper for the defense counsel to prepare his personal request for clemency and forward it in the manner described above. Immediately after trial the defense counsel and accused must determine whether to submit an application to the convening authority for deferment of any confinement at hard labor adjudged by the court (MCM 88f).

77. EXAMINATION OF RECORD OF TRIAL

After the record of trial has been typed and approved by the trial counsel, the defense counsel will be given an opportunity to examine it. The defense counsel should insure that the record correctly reflects all of the proceedings before the court. If the defense counsel believes the record correctly reflects the proceedings, he should sign the authentication sheet of the record of trial. If he notes any discrepancies between the record and what actually occurred at the trial, he should call the errors to the attention of the trial counsel. If the defense counsel believes the record does not correctly reflect the proceedings and the trial counsel is unwilling to change the record in accordance with his sug-

gestion, the defense counsel should make a note of the discrepancies so that he can mention them in his appellate brief (MCM 48k(2)). In this connection, see paragraph 82e of the Manual. If the defense counsel is absent and is not able to examine the record of trial, an assistant defense counsel who was present during the proceedings may perform this duty for him. In those cases where there is a summarized record of trial, defense counsel should carefully check the summarized evidence to assure that any objections or motions made at the trial are preserved for consideration by the reviewing authorities.

78. APPELLATE DUTIES

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

b. Interviewing the accused. After an accused has been found guilty and has been sentenced, the defense counsel should make arrangements to interview him. Often he will find that the accused is discouraged at the result of the trial. The Army and the Federal penal institutions have a real interest in the rapid rehabilitation of a prisoner for restoration to duty or return to civilian life. The defense counsel can aid materially in many cases in this rehabilitation process by assisting the accused to adjust himself mentally and morally for the future. He should advise the accused of his appellate rights (MCM, chap XX), of the rehabilitation and clemency programs, and of the benefits the accused may achieve by his exemplary behavior while in confinement. Above all, he should try to encourage the accused to face the future realistically. A few words of encouragement at this time, especially if the accused is young and inexperienced, may do a great deal to strengthen his morale and thus enable him to rehabilitate himself rapidly and successfully. It is particularly appropriate for defense counsel to correspond with the wife, parents or nearest relative of the accused to explain what has transpired and the workings of the appellate processes (fig 4-5).

c. Disposition of the accused's copy of record of trial. The defense counsel always should explain to the accused that he should safeguard the copy of the record of trial which will be

7 November 1969

Mr. and Mrs. Thomas Smith
111 Center Street
Cotulla, Texas 78014

Dear Mr. and Mrs. Smith:

On 5 November 1969 your son Bill was tried by a general court-martial convened at this headquarters and was convicted of aggravated assault. The court sentenced him to a bad-conduct discharge, confinement at hard labor for one year, and forfeiture of \$65.00 per month for twelve months.

The case is by no means closed. The appellate process begins when the record of trial is reviewed by the commanding general. He has the authority to disapprove the sentence, reduce the sentence, or change the punishment to one of a different nature; however, he does not have the authority to increase the severity of the sentence or increase the punishment imposed. The commanding general can order a new trial if he feels one is necessary.

If the sentence is approved by the commanding general, the record of trial is forwarded to The Judge Advocate General of the Army who in turn refers it to a Court of Military Review for a second review. At this level Bill will again be represented by appointed military lawyers at no expense to you or Bill. They will attempt to obtain a dismissal of the case, a new trial or a reduction of the sentence. Should the Court of Military Review approve the findings Bill would have the right to appeal the case to the Court of Military Appeals. His appellate defense counsel will continue to represent him without charge. He may, if he so desires, hire civilian legal counsel at his own expense any time during the appellate process.

Bill has been advised of all his rights of appeal and assured that I will be available for consultation until final review is accomplished. You may be assured that I have done and will continue to do everything in my power to insure that Bill is afforded every legal right to which he is entitled under the Constitution of the United States and the Uniform Code of Military Justice.

If you have any questions please contact me at any time.

Sincerely,

FINIS JONES
Captain, JAGC
Defense Counsel

Figure 4-5.

furnished him by the trial counsel. Ordinarily, the accused should retain possession of the record until all appellate review processes have been completed so that counsel who are called upon to advise and assist the accused in the exercise of any of his appellate rights may examine the record. Thereafter, the accused should mail the copy to his family or relatives, instructing them to safeguard it for possible use in future legal or administrative proceedings. If the accused retains civilian counsel to represent

him during the appellate proceedings, he should forward his copy of the record to such counsel.

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

e. Advising accused of appellate rights. The defense counsel is required to advise any accused who has been sentenced to a punitive discharge or to a punishment beyond the normal jurisdiction of a special court-martial of his appellate rights. The principal appellate right with which the trial defense counsel is concerned is the accused's right to counsel before a Court of Military Review in the event his case is reviewed at that level.

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

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

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

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

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

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

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

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

f. Extraordinary remedies. The accused also has the right to petition The Judge Advocate General for appropriate relief on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused (Art. 69), when his case has been finally reviewed but has not been reviewed by a Court of Military Review (MCM 110a). This right to petition is not a part of the appellate process in a court-martial case, however, and the application must be submitted under oath or affirmation. For assistance in preparing the proper form, see chapter 13, AR 27-10.

Chapter 5

PRETRIAL INVESTIGATION

79. ARTICLE 32 INVESTIGATION

a. General. No charge may be referred to a general court-martial unless there has been an investigation conducted in accordance with Article 32. The purposes of the investigation are: (1) to inquire into the truth of the matters asserted in the charges; (2) to check the form of the charges and specifications; and (3) to make recommendations concerning the disposition of the charges in the interest of justice and discipline. In furtherance of these purposes, the investigating officer is charged with conducting a thorough and impartial investigation. In no sense is he an advocate for the government; rather, he is to gather and evaluate all available facts in arriving at his recommendations for disposition of the case. He is not limited to an examination of the witnesses and evidence specified in the charge sheet. On the contrary, he is bound to examine witnesses presented on behalf of the accused and, where necessary, to extend independently his inquiry as far as may be necessary to insure a thorough and fair investigation. The investigation is a judicial function and an integral part of the trial itself. It is the military equivalent of the civilian pretrial hearing.¹ It is designed to prevent frivolous and unfounded charges from going to trial² and serves as a discovery proceeding.³

In view of the responsible function of the investigating officer, he should be a mature officer, preferably of field grade or one with legal training and experience. Further, the impartiality required demands that neither the accuser nor any officer who has a direct interest in the case or who is expected to participate in any capacity upon possible trial of the case be designated to perform this duty. The investigating officer is subject to challenge on the basis of a lack of impartiality⁴ or status.⁵ Objections to

¹ U.S. v. Eggers, 3 USCMA 191, 11 CMR 191 (1953).

² CM 377832, U.S. v. Batchelor, 19 CMR 452 (1955), *aff'd* 7 USCMA 354, 22 CMR 144 (1956).

³ U.S. v. Samuels, 10 USCMA 206, 27 CMR 280 (1959).

⁴ U.S. v. Parker, 6 USCMA 75, 19 CMR 201 (1955).

⁵ U.S. v. Long, 5 USCMA 572, 18 CMR 196 (1955).

the appointed investigating officer should be communicated to the officer responsible for his appointment. A failure to object at trial constitutes a waiver of any defect.⁶

b. Rights of the accused. At the outset of the investigation the accused will be informed of the following: the offense charged against him; the name of the accuser and of the witnesses against him as far as then known by the investigating officer; the fact that charges are about to be investigated; his right to have counsel represent him at the investigation; his right to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense, extenuation, or mitigation; his right to have the investigating officer examine available witnesses requested by him; his right to make a statement in any form; and his rights under Article 31(b).

c. Counsel.

(1) *The accused's right to representation by appointed counsel certified in accordance with Article 27(b).*

(a) Article 32 provides that if the accused does not desire to be represented at the pretrial investigation by civilian counsel provided by himself or by available military counsel of his own selection, "upon his own request he shall be represented by . . . counsel detailed by the officer exercising general court-martial jurisdiction over the command." The Manual further provides that such counsel will be "competent." (MCM 34c(3)). Because the pretrial investigation provides a discovery proceeding for the accused requiring the services of a qualified lawyer, and is therefore, "a judicial proceeding, fundamentally a part of a general court-martial case," the words "competent" in the Manual and "counsel" in Article 32 have been construed to mean counsel certified within the meaning of Article 27(b).⁷

(b) An accused who has been fully and correctly advised of his right to be represented by certified legally qualified counsel may waive the right.⁸

(c) Where the accused requests military counsel of his own choice, the services of such counsel must be given the accused if such person is reasonably available. This determination is a matter of military exigency and the decision is that of the convening authority. In the event the convening authority de-

⁶ U.S. v. Allen, 5 USCMA 626, 18 CMR 250 (1955).

⁷ U.S. v. McFerren, 11 USCMA 31, 28 CMR 265 (1959).

⁸ U.S. v. Rogan, 8 USCMA 739, 25 CMR 243 (1958).

clares the requested counsel not to be reasonably available, the accused has the right to appeal this decision to the next higher authority in the court-martial chain of authority (MCM 48b). In order to correct the error of the improper denial of requested counsel, the accused must object to the omission at trial or he will be deemed to have waived the pretrial defect.⁹

(2) *Counsel for the Government.* If the accused is represented by counsel at the Article 32 investigation, the government may, at the discretion of the officer ordering the investigation, be represented by counsel with qualifications equivalent to those of defense counsel.¹⁰ Counsel for the government may, and logically should, subsequently act as trial counsel if the case is referred for trial.

(3) *Counsel for the investigating officer.* There is some authority for the proposition that counsel may be appointed to assist the investigating officer in the performance of his duties.¹¹ The Manual does not authorize or prohibit this procedure.

d. Report of investigation. At the conclusion of the investigation, the investigating officer must make a report to the authority who directed the proceedings. This report may be either formal or informal depending on the conclusions reached by the investigator. An informal report may be made where it appears that the case will be disposed of other than by reference to a general court-martial (MCM 34f). Such a report may be submitted orally, by memorandum, or other suitable means. A formal report is required to be made on DD Form 457 whenever it appears that the case will be disposed of by reference to a general court-martial (MCM 34e).

80. DUTIES OF DEFENSE COUNSEL AT INVESTIGATION

a. General. When an officer is designated to represent an accused at the pretrial investigation of charges, his duties are similar to those of the defense counsel at the trial of the case (MCM 42b, 48c). He must protect the interests of the accused by all legitimate and honorable means and must respect at all times the confidential relationship that exists between the accused and himself.

At the outset of the investigation, counsel should make certain that the accused understands his rights under Articles 31 and

⁹ U.S. v. Mitchell, 15 USCMA 516, 36 CMR 14 (1965).

¹⁰ U.S. v. Weaver, 13 USCMA 147, 32 CMR 147 (1962). See MCM 34c.

¹¹ U.S. v. Young, 13 USCMA 134, 32 CMR 134 (1962).

38(b). Additionally, accused should be impressed with the importance of a full disclosure to his counsel of the true facts surrounding the offense charged, for without such a disclosure the counsel can be of little assistance to him. In order that the accused will understand that whatever he may divulge to his counsel will not be repeated to others, the confidential relationship that exists between himself and such counsel should be explained thoroughly to him.

When appropriate, counsel will cross-examine witnesses who appear before the investigating officer. In the event a witness whose testimony has been recorded verbatim is unavailable at a subsequent trial, the hearsay statement would be admissible.¹² A failure to cross-examine for tactical reasons, *i.e.*, non-disclosure of the defense, would under these circumstances be extremely damaging.¹³

b. Identity of the accused. If the identity of the accused as the perpetrator of an offense depends upon the ability of witnesses to recognize the accused, the pretrial counsel should request that the witnesses be required to identify the accused from a lineup of persons similar in appearance to the accused. Every effort should be made to insure that no suggestive influence points to the accused. Otherwise, the ability of the witness to identify the accused as the offender may be based on the fact that the accused is the only person whose conduct is being investigated. In the event it appears that an identification was made prior to the appointment of counsel the nature and extent of the identification must be thoroughly examined. The extent to which the prior identification influenced the present identification may be highly critical.¹⁴ Non-certified counsel are encouraged to seek assistance from the office of the Staff Judge Advocate if this issue arises.

c. Presentation of defense matter. After the known evidence has been presented and examined, the accused will be given an opportunity to present matter in his behalf. If he desires, he may make a sworn or unsworn statement concerning one or more of the offenses charged; he may request the investigating officer to call reasonably available defense witnesses or to secure documentary evidence in his favor. Exactly how far the pretrial counsel should go in presenting defense matter that is unknown to

¹² U.S. v. Essars, 3 USCMA 191, 11 CMR 191 (1953).

¹³ U.S. v. Borrous, 16 USCMA 94, 36 CMR 250 (1966).

¹⁴ U.S. v. Wade, 388 U.S. 218 (1967).

the investigating officer is a question that can be determined only after a careful consideration of the facts in each case. Counsel should keep in mind that the recommendations of the investigating officer are advisory only; that a presentation of new defense matter at the investigation will not aid the accused unless such matter will cause the dismissal or reduction of the charges to which the matter relates, or otherwise result in official action favorable to the accused; that, if the charges are referred to trial and the trial counsel knows in advance what defense evidence will be presented, he can plan the prosecution with a view to lessening or negating the effect of the defense evidence. As a general rule, therefore, unless counsel believes that the new defense matter, if presented at the investigation, may influence official action on the case to the benefit of the accused, he should not present such matter. The same considerations apply in advising the accused whether to make a statement or remain silent.

d. Suspected insanity of the accused. If any facts come to the attention of counsel which would indicate either that the accused does not possess sufficient mental capacity to understand the nature of the proceedings against him and intelligently to conduct or cooperate in his defense or that the accused lacked mental responsibility at the time of the commission of the offense, those facts should be brought to the attention of the investigating officer for action pursuant to paragraph 121 of the Manual. See 63e.

81. DUTIES OF GOVERNMENT COUNSEL AT INVESTIGATION

The effect of providing counsel for the government in appropriate cases is to make the Article 32 investigation a quasi-adversary proceeding presided over by the investigating officer. government counsel should fairly present all pertinent government evidence, cross-examine defense witnesses, raise appropriate objections concerning improper procedure or inadmissible evidence and may present appropriate arguments and comments on the evidence. In short, government counsel should take all necessary action to effectively present the government's case and thereby assist the investigating officer to determine the appropriate disposition of charges against the accused. He must, however, refrain from any action or conduct that would cause the investigating officer to depart from his role of objectively and impartially weighing the facts of the case. He must assist in every way possible to insure that there are no substantial defects in the

investigation. He should insure that all essential available witnesses are called ¹⁵ and that all testimony or statements considered are under oath. ¹⁶ Both government counsel and defense counsel should strictly adhere to the standards of conduct and decorum established for trials by courts-martial. The fact that the investigating officer may lack the experience or authority of a military judge in matters of law and procedure should not be exploited by counsel in any way. This is not in fact a pure "adversary" proceeding as the investigating officer has an independent duty to examine all the evidence, not just that presented by counsel.

82. DUTIES OF COUNSEL AFTER INVESTIGATION

Pretrial counsel should make full and complete notes covering such matters as the demeanor of the witness for and against the accused, their attitude toward the accused, and the legal defects, if any, in the documentary evidence considered by the investigating officer. If the case ultimately is referred for trial, these notes will be valuable in his preparation of the case. Accordingly, when pretrial counsel do not subsequently serve as detailed trial or defense counsel, the notes and any other information concerning the case in the possession of the pretrial counsel should be given to the detailed counsel for their information and use.

¹⁵ U.S. v. Nichols, 8 USCMA 119, 23 CMR 343 (1957); CM 377832 U.S. v. Batchelor 19 CMR 452 (1955), *aff'd* 7 USCMA 354, 22 CMR 144 (1956).

¹⁶ U.S. v. Samuels 10 USCMA 206, 27 CMR 280 (1959).

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Appendix I

CHECKLIST FOR TRIAL COUNSEL*

ACCUSED (Last name—First name—Middle initial)	SSAN	Grade	Organization
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INSTRUCTIONS

To indicate completion of the items listed, place a checkmark in the box to the right of the checklist item; if an item is inapplicable, place a diagonal mark in the box. If the convening authority has a Judge Advocate, correspondence and reports to him should be through the Judge Advocate.

References are to appendices of this handbook, Articles of the Uniform Code of Military Justice, and paragraphs and appendices of the Manual for Courts-Martial, United States, 1969 (Revised edition).

SECTION A—DUTIES PRIOR TO TRIAL

1. Check the charge sheet and all allied papers in order to assure that the file is complete. _____

2. Ascertain from the indorsement on the charge sheet and the order convening the court whether the charges have been properly reported to the Court for trial. _____

3. Examine the charges and allied papers to determine whether any member of the prosecution is disqualified because of prior participation in the same case (MCM 6, 44b). If so, the matter must be reported immediately to the convening authority prior to any action being taken. _____

*4. Report substantial discrepancies in the report of investigation to the convening authority (MCM 44f(5)). _____

5. a. Make certain that the data on the charge sheet are free from errors of substance or form (MCM 44f(1)). _____

b. Compare the name and description of the accused in each specification with the corresponding data on page one of the charge sheet. _____

c. Compare the charges and specifications in the charge sheet with the pertinent forms set forth in appendix 6c of the Manual to determine if they are in proper form, and allege offenses. _____

*The use of this checklist is optional. If used, it may be locally reproduced. Items marked with an * are inapplicable to a special court-martial.

CHECKLIST FOR TRIAL COUNSEL—Continued

SECTION A—DUTIES PRIOR TO TRIAL—Continued

6. a. Report substantial discrepancies in the convening orders to the convening authority. _____

b. Examine the orders convening all courts to which the case has been referred, the charge sheet, and the accompanying papers to determine whether the military judge and counsel have the necessary legal qualifications and whether any facts appear which would disqualify the military judge or any of the counsel from acting in the case (MCM 4e, 6). _____

c. If, with respect to the qualifications of the military judge or counsel, the court is not legally constituted, notify the convening authority. _____

7. a. Serve or cause to be served a copy of the charge sheet and all allied paper on the accused in the presence of his defense counsel if possible. _____

b. Complete and sign the certificate of service (bottom of page 3 of charge sheet (DD Form 458)). _____

8. a. Examine the record of previous convictions for completeness, admissibility, and freedom from errors of form or substance. If any previous convictions would not be admissible in the case, obtain a new record of convictions showing only those which are admissible (MCM 44f(1), 75b(2)). _____

b. If the court-martial is constituted with a military judge, insure that authenticated copies of DA Form 20, or DA Form 66, and authenticated copies of records of punishment under Article 15 which are required by regulation to be retained in the accused's Field Military Personnel Records Jacket are available (MCM 75d; para 2-20, app 8g; AR 27-10). _____

9. a. If the defense counsel was not present when the charges were served notify him that charges have been served. _____

b. Deliver copies of the papers that accompanied the charge sheet to the defense counsel (MCM 44h, 115c). _____

c. Determine from the defense counsel whether the data shown on the first page of the charge sheet are correct. _____

d. Inform defense counsel of any papers accompanying the charges that were withheld from him by order of the convening authority. _____

10. a. If the accused is an enlisted person, ascertain from defense counsel whether he desires enlisted members on the court. If so, obtain a request signed by the accused therefor and advise the convening authority. _____

CHECKLIST FOR TRIAL COUNSEL—Continued

SECTION A—DUTIES PRIOR TO TRIAL—Continued

b. If the accused requests enlisted members, make certain that none of the enlisted persons who will sit as members of the court are members of the same unit as the accused or are junior in grade to the accused; insure that one-third of the total court membership will be enlisted persons (Art. 25(c); MCM 4). _____

c. If a military judge has been detailed to the court-martial which will try the accused, determine if the accused has submitted a written request for trial by the military judge alone. (Art. 16; MCM 4a). _____

11. Ask defense counsel how accused intends to plead. _____

12. Ascertain from the defense counsel what witnesses he will need and the earliest date he will be ready for trial. _____

13. Arrange for any necessary depositions in coordination with the defense counsel (MCM 117). _____

14. Study the elements of proof and the law relating to each offense charged (MCM, chap XXVIII). _____

15. Interview prosecution witnesses and take notes. _____

16. Interview defense witnesses other than the accused and take notes. _____

17. Arrange with appropriate company commander to have all material witnesses available for trial; take action to insure that such witnesses will not be transferred or allowed leave so as to make them unavailable. _____

18. Examine any documentary evidence pertaining to the case for accuracy, completeness, admissibility, and form (MCM 143-146). _____

19. Arrange to have any real evidence, such as knives, guns, money, clothing, etc., available for the trial; be prepared to establish reference, if necessary (app. VII(B)). _____

20. If, during the preparation of the case, new information is discovered that affects the feasibility of proceeding with the trial, advise the convening authority (MCM 44f(5)). _____

21. If a question arises as to the sanity of the accused, refer the matter to the convening authority (MCM 121). _____

22. a. Prepare proof analysis sheet (app III(A)). _____

b. Plan the order in which the evidence will be placed before the court at the trial. _____

23. Obtain and study legal authorities concerning any possible questions of law likely to arise at the trial, particularly in connection with the instructions or special findings. _____

CHECKLIST FOR TRIAL COUNSEL—Continued

SECTION A—DUTIES PRIOR TO TRIAL—Continued

24. Note any lesser offenses included in each specification and carefully analyze the expected evidence to determine which lesser offenses might be in issue. _____

25. Prepare proposed instructions or special findings. (MCM 73d). _____

26. Prepare an outline of any opening statement and final argument to be made at the trial. _____

27. Examine the order convening the court, the charge sheet, and the accompanying papers for possible grounds for challenge (MCM 62f). _____

28. Consider whether the defense may make any motions or objections and, if so, make the necessary preparation to respond to them (MCM, chap XII). _____

29. Have necessary photographs, maps, charts, etc., prepared. _____

30. Obtain official copies of price lists, regulations, orders, etc., of which the court will be requested to take judicial notice (MCM 147a). _____

31. Determine the strong points in the probable defense case and prepare to counteract them if possible. _____

32. Outline the expected testimony of each prosecution witness and the expected cross-examination of each defense witness. _____

33. Prepare an outline for the cross-examination of the accused in the event he elects to take the stand to testify. _____

34. Prepare trial notes (app III(A)). _____

35. If possible, stipulate with the defense counsel and the accused concerning unimportant or uncontested matters (app XVII). _____

36. *a.* Determine the desirability of an Article 39(a) session, if applicable, and the issues to be presented to the session. See 39. _____

b. Contact military judge to arrange time and date of the session and the uniform to be worn. _____

c. Give appropriate notice of the Article 39(a) session to defense counsel (para 2-28, AR 27-10). _____

d. Arrange for the presence of witnesses and a reporter at the Article 39(a) session. _____

37. *a.* Arrange for a military judge, if applicable. _____

b. If a court reporter is to be used, ascertain the dates that he will be available. _____

CHECKLIST FOR TRIAL COUNSEL—Continued

SECTION A—DUTIES PRIOR TO TRIAL—Continued

c. Ascertain from the president of the court the uniform to be worn (MCM 40b(1)(a)). _____

d. Confer with the military judge and/or president of the court regarding the date and time of trial (MCM 39b(3), 40b(2)). _____

38. Notify all persons concerned of the meeting of the court and the uniform to be worn, i.e., members of the court, military judge, counsel, reporter and interpreter. _____

39. Arrange for the presence of civilian witnesses; if necessary, subpoena civilian witnesses for the prosecution and the defense (MCM 115a). Arrange with their units for the presence of military witnesses (MCM 115b). _____

40. Arrange with the unit for the presence of the accused at the trial (MCM 60). _____

41. Inspect the courtroom and see that proper furniture is provided and is properly arranged (MCM, app 8b). _____

42. Secure necessary stationery items; submit proposed findings and sentence worksheets, etc., to the military judge for use by members of the court-martial and furnish copies to the defense counsel. _____

43. Have typewritten copies of the charges and specifications prepared by the reporter for the military judge, each member of the court, the accused and reporter. _____

44. Go to the courtroom early and check all arrangements. _____

SECTION B—DUTIES DURING TRIAL

45. At all times during the trial, utilize trial notes and the procedural guide for trials before general and special courts-martial (app III(A); MCM, app 8; DA Pam 27-15). _____

46. Check with the reporter concerning the time of each assembly or opening recess, adjournment, or closing. _____

47. Account for the "parties to the trial" when the court opens after closing, adjourning, or recessing. _____

SECTION C—DUTIES AFTER TRIAL

48. Arrange for proper disposition of accused, to include an armed guard if necessary (MCM 21d). _____

CHECKLIST FOR TRIAL COUNSEL—Continued

SECTION C—DUTIES AFTER TRIAL—Continued

49. Notify, in writing, the accused's commanding officer, the commanding officer of the confinement facility in which the accused is confined, and the convening authority of the outcome of the trial (MCM 44e; app XI). _____

50. Complete witness vouchers and assist witnesses in securing payment as prescribed by departmental regulations (chap 13, AR 37-106). _____

51. If original documents are to be returned, see that certified true copies or other authorized reproductions of such documents are prepared for substitution in the record of trial (MCM, app 8b). _____

52. Prepare proper descriptions or photographs of items of real evidence for inclusion in the record (MCM 138c). _____

53. Determine the number of copies of the record of trial to be prepared (MCM 49b(2)). _____

54. Turn over to the reporter or clerical assistant exhibits and allied papers to be attached to the record of trial. _____

55. Supervise the preparation of the record of trial (Art. 38(a); MCM 82a)). _____

56. *a.* Check the record of trial as it is being transcribed, and when the record has been completed, carefully review it and see that all papers are arranged and bound in the manner prescribed by secretarial regulations (MCM, app 9e, 10c). _____

b. Note, correct, and initial errors in the record of trial. _____

c. Submit the record of trial to the defense counsel for his examination and signature prior to authentication. _____

d. Special Court-Martial. _____

(1) With a military judge submit the record of trial to the military judge for authentication (MCM 83a, app 9b). _____

(2) Without a military judge—submit the record of trial to the president of the court for authentication (MCM 83a, app 9b(3)). _____

e. General Court-Martial. Submit the record of trial to the military judge for authentication (MCM 82f, app 9b(1)). _____

f. If a civilian reporter was employed, check the reporter's voucher and sign it, if it is correct. _____

g. Supply each accused with a copy of the record of trial from which any classified material has been deleted; obtain a receipt for each copy so provided and attach it to the record of trial (MCM 82g(1)). _____

CHECKLIST FOR TRIAL COUNSEL—Continued

SECTION C—DUTIES AFTER TRIAL—Continued

h. Complete the Court-Martial Data Sheet (DD Form 494). _____

i. If appropriate, include in the record a signed letter containing reasons why declassification of classified matter in the allied papers was not accomplished prior to the dispatch of the record. _____

*j. Include immediately following the chronology sheet in all records of trial by general courts-martial in which a sentence has been adjudged and in those records of trial by special courts-martial in which a bad conduct discharge has been adjudged, a statement of the accused through defense counsel that he does or does not desire appellate defense counsel or, in lieu thereof, a certificate of the defense counsel that he advised the accused of his appellate rights (Arts. 38(a), 66 and 70). _____

k. Forward the record of trial to the convening authority. _____

57. Retain all reporter's notes and other records from which the record of trial was prepared, until appellate review is completed (para 2-6, AR 27-10). _____

Appendix II

CHECKLIST FOR DEFENSE COUNSEL*

ACCUSED (Last name—First name—Middle initial)	Service Number/ SSAN	Grade	Organization
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INSTRUCTIONS

To indicate completion of the items listed, place a checkmark in the box to the right of the check list; if an item is inapplicable, place a diagonal mark in the box. If the convening authority has a Judge Advocate, correspondence and reports to him should be through the Judge Advocate.

References are to appendices of this handbook, Articles of the Uniform Code of Military Justice, and paragraphs and appendices of the Manual for Courts-Martial, United States, 1969 (Revised edition).

SECTION A—DUTIES PRIOR TO TRIAL

1. Check the charges and allied papers received from the trial counsel to assure that they are complete. _____

2. Ascertain from the indorsement to the charges and the orders convening the court whether the charges have been properly furnished to you as defense counsel. _____

3. Examine the charges and allied papers to determine whether any member of the defense has acted as accuser, investigating officer, military judge, court member, or for the prosecution in the same case. _____

4. If, because of prior participation, a member of the defense can serve only if the accused expressly requests him to do so, advise the accused of his rights in this respect and, if he wants the member to act in the case, have him sign a statement to that effect; otherwise, notify the convening authority (MCM 6a). _____

5. Interview the accused and advise him that you have been detailed as defense counsel, of your general duties, and of the confidential relationship which exists between the defense counsel and the accused. _____

6. a. Determine whether the accused desires individual counsel—civilian or military. _____

*The use of this checklist is optional. If used, it may be locally reproduced. Items marked with an * are inapplicable to a special court-martial.

CHECKLIST FOR DEFENSE COUNSEL—Continued

SECTION A—DUTIES PRIOR TO TRIAL—Continued

b. Advise the accused that civilian counsel cannot be provided at Government expense (MCM 48a). If he desires civilian counsel, assist him in making the necessary arrangements.

c. If the accused desires individual military counsel, submit an immediate written request therefor (MCM 46d, figure 4-2). _____

d. Request accused to complete written statement that he has been advised of his right to civilian or military counsel (fig 4-1). _____

7. Explain to the accused he should not discuss the case with anyone without your approval. _____

8. Check the accuracy of the data on page one of the charge sheet concerning the accused's restraint, record of service, and personal data. _____

9. Advise the accused of his rights, as follows: _____

a. Right to have enlisted personnel on the court (if accused is an enlisted person) (Art. 25(c); MCM 48f). _____

b. Right to challenges for cause and one peremptory challenge. _____

c. Right to assert any defense or objection (MCM, chap XII, XXIX). _____

d. Right to plead not guilty (MCM 70a). _____

e. Meaning and effect of a guilty plea and, if appropriate, a pretrial agreement (including the maximum punishment) (MCM 70b). _____

f. Right, before findings, to testify as a witness or to remain silent (MCM 53h, 148e, app 8b). _____

g. Right to introduce evidence in extenuation and mitigation and to testify, make an unsworn statement personally and/or through counsel, or remain silent (MCM 75c). _____

h. Right to be tried by the military judge alone if one has been detailed (MCM 4a). _____

i. Right to request convening authority to defer any confinement adjudged (MCM 88f). Prepare undated request if agreeable with accused. _____

10. Unless the accused has requested individual counsel and has indicated that he does not desire the services of detailed counsel, detailed counsel will begin the preparation of the case for trial (MCM 46d). _____

11. Analyze the charges, specifications, and pretrial investigation report. _____

12. Study the discussion contained in chapter XXVIII of the Manual to determine the essential elements of each offense charged. _____

CHECKLIST FOR DEFENSE COUNSEL—Continued

SECTION A—DUTIES PRIOR TO TRIAL—Continued

13. Impress the accused with the necessity for a full disclosure of all the facts and circumstances surrounding the offense charged. _____

14. In the event co-accused are to be defended, advise them of any conflicting interests in the conduct of their defense which would warrant a request for other counsel (MCM 48c). _____

15. Obtain from the accused the names and addresses of witnesses who may have helpful information concerning the case or his character. Contact each of these witnesses personally or write to them and obtain their version of the events that occurred or information pertaining to the accused's reputation. _____

16. Learn from the accused the location of any documentary or real evidence applicable to the case, such as check stubs, canceled checks, letters, etc., and have such evidence available for use at the trial. _____

17. If the accused has made a confession or admission concerning any of the offenses charged, determine the circumstances surrounding such confession or admission (MCM 140a). _____

18. *a.* Interview in detail witnesses for the defense. _____

b. Interview in detail witnesses for the prosecution. _____

c. Determine which prosecution witnesses probably should be, or should not be, cross-examined. _____

d. If it appears that the prosecution has not divulged all facts or witnesses known to him, make a motion for appropriate relief for such information to the convening authority or at an Article 39(a) session to the Military Judge. _____

19. *a.* Determine whether accused desires to plead guilty, not guilty, or guilty of a lesser included offense (MCM 70a). _____

b. If the accused desires to enter into a pretrial agreement, reduce the offer to writing, have accused sign it and bring the matter to the attention of the convening authority through the trial counsel (fig. 4-3). _____

20. Determine if the accused wishes to be tried by the Military Judge, if any, alone. _____

21. If the accused is an enlisted person, and he desires to have enlisted personnel on the court, prepare the necessary request for his signature and submit it to the convening authority through the trial counsel (MCM 48f). _____

22. *a.* Determine whether the military judge or any member of the court may be subject to challenge for cause. Prepare necessary voir dire examination (MCM 62f). _____

CHECKLIST FOR DEFENSE COUNSEL—Continued

SECTION A—DUTIES PRIOR TO TRIAL—Continued

b. Determine whether it will be advantageous for the accused to exercise his right to one peremptory challenge against any member of the court. _____

c. Discuss the membership of the court with the accused and determine his wishes with respect to challenges. _____

23. Determine whether there is any doubt as to accused's sanity at the time of the alleged offenses, or his mental capacity now to stand trial, and advise trial counsel accordingly (MCM chap XXIV). _____

24. Prepare trial notes (app III(B)) and take other appropriate action to prepare the case for trial. _____

25. a. Outline the essential elements of each offense charged. _____

b. Study and make appropriate notes concerning the rules of evidence applicable in the case (MCM, chap XXVII). _____

c. Determine whether each specification properly states an offense under the Code (MCM, app 6). _____

d. (1) Review and outline the expected prosecution evidence. _____

(2) Note weaknesses in the prosecution's evidence. _____

(3) Determine whether such expected evidence is sufficient to establish all elements of each offense charged beyond a reasonable doubt. _____

(4) If the expected evidence does not appear to substantiate the offenses charged, determine whether the evidence substantiates any lesser included offense. _____

e. Ascertain and carefully outline any defenses available to the accused. Advise the trial counsel of any anticipated delays. _____

f. Advise the trial counsel of the names and addresses of witnesses which the defense desires to have present at the trial. _____

g. (1) Plan the order in which evidence will be introduced. _____

(2) Outline the testimony of each defense witness. _____

(3) Outline cross-examination of each prosecution witness. _____

h. Arrange with the trial counsel for the taking of necessary depositions. _____

i. Depending on the desire of the accused, stipulate with the trial counsel concerning unimportant or uncontested matters (app XVII). _____

j. If appropriate, prepare a tentative outline of the opening statement. _____

k. If any motions are to be made, prepare the motions in detail and outline supporting legal authorities and supporting evidence (MCM, chap XII). _____

CHECKLIST FOR DEFENSE COUNSEL—Continued

SECTION A—DUTIES PRIOR TO TRIAL—Continued

- l.* Have necessary photographs, maps, charts, etc., prepared. _____
- m.* Obtain official copies of price lists, regulations, orders, etc., of which the court will be requested to take judicial notice (MCM 147a). _____
- n.* Prepare a tentative final argument. _____
- o.* (1) Prepare a detailed summary of accused's civilian and military background. _____
- (2) Outline available evidence in extenuation and mitigation to be presented in the event findings of guilty are announced. _____
- p.* Check for accuracy and admissibility any evidence of previous convictions (MCM 75b). _____
- q.* Note the lesser offenses included in each specification and analyze the expected evidence to determine which lesser offenses might be in issue. _____
- r.* Determine requested instructions or special findings as appropriate and furnish same to the military judge (or president of the special court-martial without a military judge) with copies to trial counsel (app III(B)). _____
- s.* Instruct accused as to his appearance and the manner in which he should conduct himself during the trial and make certain that he has a neat and appropriate uniform complete with all authorized accoutrements. _____
- t.* Obtain and prepare an outline of such legal authorities as may be necessary to support defense contentions. _____
- 26. *a.* Determine what matters, if any, to present at an Article 39(a) session: _____
 - (1) Motions for appropriate relief (MCM 69a). _____
 - (2) Motions in bar of trial (MCM 68a). _____
 - (3) Objections to admissibility of government evidence (confessions, fruits of illegal search, etc.). _____
 - (4) Challenges for cause (MCM 62f). _____
 - (5) Present request for trial by military judge without court members (MCM 4a). _____
 - (6) Other matters. _____
- b.* Inform trial counsel of defense request for an Article 39(a) session and matters to be presented, if applicable. _____
- c.* Insure trial notes include all matters to be taken up at the Article 39(a) session and are so designated. _____

CHECKLIST FOR DEFENSE COUNSEL—Continued

SECTION B—DUTIES DURING TRIAL

27. The defense counsel will at all times during the trial, to include the Article 39(a) session, utilize his trial notes and follow the approved procedure for trials before general and special courts-martial set forth in appendix 8 of the Manual and DA Pam 27-15, as appropriate. _____

SECTION C—DUTIES AFTER TRIAL

28. If the accused is found guilty and is sentenced, consider preparing and presenting to the court a clemency petition (MCM 48k(1)). _____

29. If confinement at hard labor has been adjudged, determine whether to submit a request for its deferment to the convening authority (MCM 48k(4)). _____

30. Examine the record of trial to see if it correctly reflects all of the proceedings before the court. _____

31. As appropriate, advise the accused of his appellate rights and submit to the trial counsel a signed statement of the accused that he does or does not desire appellate defense counsel or, in lieu thereof, a certificate that the accused has been advised of his appellate rights (app XXI, XXII; MCM 48k(3)). _____

32. If appropriate, prepare and submit an appellate brief (MCM 48k(2)). _____

33. Examine post trial review and rebut it appropriately. _____

34. Examine action of convening authority. _____

Appendix III
ILLUSTRATIVE TRIAL NOTES
(A) Trial Counsel

1. Preliminary matters (prior to assembly). (The information contained under this heading must be supplied by the trial counsel at trial as he follows the trial procedure guide. This information may be penciled in the margin of the procedural guide or written on a separate sheet of paper clipped to the guide or entered by grease pencil on acetate covered copy of the trial guide. Regardless of which method the trial counsel adopts, he should never have to delay the proceedings while he searches for this information among the papers on his desk.)

a. Orders: Court convened by Court Martial Convening Order No. 13, 2 Aug 69, Hq, Ft Blank, Fort Blank, Missouri.

b. Military judge and members (to be completed in order of rank as court assembles):

PRESENT

LTC Purple, Military Judge

COL Silver

LTC Brown

MAJ Green

MAJ Pink

CPT Blue

1LT Orange

2LT Gold

2LT White

CPT Victor, TC

1LT Helper, Asst TC

CPT Winner, DC

1LT Aider, Asst DC

ABSENT

MAJ Pink (Excused by the convening authority)

2LT White (Excused by the convening authority)

- c. Accused: Sergeant Peter Arnold, Co A, 30th Sig Bn
- d. Court reporter: Rapid Wright.
- e. Legal qualifications of prosecution are correctly stated in convening orders.
- f. Prosecution counsel not disqualified.
- g. Accused did not submit written request for enlisted court members or trial by military judge alone.
- h. General nature of charges:
 - (1) Desertion on 4 Jun 68 from Fort Blank until apprehension 13 May 69 at Toyson, Missouri, in violation of Article 85. (page 2 of Charge Sheet)
 - (2) Preferred by CPT Michael Coyle. (page 3 Charge Sheet)
 - (3) Investigated by MAJ Roger Fox (DD Form 457)
 - (4) Forwarded by LTC Morton Beale, who recommended trial. (Letter of transmittal and indorsements)
 - (5) Records disclose no grounds for challenge.
 - (6) No member or military judge to be called as witness for prosecution.
- i. Challenges by prosecution:
 - (1) For cause: None.
 - (2) Peremptory: None.
- j. Charges served on accused on 2 Jul 69.

2. Anticipated defense pleas and motions.

- a. Pleas: Not guilty, but guilty of the lesser included offense of AWOL.
 - b. Motions: Motion for speedy trial: Account for delay (13 May 69—Aug 69).
 - (1) Accused returned to military control: 13 May (Morning Report)
 - (2) Charges preferred: 15 May (Date of affidavit or para 3 of Charge Sheet DD 458)
 - (3) Charges received at Bn. Hq. 19 May (Date of receipt of letter of transmittal)
 - (4) Charges given to inves. off. 20 May (Date of indorsement)
 - (5) Art. 32 Inves. completed 17 Jun (Date of DD Form 457)
- 28 days lapse: (from investigating officer)
- 6 days-----testimony
 - 4 days-----D.C. unavailable, other cases
 - 14 days-----delay requested by DC
 - 4 days-----transcribing verbatim record of Art. 32
 - 28 days

- (6) Case referred to trial by GCM 30 Jun (Page 3 of 1st Ind DD 458)
13 days lapse: Administrative and clerical work and preparation of advice
- (7) Charges served on accused 2 Jul (Page 3 DD Form 458)
Lapse of time until trial: Division Field Maneuvers 6 Jul—20 Jul 69. Military Judge not available between 20 Jul 69 and date of trial.

3. Proof analysis sheet.

Elements To Be Proved (Arts. 85, 86; MCM 164, 165; DA Pam 27-9)

(a) Accused went AWOL from Co. A, 20th Sig. Bn, at Fort Blank, on 4 June 68.

(b) Accused intended at time of absenting himself or at some time during absence to remain away permanently from his organization.

(c) Desertion terminated on 13 May 1969 by apprehension.

Evidence To Prove

Authenticated Extract Copy of Morning Report of Co. A, 20 Sig. Bn for 4 Jun 68.

Pete Jones will identify accused and will testify that he hired accused on 30 Jun 68, as a mechanic, that accused told him he had "gone over the hill" and would never return to the Army, and that accused to his knowledge always wore civilian clothing. See stipulated testimony of Policeman John Smith. Judicial notice that Toyson is 70 miles from Fort Blank.

Authenticated Extract Copy of Morning Report of Co. A, 20 Sig. Bn, for 13 May 69. Written stipulation of testimony of Policeman John Smith to the effect that he took accused into custody at Jones' garage on 13 May 69.

4. Opening statement. The prosecution will show that on or about 4 June 68, accused, Sergeant Peter Arnold, went AWOL from his unit, Co. A, 20 Sig. Bn, Fort Blank, Mo., and that he remained absent until he was apprehended by civilian police at Toyson, Missouri, and returned to military control on 13 May 69—an absence of over 11 months. The evidence also will show that at the time Sergeant Arnold was apprehended he was dressed in civilian clothing and had been gainfully employed as a mechanic for an automobile agency in the town of Toyson for practically the entire period of his absence.

5. Evidence (in order of introduction).

a. Offer an authenticated extract copy of morning report of Co. A, 20th Sig. Bn, for 4 Jun 68. (This exhibit shows accused, Sergeant Arnold, "Dy to AWOL, 0600.") *Prosecution Exhibit #1.*

b. Peter Jones, shop foreman, Jones Motor Co., Toyson, Mo. Jones will testify as follows: "He knows accused, Arnold . . . identifies him . . . met

accused 30 Jun 68 . . . accused wanted mechanic's job . . . hired accused 30 Jun 68 . . . accused worked for him since that date . . . conversation with accused, 12 May 69 . . . accused said 'he had been in Army . . . became disgusted, gone over hill . . . said he wanted no part of Army and would never return to it' . . . called police station 13 May 69 because he did not want someone who was AWOL working for him . . . policeman came . . . took Arnold away . . . heard Arnold say to policeman he was AWOL . . . Arnold to his knowledge always wore civilian clothes."

c. Offer the written stipulation of the testimony which John Smith, policeman, Toyson, Mo., would give if he were present. *Prosecution Exhibit #2.*

d. Offer in evidence authenticated extract copy of morning report of Co. A, 20th Sig. Bn, for 13 May 69. *Prosecution Exhibit #3.*

e. Request court to take judicial notice that Toyson is 70 miles from Fort Blank.

f. Proposed cross-examination of accused. "Absented himself 4 Jun 68 . . . did not have authority to be absent . . . remained AWOL until apprehended on 13 May 69 . . . did not contact Army authorities during absence . . . wore civilian clothes . . . did not contact Red Cross or chaplain . . . knew Red Cross representative and chaplain were on post at Fort Blank. . . . Made no effort to seek assistance from CO or other official sources with personal problems.

6. *Argument.* The prosecution has produced competent evidence showing that on 4 Jun 68 the accused, Arnold, deserted the service of the United States and remained absent until he was apprehended by the civilian police and turned over to the MP's at Toyson, Mo. on 13 May 69. Prosecution Exhibit 1, the extract of the morning report of the accused's unit, shows that he absented himself without authority from that unit on 4 Jun 68. The facts and circumstances surrounding the apprehension of the accused and his return to military control at Toyson, Mo. on 13 May 69, were proved by the stipulation concerning the testimony of Policeman Smith and by the testimony of Peter Jones. Concerning the question of whether the accused intended to remain absent permanently from his place of service, the record clearly shows that such an intent was in his mind. This intent may be inferred by the court from these facts in the record: (1) Accused remained absent from his organization for a long period of time without turning himself in at a military installation; (2) He secured private employment almost immediately after he absented himself; (3) He worked at a civilian job during his absence; (4) In addition, the conversation between the accused and Peter Jones, the shop foreman, in which Arnold said that he "wanted no part of the Army and would never return" clearly indicates the intent not to return to military service.

7. *Instructions or special findings* (To be attached as separate inclosures.)

a. Prosecution's proposed instruction on the elements of desertion in the case of *United States v. SGT Peter Arnold*, Co. A, 20th Sig. Bn:

The specification charges the accused with desertion, in violation of Article 85, which provides, in part, that any member of the armed forces of the United States who, without proper authority, goes or remains absent

from his organization with intent to remain away therefrom permanently is guilty of desertion.

The court is advised that, to find the accused guilty of the specification and charge, it must be satisfied by legal and competent evidence beyond a reasonable doubt:

- (i) That, at the time and place alleged, the accused absented himself from his organization without proper authority, as alleged;
- (ii) That the accused intended at the time of absenting himself or at some time during his absence to remain away permanently from his organization; and
- (iii) That the accused's desertion, if any, was of a duration and was terminated by apprehension, as alleged.

b. Prosecution's proposed instruction on the lesser included offense of absence without leave in the case of *United States v. SGT Peter Arnold, Co. A, 20th Sig. Bn*:

The court is further advised that included within desertion as alleged in the specification is the lesser offense of absence without leave, in violation of Article 86, which provides, in part, that any member of the armed forces who, without proper authority, absents himself or remains absent from his organization shall be punished as a court-martial may direct. The elements of absence without leave are as follows:

- (i) That, at the time and place alleged, the accused absented himself from his organization, as alleged, and
- (ii) That such absence was without proper authority from anyone competent to give him such authority and was of the duration alleged.

You are further advised that if you have a reasonable doubt that the accused is guilty of desertion, but you are satisfied by legal and competent evidence beyond a reasonable doubt that the accused is guilty of the lesser included offense of absence without authority, you may nevertheless reach a finding of guilty, but in this event it will be necessary for you to modify the specification and the charge by exceptions and substitutions so that they will reflect findings as to which you have no reasonable doubt.

c. For special and general findings when the accused is tried by military judge alone see appendix 8f, MCM, 1969 (Rev.).

(B) Defense Counsel

1. Preliminary matters.

a. Accused.

- (1) Name and grade: Peter Arnold, Sergeant (E-5)
- (2) Organization: Co. A, 20th Sig. Bn.
- (3) Station: Fort Blank, Mo.

b. Accused to be defended by detailed defense counsel and detailed assistant defense counsel.

c. Legal qualifications of detailed members of defense correctly stated in convening orders.

d. No member of the defense is disqualified.

2. Charge. Violation of the Uniform Code of Military Justice, Article 85.

Specification. Desertion (with intent to remain absent permanently); 4 Jun 68 to 13 May 69 (11 months, 10 days), terminated by apprehension.

3. Lesser included offenses. Absence without leave.

4. Elements of offenses charged.

a. Accused went AWOL from Co. A, 20th Sig. Bn at Ft. Blank, on 4 Jun 68.

b. Accused intended at time of absencing himself, or at some time during absence, to remain away permanently from his organization.

c. Desertion terminated by apprehension by civilian police at Toyson, Mo. Accused returned to military control on 13 May 69.

5. Challenges by defense.

a. For cause: None

b. Peremptory: 1LT John C. Orange, 3d Bn, 1st Infantry.

6. Motion to dismiss.

a. The accused moves to dismiss the charge and specification for lack of speedy trial.

b. Argument: Evidence is clear that from the time of the return of accused to military control on 13 May 1969 until today, — August 1969, accused was placed in immediate pretrial confinement. Accused, an experienced noncommissioned officer with a spotless record . . . given no hearing on release from confinement . . . Confinement lasted — days . . . No "immediate" steps to try accused. Conclusion: a *per se* violation of the Sixth Amendment to the Constitution as well as of the letter and spirit of Articles 10 and 33, UCMJ . . . An unexplainable, unconscionable deprivation of fundamental liberty without relief or trial.

7. Pleas.

a. To the specification: Guilty, except the words "and with intent to remain away therefrom permanently," "in desertion," and "he was apprehended." To the excepted words "not guilty."

b. To the charge: Not guilty, but guilty of a violation of Article 86.

8. Prosecution witnesses. Refer to section 11, *infra*.

9. Motion for finding of not guilty. None.

10. Opening statement. The accused, by his pleas in this case, admits that he was absent without proper authority from his organization at Ft. Blank,

Mo. Hence, the only disputed question in this case is whether the accused intended to remain absent permanently from his organization. The defense will show that this was not his intent. In fact, a contrary intent will be shown by the testimony of accused, his wife, and the stipulated testimony of his father-in-law. Concerning the admitted offense of a AWOL, the defense will show, for the consideration of the court, the existence of extenuating and mitigating circumstances.

11. Evidence.

a. Cross-examination of Peter Jones: That accused was a good and reliable worker; that accused told him several times of his need for money to meet medical and hospital expenses.

b. Offer in evidence, as Defense Exhibit A, a written stipulation of the testimony which Mr. John Johnson, Toyson, Mo., would give if he were present.

c. Mrs. Irma Arnold of Mankato, Mo., the wife of accused, will testify as follows: "Wife of Peter Arnold . . . resided with father in Toyson . . . husband in Army at Ft. Blank . . . husband only able to come home one week-end each month . . . married 8 years . . . has 3 children . . . she became very ill on 15 May 68 . . . on 20 May 68 she became worse . . . taken to hospital . . . emergency operation . . . on 3 Jun 68 husband visited her at hospital in Toyson . . . in hospital 8 weeks . . . special nurse 4 weeks . . . after return from hospital it was necessary to have help at home . . . care for her, children, father . . . husband said he was AWOL . . . accused worried about his status . . . said many times that he would return to his unit as soon as he paid bills . . . planned to return after payday 1 Jun 69."

d. Accused, SGT Peter Arnold, Co. A, 20th Sig. Bn, Ft. Blank, Mo. will testify as follows: "He is the accused in the case . . . on 4 Jun 68 went AWOL from his unit at Ft. Blank, Mo. . . on 15 May 68 wife taken ill . . . asked one of the medical aidmen in battalion dispensary if wife could be cared for in station hospital and the medical aid man told him the station hospital had no facilities for treatment of dependents except those who lived on the post . . . previously had tried to get quarters on the post but they were unavailable . . . asked unit commander for leave . . . not granted . . . was worried . . . on 20 May 68 wife's condition became worse . . . she was taken to hospital . . . again requested leave . . . no success . . . could only get one week-end pass each month . . . left Ft. Blank on pass on 2 Jun . . . went to Toyson intending to return to camp in time for reveille on 4 June . . . found wife very ill . . . wife in hospital 8 weeks . . . expenses high . . . help needed for care of children and father-in-law . . . thought it necessary to get a job, stay home and save the cost of a maid at night . . . no intent to desert . . . intended to return when wife well . . . bills paid . . . hospital and doctor bills totaled \$800 . . . last of bills paid 1 May 69 . . . likes Army career . . . never told Pete Jones he wanted no part of the Army and would never return to it . . . told him that there are times when a person feels that he wants no part of the Army."

e. Offer in evidence an oral stipulation as follows: On 21 May 68, an emergency operation was performed at the Toyson General Hospital on Mrs. Irma Arnold, the wife of the accused in this case; that Mrs. Arnold was in a civilian hospital for 8 weeks after the operation and required a special

nurse for 4 weeks of this time; that the hospital bill was \$600 and the doctor bill was \$200; that these bills have been paid by the accused at the rate of approximately \$75 per month, the last payment on the hospital bill having been made on 1 May 69. The expenses incident to the illness and hospitalization of Mrs. Arnold were not covered by the Dependent Medical Care Act (10 U.S.C. 1071-1087).

12. Argument. Before the court properly can find an accused guilty of a charge of desertion the prosecution must show beyond a reasonable doubt that the accused intended to absent himself permanently from his organization. What does the evidence show in this case? There is prosecution testimony by the shop foreman, Peter Jones, to the effect that accused told him he was AWOL from his unit at Ft. Blank, Mo., and that he wanted no part of the Army and would never return. Arnold has denied making this statement. In support of his contention that he at all times intended to return to his organization, accused has testified as to his intent to return and has introduced to the court the corroborating testimony of his wife and, by stipulation, the corroborating testimony of his father-in-law. The court will recall that these corroborating witnesses both stated that on numerous occasions accused discussed his problems with them and clearly indicated that as soon as the family was out of debt he would return to his unit. The uncontradicted defense evidence shows the accused made regular monthly payments on the indebtedness and had paid his medical bills in full by the first of May. The expected time of his return was thus based upon the happening of a certain event—the payment of his bills. In fact, according to the testimony of the defense witnesses, the accused, having accomplished his purpose in accordance with his plans, was preparing to return to Ft. Blank on 1 Jun 69. Accused has admitted that he went AWOL. He now realizes that the procedure he adopted was wrong, however, his action was motivated solely by a genuine and worthy concern for the welfare of his wife and family. The court has heard the uncontroverted evidence of the defense concerning the serious and lengthy illness of Mrs. Arnold and may properly take these extenuating matters into consideration. Note also that the accused is a good worker and mechanic.

13. Instructions. (To be attached as separate inclosures.)

Defense's proposed instruction in the case of *United States v. SGT Peter Arnold*, Co. A, 20th Sig. Bn:

You are instructed that the accused's plea of guilty of the lesser included offense of absence without leave will warrant a finding of guilty of that offense without further proof, but that a plea of guilty of absence without leave to a charge of desertion is not itself a sufficient basis for a conviction of desertion. The court is instructed that no inference of an intent to remain absent permanently arises from any admission involved in the plea of guilty to the lesser included offense of absence without leave, and to warrant a conviction of desertion the evidence must establish this intent beyond reasonable doubt.

14. Matters in mitigation.

a. Accused will testify as follows: "Served from 19 Aug 52 to 21 Nov 55, with honorable discharge . . . tank mechanic . . . corporal in Jun 53 . . .

sergeant in Dec 53 . . . good conduct medal . . . never court-martialed . . . reenlisted in Jul 60, again in July 1966.

b. Argument as to sentence: Prior spotless record . . . his misconduct was caused by temporary disregard of possible consequences when he was faced with overwhelming difficulties . . . no reason to believe accused requires confinement to assure his rehabilitation to perform honorable and valuable service . . . if confinement or punitive discharge is imposed, it will result in severe punishment of a man for taking care of his family; it will punish his family more than it will punish the accused . . . recommend that any punishment imposed not extend to confinement or punitive discharge.

15. *Visual aids.* None.

Appendix IV

MOTIONS AT THE ARTICLE 39(a) SESSION

(A) *Motion to dismiss because of former punishment.* Preceding the trial of Private Jones for leaving his post as a sentinel before he was regularly relieved, in time of peace, in violation of Article 113, the defense moved that the charges be dismissed on the ground of former punishment. (In a special court-martial without a military judge, the motion must be made at trial prior to entering the pleas.) At the session the defense showed through the testimony of the accused's company commander that on the morning after the alleged offense the company commander restricted the accused to the limits of the company area, that thereafter he did not permit the accused to participate in the regular training of the company, that the accused remained in such restriction for a period of 7 days, that on each of these days the accused performed kitchen police duties from about 0500 hours to about 2000 hours, and that the company commander would not have so restricted the accused had he not been found off his sentinel post. The duty roster of the company was introduced to show that the accused had received no credit on the roster for performing kitchen police duties during the period of restriction. On cross-examination the company commander testified that he had not intended to punish the accused under Article 15, that he had not advised the accused that he was so doing, and that he felt it necessary to restrict the accused pending trial. To keep the accused occupied, the company commander directed the accused be assigned to kitchen police duties. The defense argued that the accused had in fact been informally punished for his alleged offense by the company commander under Article 15. The prosecution argued that the testimony of the company commander indicated that the accused was not punished under Article 15. The prosecution also argued that, even assuming the accused was so punished, the offense charged was not a minor offense under the provisions of paragraph 128b of the Manual, as it involves a greater degree of criminality than the average offense tried by a summary court-martial.

Whether the offense charged was a minor offense as defined by paragraph 128b of the Manual depends on all the facts and circumstances surrounding its commission. This is a borderline case. While the maximum punishment if tried by a GCM would be a punitive discharge and 1 year's confinement, it is easy to think of circumstances where a sentinel offense would be "minor," e.g., interior guard in a non-sensitive area. The fact that the company commander disclaimed any intent to impose punishment is not controlling if objectively his purpose was punitive in nature, *U. S. v. McCarthy*, 23 CMR 561 (1957). See also *U. S. v. Fratwell*, 11 USCMA 377, 29 CMR 193 (1960).

(B) *Motion for severance.* The accused were arraigned at a common trial upon the following charges and specifications:

CHARGE: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Private Robert D. Crosley, U. S. Army, 1st Squadron, 21st Cavalry, did, at Fort Blank, Missouri, on or about 17 July 1969, wrongfully have in his possession five ounces, more or less, of a habit-forming narcotic drug, to wit: heroin.

CHARGE: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Private Rufus Black, U. S. Army, 1st Squadron, 21st Cavalry, did, at Fort Blank, Missouri, on or about 17 July 1969, wrongfully have in his possession two ounces, more or less, of a habit-forming narcotic drug, to wit: heroin.

Each accused was represented by his own individual counsel. At the Article 39(a) session before pleas were entered, accused Crosley, through his counsel, moved for a severance "on the ground that his defense is antagonistic to the defense of accused Black."

The determination of whether the defenses are in fact antagonistic may be made at the Article 39(a) session. Normally, at a special court-martial without a military judge, the president should hear this motion outside the presence of the other members. In the latter case, defense counsel should first request for a severance from the convening authority prior to assembly of the court.

MJ: Will defense counsel state the substance of the antagonistic defenses?

DC: (for Crosley) It is the contention of accused Crosley that the heroin alleged to have been found in his possession was given to him by accused Black for safe-keeping several days before it was found in Crosley's duffel bag by the battery commander. It is also Crosley's contention that the heroin was wrapped in a small package and that he was not informed by Black as to the contents of the package and did not know that the package contained heroin until after it had been found by the battery commander. On the other hand, accused Black denies ever having had possession of heroin and contends that the heroin found in a similar package in the glove compartment of his jeep had been placed there without his knowledge.

MJ: The motion for severance is granted. Has trial counsel a suggestion as to which accused should be tried first?

TC: The prosecution would like to proceed now with the trial of accused Black.

(*Note.* If the accused were alleged to have been "acting jointly and in pursuance of a common intent" these words should be stricken and the words "in conjunction with" inserted (para 8, app 6a, MCM)).

MJ: Is this satisfactory to defense counsel?

DC: (for Black) It is.

(C) *Motion for appropriate relief because of misleading defect in specification.* The accused was arraigned on 11 August 1969 on the following charge and specification:

CHARGE: Violation of the Uniform Code of Military Justice, Article 111.

Specification: In that Private Frank D. Black, U. S. Army, Company D, 66th Infantry, did, at Fort Blank, Missouri, on or about 1 July 1969, in the motor pool area operate a vehicle to wit: a truck, in a reckless manner while drunk and did thereby cause said vehicle to strike and injure Donald E. Carter.

At the Article 39(a) session before pleas were entered, the defense moved for appropriate relief, stating that the specification did not fairly apprise the accused of the particular offense charged, in that drunken driving and reckless driving are separate offenses and the specification might be interpreted as alleging either or both. The defense counsel contended further that if it was intended to charge the accused with reckless driving, the specific acts or omissions of the accused constituting reckless driving should be alleged in the specification.

As the specification is duplicitous and misleading in the manner indicated by defense counsel, the military judge should take the action indicated below:

MJ: The motion for appropriate relief is granted. Is trial counsel prepared to propose an appropriate amendment to the specification?

TC: I propose that the specification be amended to allege drunken driving by deleting the words "in a reckless manner."

MJ: Let the record show that the specification is formally amended by striking out the words "in a reckless manner." Is defense counsel now prepared to defend the accused on the specification as amended?

DC: The accused requests a continuance to 15 August 1969 to prepare the defense.

MJ: Is a continuance to 15 August 1969 satisfactory to trial counsel?

TC: It is.

MJ: The trial will be continued to 15 August 1969. Has the prosecution any other cases to try at this time?

TC: I have nothing further.

The Article 39(a) hearing adjourned at 0930 hours, 11 August 1969.

Appendix V

VOIR DIRE EXAMINATION

Some suggested questions in areas of inquiry commonly encountered are listed below. For an analysis of the permissible scope of voir dire see Holdaway, *Voir Dire—A Neglected Tool of Advocacy*, 40 Mil. L. Rev. 1 (1968).

(A) Questions concerning law.

- Q. Do you agree with the rule of law that the accused is presumed to be innocent until his guilt is established beyond reasonable doubt?
- Q. Are you willing to follow the instructions of the military judge?
- Q. Does the fact that charges have been referred predispose you to a belief that the accused is guilty?
- Q. If you determine that there is a reasonable doubt as to the accused's sanity, will you acquit, even though you might feel he committed the act alleged?

(B) Questions concerning expected testimony.

1. Police

- Q. Would you give more weight to (or would you believe) the testimony of a policeman solely because he is a policeman?

2. Officer

- Q. Would you give more weight to (or would you believe) the testimony of an Army officer, solely because of his rank?

3. Accused

- Q. Would you tend to disbelieve (or give less weight) to the testimony of the accused, bearing in mind his interest in the case, solely because he is the accused?

4. Accomplice or convict

- Q. If a witness who is a/an (convict) (accomplice) testifies, will you give such weight to his testimony as allowed by law regardless of the (conviction) (complicity)?

(C) Sentence.

- Q. Would you feel obligated, regardless of extenuation and mitigation, to adjudge a discharge because of the nature of the offense alleged?
- Q. Would you vote to adjudge a discharge solely because the case has been referred to a general court-martial?

(D) Deliberation of the court—directed to junior members.

- Q. LT _____, there are several officers of higher rank on the court than yourself. During the deliberations of the court will you allow yourself to be influenced by the opinions of the senior members based solely on their superior rank?

Appendix VI

DESCRIBING WITNESSES' GESTURES

- A. I would say it was about as far as from here to the door in the rear of the courtroom.
- TC: Will the defense agree that the distance indicated by the witness is about 30 feet?
- DC: I would agree that it is between 25 and 30 feet.
- TC: Let the record show that the distance indicated by the witness is between 25 and 30 feet.
- A. Then he reached in his pocket like this, and took out a knife. He opened it, held it like this and began to walk toward the top kick, like this.
- TC: Let the record show that as the witness testified, he put his right hand in his right front trousers pocket and then withdrew his right hand from his pocket, held his hand at his right side about belt high, assumed a slightly crouching position, and walked slowly forward. Is this agreeable to the defense?
- DC: No objection.
- MJ or PRES: The record may so indicate.

Appendix VII

INTRODUCTION OF DOCUMENTARY AND REAL EVIDENCE

(A) *Documentary.* The following are examples of the manner in which the more common types of documentary evidence may be introduced in evidence by the trial counsel and the defense counsel. Rulings are made by the military judge or president of a special court-martial without a military judge. The following illustrations contain rulings by the military judge. In a special court-martial without a military judge, the president's rulings may be final or subject to objection by the other members, depending on the nature of the matter in question. For a discussion of this subject, see paragraph 57 of the Manual and section I, DA Pam 27-15, Trial Guide for the Special Court-Martial.

1. Authenticated extract copies of morning reports. See MCM 143, 144.

TC: Request that the reporter mark this exhibit Prosecution Exhibit 1 for identification.

REPORTER: This will be Prosecution Exhibit 1 for identification.

(NOTE: The exhibit is shown to the defense and the military judge.)

TC: Prosecution Exhibit 1 for identification is offered in evidence as Prosecution Exhibit 1. Request permission to read it to the court.

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

MJ: The objection of defense counsel is overruled (sustained). [Prosecution Exhibit 1 for identification is admitted in evidence as Prosecution Exhibit 1. You may read it to the court.]

NOTE. This procedure is applicable to a duly authenticated copy of any official record. For example, confinement could be shown by an authenticated extract copy of the guard report; previous convictions could be shown by an authenticated extract copy of the accused's service record. The document is in effect authenticated by judicial notice of the custodian's signature.

2. Checks. See MCM 143a.

TC: You stated that the accused bought the radio. What did he do then, if anything?

A. He wrote a check in payment for it and gave it to me.

TC: Request that the reporter mark this exhibit Prosecution exhibit 2 for identification.

REPORTER: This will be Prosecution Exhibit 2 for identification.

(NOTE: The exhibit is shown to the defense.)

TC (TO WITNESS): I hand you Prosecution Exhibit 2 for identification. Do you recognize this exhibit?

- A. Yes, that's the check the accused gave me.
- Q. Do you know who signed the check?
- A. Yes.
- Q. Who signed it?
- A. The accused did.
- Q. How do you know that it is the accused's signature?
- A. He signed it in front of me.
- Q. Referring to the reverse side of the check, Prosecution Exhibit 2 for identification, do you know whose signature appears there?
- A. Yes, mine. I indorsed the check before I deposited it to my account in the bank.
- Q. Did you ever see the check, Prosecution Exhibit 2 for identification, after you deposited it in the bank?
- A. Yes, it was returned to me by the bank a few days later.
- Q. Did you ever receive payment on the check?
- A. No.
- TC: Prosecution Exhibit 2 for identification is offered in evidence as Prosecution Exhibit 2.
- DC: (No objection.) (I object because . . .)
- MJ: The objection of defense counsel is overruled (sustained). [Prosecution Exhibit 2 for identification is admitted in evidence as Prosecution Exhibit 2].

3. *Letters.* See MCM 143b.

- TC: After the check, Prosecution Exhibit 2, had been returned to you by the bank, what, if anything, did you do?
- A. I wrote a letter to accused advising him that his check had been returned to me by the bank. A few weeks later I received a letter from the accused in answer to my letter.
- TC: Request that the reporter mark this Prosecution Exhibit 3 for identification.
- REPORTER: This will be Prosecution Exhibit 3 for identification.
(NOTE: The exhibit is shown to the defense.)
- TC: (TO WITNESS) I hand you Prosecution Exhibit 3 for identification. Do you recognize this exhibit?
- A. Yes.
- TC: How do you recognize it?
- A. It's the letter I received from the accused concerning his check. I am familiar with his handwriting and recognize his signature.
- Q. How did you receive that letter, Prosecution Exhibit 3, for identification?
- A. It came through the regular mail.
- TC: Prosecution Exhibit 3 for identification is offered in evidence as Prosecution Exhibit 3.
- DC: (No objection.) (I object because. . .)

MJ: The objection of defense counsel is overruled (sustained). [Prosecution Exhibit 3 for identification is admitted in evidence as Prosecution Exhibit 3].

4. Photographs. See MCM 144e.

DC: On 16 August 1969, did you go to the motor pool of the 20th Signal Battalion?

A. Yes, sir.

Q. What did you do there, if anything?

A. I took a photograph of a jeep in the parking lot there.

DC: Request that the reporter mark this Defense Exhibit A for identification.

REPORTER: This will be Defense Exhibit A for identification.

(NOTE: The exhibit is shown to the trial counsel.)

DC: (TO WITNESS) I hand you Defense Exhibit A for identification. Do you recognize it?

A. Yes, sir. I do.

Q. What is it?

A. That is the photograph which I took on 16 August 1969 of a jeep that was parked in the motor pool of the 20th Signal Battalion.

Q. Is Defense Exhibit A for identification an accurate representation of the jeep as it looked to you at the time the picture was taken?

A. Yes, sir.

DC: Defense Exhibit A for identification is offered in evidence as Defense Exhibit A.

TC: I object because it has not been shown that this jeep, photographed on 16 August 1969, is the same jeep which was involved in the accident on the evening of 15 August 1969.

MJ: The objection of trial counsel is overruled (sustained). [Defense Exhibit A for identification is admitted in evidence as Defense Exhibit A].

5. Maps, sketches, and charts. Counsel must keep in mind at every stage of the trial that while the court is present and can see what occurs, the reviewing authorities are limited to what appears in the record. Therefore, if a sketch appears on a blackboard or easel, and thus cannot be attached to the record of trial, an accurate reproduction of the matter shown thereon must be made and included in the record of trial. The following illustrates the proper use of a small sketch which has been introduced in evidence:

TC: (TO WITNESS) Captain Jones can you point out on Prosecution Exhibit 5 where you were standing at the time you saw the accused?

A. Yes, sir. Right here at the corner of this building.

Q. Take this red pencil and mark the spot with the capital letter "A."

A. May the record reflect the witness placed a red capital A on the exhibit.

- Q. Can you point out on Prosecution Exhibit 5 the place where the accused was when you first saw him?
- A. Yes, sir. He was right about here, walking north.
- Q. Mark that spot "B" with the red pencil.
- A. Let the record reflect the witness marked the exhibit as requested.
- Q. Now will you draw a line with the red pencil indicating the route you saw the accused take and indicate with an arrow on that line the direction of travel.
- A. Well, he went along the side of this building; then he crossed over this field and entered this building by the side door. It is requested that the record indicate that Capt. Jones marked the route upon Prosecution Exhibit 5 with a red pencil.
- Q. Please mark with the letter "C" the place where he entered the door.
- A. May the record reflect the witness complied with counsel's request.

6. Business entry. See MCM 144c.

(In a murder prosecution, investigators have testified as to their observations at the scene of the crime and have identified Prosecution Exhibit 8 for identification, a .38 caliber Smith and Wesson revolver, Serial No. 1234567, as the pistol found at the scene of the crime. No evidence has been presented concerning ownership.)

- Q. Will you state your name, address, and occupation, please.
- A. Sally Write, 614 Lane Avenue, Smithville, Missouri. I work as a bookkeeper and clerk for the Post Pistol Club.
- Q. Is that Post Pistol Club here at Fort Blank?
- A. Yes.
- Q. As bookkeeper and clerk at the Pistol Club, do you have any duties to perform regarding registration of firearms?
- A. Yes, I do, I am charged with responsibility of maintaining the files on registration of firearms and automobiles, and assist the other clerk in his preparation.
- Q. Will you explain the procedure for a firearm's registration?
- A. Yes. Any member of the club who has a privately owned firearm which he wishes to use on our range is required to register it with the club prior to using it on the base or participating in club sponsored matches. The member must bring the gun in and have a Pistol Club Form 2 prepared by one of the clerks from information he furnishes us after he identifies himself. He then signs it and it is placed in our files.

TC: Request the reporter mark this as Prosecution Exhibit #9 for identification (handing document to reporter).

REPORTER: This will be Prosecution Exhibit 9 for identification.

TC: (Hands to defense counsel.) Let the record reflect that Prosecution Exhibit 9 for identification has been shown to the defense.

- Q. Miss Write, I show you Prosecution Exhibit 9 for identification and ask you if you recognize it?

- A. Yes, I do, it is one of our firearms registration cards.
- Q. Who is the custodian of Prosecution Exhibit 9 for identification?
- A. The Club President.
- Q. And from whose custody did Prosecution Exhibit 9 for identification come?
- A. I took it from the club files this morning.
- Q. Where did you get it?
- A. From the club files.
- Q. Are registration forms like Prosecution Exhibit 9 for identification made in the regular course of business of registering firearms at the club?
- A. They are.
- Q. Where are forms #2 made?
- A. In the regular course of business it must be made at the time the registrant came to the club.
- TC: Prosecution Exhibit 9 for identification is offered in evidence as Prosecution Exhibit 9. Request permission to substitute in the record a copy of the exhibit.
- (NOTE: After admission of the document, the witness may be asked to explain entries, if necessary.)

(B) Real Evidence. Items of real evidence, such as clothing, weapons, and jewelry, are introduced in evidence in the same way as documents are introduced, that is, they must be identified, shown to be relevant and material, and then offered in evidence. Unless the testimony in the case has developed a full and accurate description of such objects, marks, or wounds, the record of trial should include such a description, since it is ordinarily either impossible or impractical to attach them to the record.

1. Stolen property.

WITNESS: After signing in at the orderly room, I went to my quarters.

- Q. What was the condition of your quarters?
- A. I found my personal belongings scattered all over the room.
- Q. What did you do then?
- A. I checked to see if anything was missing.
- Q. Was anything missing?
- A. Yes. My radio.
- Q. Can you describe this radio?
- A. Yes. It is a Zenith, four-tube, table-model radio.
- Q. If you were able to see this radio again, would you be able to distinguish it from other radios of the same make and type?
- A. Yes. My radio has a black plastic case. The dial hand is bent toward the left, and one of the numbers on the dial is blurred.

TC: Request that the reporter mark this Prosecution Exhibit #4 for identification.

REPORTER: This will be Prosecution Exhibit 4 for identification.

NOTE: The exhibit is shown to the defense and the military judge.)

TC: (TO WITNESS) I hand you Prosecution Exhibit 4 for identification. Have you seen it before?

A. Yes, it's mine. It is the radio that I told you was missing from my room.

Q. After you discovered it to be missing from your room, when did you next see the exhibit?

A. I saw it the following morning.

Q. Where did you see it?

A. I saw the radio in the accused's wall locker.

TC: Prosecution Exhibit 4 for identification is offered in evidence as Prosecution Exhibit 4. Permission is requested to withdraw it at the conclusion of the trial and substitute a written description therefor.

DC: No objection.

MJ: Prosecution Exhibit 4 for identification is admitted in evidence as Prosecution Exhibit 4, and a description may be substituted.

2. Weapons. Accused is charged with assault with a dangerous weapon, a knife, upon James W. Boyle, on 1 August 1969, at Cadence, Missouri. Military policeman Briggs broke up the fight and disarmed the accused. At the trial, he is called as a prosecution witness, sworn, identifies himself and the accused. After testifying as to how he broke up the fight, he was questioned as follows:

TC: What if anything happened right after you stopped the fight, Sgt. Briggs?

A. Well, I took a knife from the accused's hand.

Q. Can you describe the knife?

A. Yes. It is a switchblade knife with a pearl handle and a blade about 4 inches long.

Q. Do you have it with you?

A. Yes. (Hands to TC)

TC: Request this be marked Prosecution Exhibit #5 for identification (handing knife to reporter).

REPORTER: (Puts tag on knife, and writes on tag) This will be Prosecution Exhibit 5 for identification.

(NOTE: The exhibit is shown to the defense and the military judge.)

TC: Briggs, I show you Prosecution Exhibit 5 for identification and ask you if you have seen it before?

A. It looks the same.

Q. When?

A. I think it is the knife I took from the accused's hand after the fight.

Q. What did you do with the knife after you took it from the accused?

A. Well, I took it with me when we took the accused to the Provost Marshal's office on the base, and I gave it to the CID agent, CWO Green.

- Q. What did he do with it?
A. I saw him put it in his safe.
Q. What time was that?
A. About 2300, on 13 July 1969.
Q. When did you next see it?
A. The CID returned it to me this morning.

The witness, after cross-examination by DC is excused. TC calls CWO Green, who is sworn and identifies himself. The preliminary questions addressed to Mr. Green are obviously leading. This type of preliminary questioning is ordinarily permissible, however, to expedite the inquiry into the substance of the testimony of the witness.

TC: Mr. Green, are you a CID agent on this post?

- Q. Were you in your office here at about 2300 on 13 July 1969?
Q. Did you see an MP by the name of Briggs at that time?
Q. Did he give you anything for safekeeping at that time?
Q. I show you Prosecution Exhibit 5 for identification and ask you if you recognize it?
A. I do. That's the knife Briggs gave me on the night of 13 July.
Q. How do you know it's the same knife?
A. Well, I taped a piece of paper with my signature and the date around the handle.
Q. And is that paper with the date and your signature there now?
A. Yes.
Q. What did you do with the knife Briggs gave you?
A. I put it in my safe as soon as I taped the paper on it.
Q. Who has had access to your safe between 13 July and today?
A. No one except myself.
Q. Did you have occasion to remove it or allow it to be removed until now?
A. No, not until this morning when I gave it to Briggs.

TC: Prosecution Exhibit 5 for identification is offered in evidence as Prosecution Exhibit 5.

Permission is requested to withdraw it at the conclusion of the trial and to substitute a (written description) (photograph) for it.

The exhibit will then be admitted or refused as the court rules, and the witness excused.

3. "Chain of Custody." On those occasions when there is not a single witness available who can identify the object offered in evidence as that which it purports to be, or if there is any substantial likelihood that the object offered has been changed in any respect that might affect the information to be conveyed to the court, authentication should be by proof of chain of custody, i.e., by proof of the complete chain of possession of the object from the time it was first discovered until the time of trial. To establish relevancy counsel should consider calling as a witness every person who had the evi-

dence in his custody from the time of its discovery to the time of trial. See ACM 18900, *U. S. v. Lewis*, 34 CMR 980, *petition denied*, 35 CMR 478 (1964), *U.S. v. Bass*, 8 USCMA 299, 24 CMR 109, (1957). The following example involves only two witnesses, but the procedure should be followed with all pertinent witnesses which are necessary in any given case:

Based on probable cause to believe that the accused had narcotics in his possession, the accused's company commander searched his footlocker and found a paper sack. After establishing the proper preliminary procedures regarding the search, trial counsel should continue as follows:

TC: What did you do?

A. I reached into the footlocker into the place where I saw the accused put the paper sack, and I found the sack and removed it.

Q. What did you do then?

A. I opened the sack and looked inside. There I saw some small, dark, greenish leaves and stems that were dried up.

Q. What did you do then?

A. I smelled the contents of the sack.

Q. What did the contents smell like?

A. They had a peculiar smell like dried hay, but different. I think I would recognize the smell if I smelled it again.

Q. What did you do with the sack and its contents?

A. I turned it over to the CID investigator, Mr. Billy Steppon.

Q. Have you seen the sack of leaves since that time?

A. No, sir, I have not.

Q. Do you think you would recognize the sack of leaves if you saw it again?

A. Yes, sir, I do.

Q. How would you recognize it?

A. At the time I gave it to Mr. Steppon, I placed my initials and the date on the sack. Also, I remember what the leaves looked like and smelled like.

TC: I ask that this sack and its contents be marked Prosecution Exhibit 6 for identification.

REPORTER: The sack and contents are marked and will be Prosecution Exhibit 6 for identification.

(NOTE: The exhibit is shown to the defense.)

TC: I now show you Prosecution Exhibit 6 and ask if you recognize it?

A. Yes, sir, it is the same sack I found in the footlocker of the accused.

Q. How do you recognize it?

A. The sack has my initials where I put them. The contents appear to be the same dark, greenish leaves, and the smell is the same.

Q. Will you state whether or not the contents are in the same condition and about the same volume as when you first saw them?

- A. Well, the leaves seem to be broken into smaller pieces, and the volume is therefore somewhat less, but there appears to be little change otherwise.
- TC: No further questions.
NOTE: The witness is now cross-examined. TC then calls Billy Steppon the CID investigator and examines him.
- Q. I call your attention to 5 July 1969. On that date did you have occasion to see LT Suder Sea?
- A. I did.
- Q. What, if anything transpired at that time?
- A. LT Sea handed me a paper sack which contained greenish leaves.
- Q. After LT Sea gave you the sack containing the greenish leaves, what did you do with it?
- A. I returned with it to the CID office. There I got a pair of tweezers and removed some of the leaves and twigs, and one or two little seeds, and put them in a plastic bag, and sealed the plastic bag.
- Q. What did you do with the plastic bag?
- A. I personally mailed it by registered mail, return receipt requested, deliver to addressee only, to United States Army Criminal Investigation Laboratory, Fort Gordon, Georgia.
- Q. What did you do with the paper bag and the remainder of its contents?
- A. I placed the entire bag and contents into another plastic bag, tied a knot in the top of the plastic bag and sealed it by heating the edges. Then I put a tag on it and placed it in the evidence locker, which is a locked room, in a metal box with a combination lock that only I can open.
- Q. Did you ever remove the plastic bag?
- A. On two occasions I have removed it to show to counsel, but I did not open the sealed plastic bag until today. On each occasion I stayed with the bag and returned it to the locker box in the evidence locker. I removed it today.
- Q. What did you do with the paper sack today?
- A. I took it out of the plastic bag, put my initials on the paper bag, and gave it to you just as the trial began. At that time I looked in it and it had the same contents as when I sealed it up.
- Q. I now show you Prosecution Exhibit 6 for identification and ask if you recognize it?
- A. Yes, sir, it is the same paper bag and contents that I gave you today at the beginning of the trial.
- Q. How do you recognize it?
- A. By the way it looks and by the fact that the bag has my initials on it where I put them.
- TC: Prosecution Exhibit 6 for identification is offered into evidence as Prosecution Exhibit 6.
- TC: Would you recognize the plastic sack which you mailed to the United States Army Criminal Investigation Laboratory?

A. Yes, sir.

TC: How would you recognize it?

A. At the time I mailed it, I tagged the sack and put my initials, the CID case number, and the registered mail receipt number on it.

TC: I ask that this sack and its contents be marked as Prosecution Exhibit 7 for identification.

REPORTER: The sack and contents are marked and will be Prosecution Exhibit 7 for identification.

(NOTE: The exhibit is shown to the defense.)

TC: I now show you Prosecution Exhibit 7 and ask if you recognize it?

A. Yes, sir, it is the same sack which I mailed to the laboratory.

TC: How do you recognize it?

A. The tag on the sack bears my initials, and the contents appear to be the same dark greenish leaves and the smell is the same. The tag also bears our CID case number 69-230.

TC: No further questions:

NOTE: The witness is now cross-examined. TC then calls Winston Puff, a CID laboratory technician, qualifies and then examines him.

TC: I show you prosecution Exhibit 7 for identification and ask if you recognize it?

A. Yes, sir, it is a sample upon which I ran a chemical analysis.

TC: How do you recognize it?

A. On 10 July 1969 a package arrived at the laboratory by registered mail, return receipt requested, deliver to addressee only, bearing the same registry number. After executing the receipt, I opened the package and withdrew the sample. I then put my initials and date on the bag. The tag also contained, as this one does, the CID case number 69-230 which I used to identify the sample when I conducted the chemical analysis.

Appendix VIII

STATEMENTS OF THE ACCUSED

Any statement—whether an admission or confession, inculpatory or exculpatory—given by a person accused or suspected of an offense as a result of an investigative interrogation must meet the requirements of Article 31 UCMJ and paragraph 140a of the MCM as expanded by the recent court decisions before it can be admitted in evidence at a court-martial. The Trial Counsel must be particularly alert to press for a complete showing that the requirements have been met. The following line of questioning is suggested. Obviously, it may have to be varied to meet the facts of the case. Each investigator may use a different style in advising the accused, although the substance of the advice must meet all legal requirements. Counsel's questions must be adapted to the particular manner by which the investigator attempts to comply with these requirements.

Preliminary

TC: The prosecution calls as a witness *John T. Query*.

Note: Witness is sworn and takes his seat in the witness chair.

TC: Are you *John T. Query*, Criminal Investigator, Detachment D, 3rd Military Police Group (C1), U.S. Army, Fort Blank, Georgia?

A. I am.

TC: What are your duties in Detachment D?

A. I conduct investigations of offenses allegedly committed by members of Army or against government property.

TC: Do you know the accused in this case?

A. Yes, Sir, I do.

TC: Please point to the accused if you see him in the courtroom and state his name and organization if you know it.

A. He is seated right there [pointing]. His name is John R. Heavy and he is a member of _____.

TC: Let the record reflect that the witness pointed to the accused as he stated his name and organization.

TC: Were you on duty as a Criminal Investigator on 25 August 1969?

A. I was.

TC: In the performance of your duty as an Investigator, did you have occasion to interview the accused on 25 August 1969?

A. I did.

TC: When did you first see the accused on that date?

A. At about 1230 hours at his company Orderly room.

TC: What happened at that time?

A. My partner, Mr. Goodfriend and I went to the accused's unit and reported to the Company Commander. The accused was present

and we took him from the Orderly Room to an interrogation room at the Military Police Station.

TC: What did you do after arriving at the interrogation room?

A. I asked him to be seated, offered him a cigarette and a cup of coffee. He took a seat but declined the cigarette and coffee.

TC: At approximately what time did you interview the Accused?

A. At about 1300 hours.

Article 31 Advice and Right to Counsel

(Note: This is only *one* way an accused may be advised of his rights. The questioning must be adapted to the manner by which he was actually advised.)

TC: What did you do then?

A. I advised him of the offense of which he was suspected and of his rights under Article 31, UCMJ and his right to counsel.

TC: How did you do that?

A. I told him that he was suspected of the larceny of Private Eddie Nix's wallet and money from the barracks on the night of 24 August 1969.

I then read to him verbatim the warning contained on the warning card GTA 19-6-1.

I then handed the card to the accused and asked him to read it word for word back to me which he did. (Note: It is not legally required to give the accused the card if he is otherwise properly advised by use of a different method.)

I then told the accused that the word "counsel" on the card included a lawyer and I asked him to look again at the card with that in mind, which he did.

I then asked the accused to explain to me what the warning meant to him—using his own words while referring to the card. He did so, and then stated that he understood the meaning of the warning.

TC: What did you do then?

A. I told the accused that I was going to ask him two questions, specifically, "Do you want Counsel?" and "Do you want to make a statement and answer questions" and that if he answered the first question, "Yes, I want counsel" the interview would be over and concluded because I could go no further until he had a counsel, but if he answered the first question "No", I would then asked him the second question.

TC: Very well, what did you do then?

A. I then asked the accused, "Do you want counsel?", and he said "No".

I then asked, "Do you want to make a statement and answer questions?", and he said "Yes".

The accused, Mr. Goodfriend, and I initialed the card (GTA 19-6-1) that we had used and I attached it as an exhibit to my report.

TC: Request the reporter mark this card as Prosecution Exhibit, next in order, for identification.

- Reporter: This card will be Prosecution Exhibit 8 for identification.
- TC: Let the record reflect that I am affording opposing counsel the opportunity to examine the card.
- TC: Mr. Query, I hand you a card which has been marked Prosecution Exhibit 8 for identification and ask you if you recognize it?
- A. Yes, sir. It is the card used in giving the warning to the accused about which I have been testifying.
- TC: How do you recognize it as the same card?
- A. From the initial of the accused, Mr. Goodfriend, and myself which appear on it together with the date of 25 August 1969.
- TC: Prosecution Exhibit 8 for identification is offered in evidence as Prosecution Exhibit 8.
- MJ: Does the defense have any objections or wish to question the witness?
- DC: (No objections) (I object because _____)
- MJ: Prosecution Exhibit 8 for identification is admitted in evidence as Prosecution Exhibit 8. Permission is granted to read the contents of the card aloud to the court).

The Interview

- TC: After giving the accused this warning and obtaining his waiver, what did you do?
- A. I questioned the accused, then typed a statement from his answers, gave it to him to read, and asked him if the statement was accurate, if he wanted to change it and if he had anything to add to it. He said that the statement was correct and that he had nothing to add to it.

The Oath

- TC: Then what did you do?
- A. I ascertained that my partner, Mr. Goodfriend, was present and I then placed the accused under oath. After I had administered the oath, I asked the accused to sign his name at the place indicated on the last page and also to initial each page of the statement. He did this. I also asked him to initial the typographical errors and the corrections in the statement which he did. I then signed my name as having administered the oath and I had Mr. Goodfriend sign his name attesting to the fact that he had witnessed the accused initial or sign his name on each page of the statement.
- TC: Request the reporter mark this document as Prosecution Exhibit, next in order, for identification.
- Reporter: This will be Prosecution Exhibit 9 for identification.
- TC: Let the record reflect that I am affording the opposing counsel the opportunity to examine the statement.

Identification of the Statement

- TC: Mr. Query, I hand you Prosecution Exhibit 9 for identification, a document consisting of three pages and ask you if you can identify it?

- A. Yes, sir. This is the statement I took from the accused on 25 August 1969.
- TC: How do you recognize it as the same statement?
- A. By its general appearance, by the signature "John R. Heavy" at the bottom of the last page, by the signature of Mr. Goodfriend, and by my signature.
- TC: Do you know who signed the name "John R. Heavy" on Prosecution Exhibit 9 for identification:
- A. Yes, sir. The accused signed that name in the presence of Mr. Goodfriend and in my presence.
- TC: How long a time elapsed between the time you gave the warning to the accused and the time the accused signed the statement?
- A. A little over two hours. The accused signed the statement at about 1530 hours on 25 August 1969.
- TC: Who was present during the interview?
- A. The accused and I. Mr. Goodfriend was present with the accused and me when the warning was given and when the accused was administered the oath and when the accused signed or initialed each page of the statement.

Voluntariness

- TC: What inducements, if any, were offered to the accused to obtain the statement.
- A. None, sir.
- TC: What force, if any, was used to obtain the statement?
- A. None, sir.
- TC: What threats, if any, were made to obtain the statement?
- A. None, sir.
- TC: What promises, if any, were made to the accused to obtain the statement?
- A. None, sir.
- TC: What bodily comforts, if any, were afforded the accused in the course of the obtaining the statement?
- A. The accused was offered coffee and cigarettes which he declined. He was shown the latrine and the water fountain and he used both during the course of the interview.
- TC: Prosecution Exhibit 9 for identification is offered into evidence as Prosecution Exhibit 9.
- TC: Let the record reflect that I am now affording opposing counsel the opportunity to examine the document.
- MJ: Does the defense have any objections or wish to question the witness?
- DC: (No objections) (I object on the grounds that _____).
- MJ: (May satisfy himself that the accused is aware of his right to testify or may explain such right to the accused).
- MJ: Prosecution Exhibit 9 for identification is admitted in evidence as Prosecution Exhibit 9. Permission is granted to read the contents of the document to the court.
- TC: (Reads the contents of the document to the Court).

Appendix IX

CHILD WITNESS

- DC: The defense calls as its next witness Master James B. Minor.
- TC: The prosecution objects to the proposed witness being sworn, as it is obvious that he is a child under 14 years of age and that his competency cannot be presumed. The Government requests permission to conduct a voir dire of the proposed witness at this time.
- DC: The Defense requests permission to conduct the preliminary inquiry to show competency.

NOTE: Determination of the competency of a child witness is within the discretion of the Military Judge (*United States v. Slozes*, 1 USCMA 47, 1 CMR 47 (1951); *United States v. Hunter*, 2 USCMA 37, 6 CMR 37 (1952); *United States v. Hurt*, 9 USCMA 735, 27 CMR 3 (1958)). The military judge may properly conduct the preliminary inquiry as to competency (*United States v. Hurt, supra*) or it may be conducted by the military judge and/or the counsel offering the witness (*United States v. Slozes, supra*). Whether there has been an abuse of discretion in permitting the witness to qualify may be determined on the basis of the voir dire and the testimony in the case (*United States v. Slozes, supra*, see also *United States v. Hunter, supra*). Objection to competency should be made before the witness is sworn or affirmed, if it is known. If it later develops, the objection should be made together with a motion to strike and disregard (*United States v. Hunter, supra*). Competency is not dependent on age, but on the apparent sense of the witness, his ability to distinguish truth from falsehood, and an appreciation of the moral importance of telling the truth (MCM 148b). When the witness is the alleged victim, and age is an element of the offense, counsel offering the witness should remember to adduce proof of age after the witness is sworn, in addition to expressions of age secured during the voir dire examination (CM 400086, *Sarabia*, 26 CMR 715 (1958)).

Counsel offering the witness should request permission to conduct the initial portion of the inquiry as the child will know him and thus be made more at ease.

- Q. James, will you come over here with me and sit in this chair?
- A. Yes.
- Q. How old are you, James?
- A. Seven.
- Q. Do you go to school?
- A. Yes.
- Q. Where do you live?
- A. At Quarters 104A, Fort Blank, Missouri.

- Q. What grade are you in, in school?
 A. Second grade.
 Q. Where do you go to school?
 A. Here at Fort Blank, to Harrison School.
 Q. What's your teacher's name?
 A. Miss Dorothy Brown.
 Q. Can you read from books, James?
 A. Yes.
 Q. Can you write?
 A. Yes.
 Q. Do you go to Sunday school?
 A. Yes.
 Q. James, do you know what a lie is?
 A. Yes, I do.
 Q. What is a lie?
 A. It's when you tell something that didn't happen, something not true.
 Q. And what does true mean, James?
 A. What really happened.
 Q. James, is it right or wrong to tell a lie?
 A. It's wrong.
 Q. What happens to someone who tells lies?
 A. They might get whipped or punished.
 Q. Who might whip or punish them?
 A. Their mothers and fathers.
 Q. Would anything else happen to them?
 A. God would punish them when they die.
 Q. Do you believe in God?
 A. Yes.
 Q. Do you believe God will punish you if you lie?
 A. Yes.
 Q. James, if I ask you to raise your hand and promise to tell the truth, will you promise to tell the truth?
 A. Yes.
 Q. And will you tell the truth about what happened when you are asked?
 A. Yes.

NOTE: It is not necessary that the child believe in God, or the future state of rewards or punishments, to qualify as a witness, *United States v. Slozes*, 1 USCMA 47, 1 CMR 47 (1951).

DC: Sir, at this time I request that the witness be sworn on the basis that competency has been established.

NOTE: If, after the inquiry, the witness is sworn and testifies, a motion to strike the testimony should be made if it subsequently develops that the child lacks testimonial capacity.

Appendix X

IMPEACHMENT

(A) Prior inconsistent statement.

In an assault case, an eyewitness has testified to the encounter between the accused and the victim, and has stated on direct examination that the victim had nothing in either hand at the time of the encounter. A prior inconsistent statement exists. Cross-examination continues:

- Q. And you were standing about 30 feet from the two men at the time?
- A. Yes.
- Q. Were the two men fighting in the walkway, on the sidewalk, between the two trees?
- A. Yes.
- Q. This occurred, I believe you testified, about 2300 hours, is that right?
- A. Yes.
- Q. And you were able to see the hands of Corporal Victim at that time?
- A. Yes.
- Q. By the light that was available, you were able to see that he had nothing in his right hand?
- A. Yes.
- Q. And you could also see that he had nothing in his left hand?
- A. Yes, both of his hands were empty.
- Q. Did Corporal Victim have his hands open when he was fighting with Corporal Leading-Fighter?
- A. No sir, he had his hands closed into fists.
- Q. You could see that?
- A. Yes.
- Q. You're certain of that?
- A. Yes, sir, I saw it.
- Q. Now, two days after this fight took place, you were called to the orderly room of your company and questioned about it, weren't you?
- A. Yes, sir.
- Q. Lieutenant Eager asked you questions and you answered him didn't you?
- A. Yes, sir.
- Q. Now on that date, 22 August 1969, at the orderly room of your company, did Lieutenant Eager ask you whether you could clearly see both Corporal Victim and Corporal Leading-Fighter as they fought, and did you answer, "Things happened so fast,

they were talking louder and louder, and the others were coming out of the NCO Club, down the walk, as it was difficult to see. I know Leading-Fighter had a beer bottle in his hand, but I couldn't say as to Corporal Victim."

A. I don't remember making any such statement.

NOTE: After establishing the date, place, person to whom the statement was allegedly made, and inquiring as to the contradictory statement (*U.S. v. Freeman*, 4 USCMA 76, 15 CMR 76 (1954)), the examiner may, upon receiving a negative reply, adduce the impeaching testimony on his case in chief. Even if the witness admits making the inconsistent statements, other competent evidence that he made it, including other evidence of the text or substance of the statement, may be introduced in addition to the admission. See MCM 153b(2)(c).

(B) Conviction of crime. See MCM 153b(2)(b).

Any witness who testifies may be impeached by showing that he has been convicted of a crime *involving moral turpitude* or otherwise *affecting his credibility*. Effort should *first* be made to place the conviction into evidence by cross-examination of the witness. However, even if the witness denies the conviction, or does not remember it, or refuses to testify concerning it, other evidence of the conviction becomes admissible.

Q. Is it not true that, on 1 May of last year you appeared before or (the United States District in Knoxville, Tennessee court) (a general court-martial at Fort Blank) as the accused and on that occasion you were convicted of the offense of larceny by that (court) (court-martial)?

NOTE: If the witness admits the conviction, other evidence is not required. If the witness denies the conviction, does not remember, is evasive, or refuses to acknowledge the conviction, other evidence of the conviction should be introduced into evidence.

(C) Motive, prejudice or bias. See MCM 153b(2)(d).

On cross-examination counsel may show an interest the witness has in the outcome of the case, and any prejudice or bias he may have for or against the accused.

Example Interest.

- Q. You are the victim of the reckless driving charged by specification 2 of (the) charge I, are you not?
- Q. And you wish to see the accused punished, do you not?
- Q. Haven't you previously expressed a desire that the accused be "hung" for this offense?
- Q. Have you ever been advised that you might have a basis for a civil lawsuit against the accused resulting from the offense charged?
- Q. Have you consulted (retained) counsel for this purpose?
- Q. Have you been advised that a conviction of the accused for the offense charged would be helpful in a possible civil suit against the accused?

Example Prejudice.

- Q. Has there ever been any difficulty between you and the accused in the past?
- Q. What was the nature of this difficulty?
- Q. As a matter of fact, you had a fight with Private Smith, did you not?
- Q. As a result of this difficulty, you have expressed a sharp dislike for the accused, have you not?
- Q. Were you not, in fact, a suspect in this case?
- Q. And if the accused were convicted, will it not assist in clearing you of suspicion?

Example Bias.

- Q. You are the wife of the accused, are you not?
- Q. You want to help your husband in any way you can, don't you?
- Q. And if the accused were convicted, that will seriously affect you both financially and emotionally, will it not?

Appendix XI

CHARACTER OR REPUTATION EVIDENCE

Whenever the character of an accused, a victim, or other witness is *properly* placed in issue, any witness who has sufficient personal knowledge of that individual and his conduct and reputation may testify as to such general character. This may be done by having the witness express his opinion of such individual's moral character, or he may testify concerning such individual's general reputation in the community in which he lives or works. The same may be done for specific traits of character. **CAUTION:** These samples only indicate the method in which such evidence may be brought out, and even then they must be modified to fit the particular circumstances. *The most important thing to realize is that the substantive rules of evidence must be consulted to determine when character may be or has in fact been placed in issue.* Otherwise, prejudicial error may result.

(A) Opinion of general moral character.

- Q. Are you personally acquainted with _____?
- Q. How long have you known him?
- Q. How well do you know him?
- Q. About how much time have you spent in his company, either at work or after duty hours?
- Q. During this time, have you heard _____ express his ideas on various subjects?
- Q. To what extent?
- Q. During the time you have known _____, have you observed his demeanor toward his fellow man and his attitude toward his moral responsibilities?
- Q. To what extent?
- Q. Based upon your knowledge and observation of _____, do you have an opinion of his character as a moral, well-conducted person and a law abiding citizen?

(B) Opinion of military character.

- Q. Are you personally acquainted with _____?
- Q. How long have you known him?
- Q. How well do you know him?
- Q. Where have you served with him?
- Q. During the time you served with him what were his duty assignments?
- Q. To what extent, if any, did you observe his performance of military duties?
- Q. During the time you have known _____, to what extent, if any, have you observed his off duty conduct in the military community such as barracks and clubs?

- Q. As a result of your contacts with _____, have you had occasion to observe his attitude toward the military and toward his responsibilities to the military?
- Q. To what extent?
- Q. As a result of your knowledge and observations of _____, do you have an opinion of his character as a loyal, obedient, and well disciplined member of the military service?
- Q. Will you state that opinion?

(C) Reputation.

- Q. Are you personally acquainted with _____?
- Q. How long have you known him?
- Q. How well do you know him?
- Q. How long have you served in the same organization as _____?
- Q. How closely were you associated with him on duty during this time (these times)?
- Q. During the period _____ to _____, were you associated with other individuals who knew and worked with _____?
- Q. Have you ever lived in the immediate neighborhood of _____?
- Q. When and how close?
- Q. Have you been associated with other individuals who lived in the immediate neighborhood of _____?
- Q. As a result of your contacts with other individuals who (served with) (and) (lived in the neighborhood of) _____, did you become aware of his reputation in the (command where he worked) (and) (community where he lived) (as a moral, well conducted and law-abiding citizen)?
- Q. What was that reputation?

(D) Reputation for truth and veracity.

- Q. State your name and address.
- A. _____
- Q. What is your occupation?
- A. _____
- Q. Do you know _____?
- A. Yes, I do.
- Q. How long have you known _____?
- A. Three years.
- Q. Do you know where _____ lives?
- A. I do, at 123 Lane Avenue, Cleveland, Ohio.
- Q. How far is that from your home?
- A. About a block.
- Q. Have you had occasion to meet _____ socially?
- A. Yes.
- Q. How frequently?
- A. About once a week up until a couple of months ago.

Q. Have you had occasion to work with him?

A. Yes.

Q. Where?

A. _____

Q. Do you know the general reputation of _____ for truth and veracity in the community where he lives?

A. Yes, I do.

Q. What is that reputation, good or bad?

A. It's bad.

Q. Would you believe him under oath?

A. No, I wouldn't.

Appendix XII

OPINION EVIDENCE (EXPERT)

The rules concerning the admissibility of opinion evidence are stated in paragraph 138e of the Manual.

(A) *Traffic Expert.*

- Q. On the ____ day of _____ 19____, what were your duties?
- Q. How much actual experience do you have as a traffic investigator?
- Q. What formal schooling or course of study have you received on the subject?
- Q. And what are your duties as traffic investigator?
- Q. About how many accidents of motor vehicles have you investigated?
- NOTE: Here counsel can bring out any special qualifications in the field such as: being an instructor in the subject, authorship of a book, membership in a professional society or association, etc.
- Q. Have you ever testified in court as an expert in the field of traffic investigation?
- Q. How many times? Before what courts?
- Q. Have you ever been required to make written reports of your observations of traffic accidents for official use other than courts?
- Q. About how many such reports have you made, and over what period of time?
- Q. As a result of your experience in the field of traffic investigation, to what extent are you able to determine the circumstances surrounding the average automobile accident by observing the physical evidence at the scene of an accident shortly before it has happened?
- Q. Is it ever possible to make a reasonable estimate of speed of a vehicle by physical evidence at the scene of an accident?
- Q. Under what circumstances is this possible?
- Q. On the ____ day of _____ 19____, did you have occasion to investigate an accident at _____?
- Q. As a result of your investigation of the physical evidence at the scene of the accident, have you an opinion as to (the speed of the vehicle _____) (the point of impact) (the direction in which car _____ was going) (_____)?
- Q. Will you state that opinion?

(B) *Psychiatrist (Direct examination).*

- Q. Will you state for the court the formal education you have had in schools or colleges, the years you attended, and the degrees you have received, if any?
- Q. Where and when were you licensed to practice medicine?
- Q. Beginning with your internship, what experience have you had in the practice of medicine?

Q. What special education, if any, have you had in the field of psychiatry?

Q. What practical experience have you had in the field of psychiatry?

NOTE: Here bring out any special qualifications in the field of psychiatry such as instructing in the field, authorship of a book or paper, membership in a professional society or association, etc.

Q. Have you ever been required to make written reports of your observations and conclusions in the field of psychiatric medicine for official use? If so, about how many such reports have you made and over what period of time?

Q. As a result of your training and experience in the field of psychiatry do you consider yourself qualified to make a reasonable determination as to the existence or non-existence of a mental defect, disease or derangement in a patient after sufficient observation and examination?

Q. Have you ever had occasion to observe and examine the accused, _____?

Q. As a result of your observation and examination, do you have an opinion as to whether or not the accused was, at the time of the alleged offense(s), so far free from mental defect, disease or derangement, as to be able, concerning the acts charged, to distinguish right from wrong?

Q. Will you state that opinion?

Q. As a result of your observation and examination, do you have an opinion as to whether or not the accused was, at the time of the alleged offense(s), so far free from mental defect, disease or derangement as to be able, concerning the particular acts charged, to adhere to the right?

Q. Will you state that opinion?

Q. As a result of your observation and examination, do you have an opinion as to whether or not the accused now possesses sufficient mental capacity to understand the nature of the proceedings against him and intelligently conduct or cooperate in his defense?

Q. Will you state that opinion?

(C) Psychiatrist (Cross-examination).

The following questions have been adapted from suggested questions appearing in Flannery, *Meeting the Insanity Defense*, 51 J. Crim. L. 309, 315 (1960), as developed by the author for attorneys attending the annual Short Course for Prosecuting Attorneys given at Northwestern University School of Law.

Q. How long after the date of the crime did you first examine the accused? (This question is important since most competent psychiatrists will state that it is extremely difficult to give an opinion as to a person's mental condition at a time prior to the time he first examined him.)

Q. How many times did you examine the accused?

Q. What was the total amount of time you spent with the accused?

Q. Did the accused have a prior psychiatric history?

Q. What independent investigation have you made in this case?

- Q. Have you talked to accused's family, fellow employees, friends, neighbors?
- Q. Did you have psychological tests made?
- Q. Did you have examinations made to determine the presence of organic brain disease?
 - a. An X-ray examination.
 - b. A physical examination.
 - c. Electro-encephalogram test, e.g., tracing of waves generated by electrical impulses from brain which may indicate epilepsy or brain tumors.
 - d. Pneumo-encephalogram test. In this test air is injected into the brain. X-rays of the brain will then show any unusual spaces in the brain.
 - e. Neurological examination, e.g., a check of the central nervous system damage.

NOTE: If the witness did not conduct these various tests it can be argued that his examination was woefully inadequate. If he did conduct the tests and found no organic brain damage then he can be asked the following question:

- Q. Then, doctor, you are relying entirely on what the accused told you about his symptoms or what you observed about his behavior while talking to him?
- Q. Since you found nothing organically wrong there is a possibility that the accused is malingering since your opinion rests on his demeanor and behavior while being observed by you.
- Q. Did accused know the difference between right and wrong?

NOTE: If the answer is no, then the following questions might be asked depending upon the circumstances to show that the accused did in fact recognize he had committed a wrongful act.

- Q. Then why did the accused flee from the scene?
- Q. Then why did he pick a secluded spot to commit the crime?
- Q. Then why did he hide the (gun) (knife) (etc) if he did not realize he had done wrong?
- Q. What was the accused's motive (to secure money, to satisfy his lust, to gain revenge; or was he driven by some insane delusion to commit the crime)?
- Q. Do you believe that all criminals suffer from mental disease? (There are some psychiatrists who believe that all criminals are suffering from mental disease. When court members hear a psychiatrist state this, they usually disregard his testimony.)
- Q. Have you ever testified in court that an accused was of sound mind? (This question should be saved for the "professional" defense psychiatrist.)

NOTE: It is impossible to discuss all of the various ways to cross examine a psychiatrist, but the answers to the questions suggested will open up new avenues of cross examination. It is emphasized that the witness should be made to answer questions in language which the jury can understand. If the expert does not give common sense reasons for his opinion

in understandable language, the court will usually disregard his testimony.

(D) Forensic Chemist.

Q. Will you state for the court the formal education you have had in schools or colleges, the years you attended, and the degrees you have received, if any?

Q. What portion of this education was in the field of chemistry?

Q. What experience have you had in the field of chemistry?

NOTE: Here bring out any special qualifications in the field of forensic chemistry such as instructing in the field, authorship of books or papers, membership in professional societies and associations, etc.

Q. Have you ever testified in court as an expert in the field of chemistry? If so, how many times?

Q. Have you ever been required to make written reports of your observations and conclusions in the field of chemistry for official use? If so, about how many such reports have you made and over what period of time?

Q. As the result of your training and experience in the field of chemistry, do you consider yourself qualified to make a reasonable determination as to (the chemical composition of various substances) (the presence of a narcotic substance in a sample of urine) ()?

Q. Have you been requested to examine certain compounds relative to this case?

Q. Who made such request of you?

Q. What was delivered to you for such examination?

A. Two samples of substances which upon superficial examination appeared to be paint scrapings were delivered to me at my laboratory at _____ on _____. One of these samples was marked _____ and the other _____.

Q. What examination was requested of you?

A. It was requested that I conduct a spectroscopic analysis of the two samples in an effort to determine if they were of the same constituency.

Q. What did you do with respect to the samples?

Q. As the result of your examination and analysis of the two samples, have you formed an opinion with respect to their chemical composition?

A. I have.

Q. What is that opinion?

(E) Expert Testimony as to Value.

(Prosecution Exhibit 1, a Bulova watch, has previously been identified by its alleged owner as the watch missing from a jewelry store on 12 July 1969 in Smithville, Missouri. The owner has testified that he gave no one permission to take the watch, and that it was in good working condition on 12 July 1969.)

- Q. State your name and address, please.
- A. Harold E. Triball, 123 Lane Avenue, Smithville, Missouri.
- Q. What is your occupation, Mr. Triball?
- A. I am employed as a pawnbroker.
- Q. By whom are you employed?
- A. By Mr. Silver. I work at his pawnshop at 345 Lane Avenue, Smithville, Missouri.
- Q. How far is that from Fort Blank, Missouri?
- A. Almost a mile and a half.
- Q. How long have you been a pawnbroker?
- A. Thirteen years, as of last June.
- Q. Where have you worked as a pawnbroker during that period?
- A. Here in Smithville, Missouri.
- Q. What does your work as a pawnbroker entail?
- A. Well, I loan money on items which are pledged, and also buy and sell items of personal property.
- Q. Do these items include watches?
- A. Yes.
- Q. Mr. Triball, I hand you Prosecution Exhibit 1, a Bulova watch, and ask you if you have seen that watch before?
- A. Yes, I have.
- Q. When was that?
- A. Well, I examined it this morning before coming to court, and I also examined it on 18 July 1969.
- Q. For what purpose did you examine it on 18 July 1969?
- A. To make an appraisal of its fair market value as of 12 July 1969.
- Q. How do you know that Prosecution Exhibit 1 is the same watch you examined on 18 July 1969?
- A. By its general appearance and by my initials which I put on the tag here on that date.
- Q. What is the condition of Prosecution Exhibit 1?
- A. It is in good working condition.
- Q. Mr. Triball, are you familiar with what the fair market value of a watch such as Prosecution Exhibit 1 was on 12 July 1969 in Smithville, Missouri?
- A. Yes, in my business I have to know what the fair market value of such an item is in order to determine what amount to loan on it.
- Q. In your opinion, what was the fair market value of Prosecution Exhibit 1 on 12 July 1969 in Smithville, Missouri?
- A. About thirty-five dollars.

Appendix XIII

OPINION EVIDENCE (NON-EXPERT)

(A) *Drunkenness*

- TC: On 21 July 1969, did you have occasion to observe the accused?
- A. Yes.
- Q. Where?
- A. It was in the Orderly Room, Company A, 1st Battalion, 66th Infantry, here at Fort Blank.
- Q. Under what circumstance?
- A. He came in griping because he was on KP for the next day, Sunday.
- Q. For what period of time did you observe the accused?
- A. Approximately 15 minutes.
- Q. Describe the accused's appearance as to cleanliness.
- A. His face appeared unwashed and had a heavy beard.
- Q. Describe the accused's appearance as to neatness (and the proper wearing of his uniform).
- A. His uniform was wrinkled, his tie pulled down, and blouse unbuttoned.
- Q. What was the accused's condition as to equilibrium?
- A. He couldn't maneuver very well.
- Q. Did you hear the accused speak?
- A. Yes.
- Q. Describe clarity and coherency of his speech.
- A. He talked wild and didn't make much sense.
- Q. What was the accused's condition as to muscular control and coordination?
- A. He tried to pick up the clipboard which had the duty roster on it but dropped it.
- Q. Describe the accused's complexion.
- A. His face was flushed.
- Q. Describe the condition of the accused's eyes.
- A. They were bloodshot.
- Q. Did you have an opportunity to smell the accused's breath?
- A. Yes.
- Q. How did it smell?
- A. It smelled of liquor.
- Q. As a result of your observations, did you form an opinion as to the accused's sobriety?
- A. Yes, I did.

Q. What is that opinion?

A. In my opinion, he was drunk.

(B) Handwriting

TC: Have you ever seen the accused write (anything) in longhand?

A. Yes.

Q. How often?

A. Practically every day. We worked together for six weeks.

Q. Have you ever received documents purportedly written or signed by the accused?

A. Yes.

Q. Under what circumstances?

A. He made out the recurrent reports in longhand and would give them to me to approve before they were typed.

Q. How frequently?

A. Every month.

Q. As the result of your experience, are you familiar with the accused's handwriting?

A. Yes.

TC: Resquest that the reporter mark this exhibit for identification.

Q. I show you Prosecution Exhibit ____ for identification. Please examine it and state whether or not you have an opinion as to who wrote this document.

A. Yes.

Q. What is that opinion?

A. In my opinion, it was written by the accused, Specialist 4 John C. Fingers.

(C) *Speed of a Vehicle*

Q. Directing your attention to _____ (time) at _____ (place)
did you happen to observe a _____ (vehicle) traveling _____ (direction)
on _____ street?

Q. Did you observe anything unusual about the manner in which the vehicle was traveling?

Q. As a result of your observations of this vehicle, do you have an opinion as to the speed of the vehicle at the time of your observation?

Q. Will you state that opinion?

Appendix XIV

REFRESHING RECOLLECTION

If a witness testifies that his memory has failed but that there exists a document or object by which, if shown to the witness, his memory might be refreshed, such a document or object may be shown to him for his inspection. Thereafter, the witness, if his memory is refreshed, may testify *on the basis of his refreshed recollection*. The document or object is not introduced into evidence. See MCM 146a, 149c(1)(b).

- Q. Do you recall the serial number of the weapon?
- A. No.
- Q. Did you, at one time, know the serial number?
- A. Yes, I did.
- Q. Do you know of anything that might help you to recall it?
- A. Yes, sir, I made notes at the time; they would help me remember. (The written police report will help me remember) (There is a photograph—that would remind me) (It was reported in the newspapers, a clipping of the account would help me remember) (_____).

NOTE: Have document marked as exhibit for identification.

This is only for purposes of reference and it is not introduced unless it qualifies for some *other* purpose such as past recollection recorded. Show the document to opposing counsel. Hand the document to the witness without revealing its contents.

- Q. I now hand you what has been marked Prosecution Exhibit 6 for identification, is this the note (document) (object) to which you referred?
- A. Yes, it is.
- Q. Will you examine it please, and then return it to me?
- A. (Examines document, returns to counsel) Yes, sir.
- NOTE:** Place document out of sight of witness.
- Q. Now can you tell me on the basis of your independent recollection the serial number?
- A. Yes, sir. 762315.

Appendix XV

PAST RECOLLECTION RECORDED

If a witness' memory on a point is completely exhausted, a document may be introduced in evidence as a substitute for the witness' memory on the point, subject to the requirements set out below.

To make use of this document, counsel must show:

1. That the witness' memory is exhausted (i.e., that it cannot be refreshed by allowing him to read the document); and,
2. That a document exists which contains the witness' past knowledge on the point; and,
3. That the witness either made the document personally or it was made by someone else and the witness verifies it; or he must have done so; and,
4. Such document was made or verified at a time when the events it records were fresh in the witness' mind.

A defense witness, in response to a question put to him by DC, answers in such a manner as to indicate that he cannot remember the information asked for.

DC: Can you describe in detail the exact times each of these events occurred?

A. No, sir.

Q. Are you having difficulty recalling the facts?

A. Yes, I simply cannot recall them now.

Q. Is there anything which might help you to recall the facts?

A. Yes. I made a memo for record about two hours following the event.

DC: (handing the memo to reporter) Request this document be marked for identification.

REPORTER: This will be Defense Exhibit B for identification.

(NOTE: The memo should be shown to the prosecution.)

DC: I show you Defense Exhibit B for identification and ask you to read it to yourself.

Q. Now that you have read it, can you answer my question?

A. No. Not without reference to the document.

Q. What is Defense Exhibit B?

A. It is a document I prepared shortly after the event.

Q. How do you know?

A. I specifically recall preparing it, and that is my signature on it.

Q. When did you prepare this with respect to the time these events about which I asked you occurred?

A. About two hours later.

Q. At the time you prepared this document, did you have personal knowledge of the facts you put in it?

A. Yes, I did.

Q. Did it truly represent your knowledge as it then existed?

A. Yes.

DC: Defense Exhibit B for identification is offered in evidence as Defense Exhibit B.

TC: No objection.

MJ: Defense Exhibit B for identification is received in evidence.

DC: Will you read Defense Exhibit B?

Appendix XVI

DEPOSITIONS¹

(A) Request To Take Oral Deposition.²

HEADQUARTERS, FORT BLANK, MISSOURI
OFFICE OF THE STAFF JUDGE ADVOCATE

FBJA-MA-A250

1 August 1969

SUBJECT: Request to take Deposition, United States vs. Thomas Sublette,
RA 12345678, Headquarters Company, 20th Maintenance Quar-
termaster Battalion, Fort Blank, Missouri

Commanding General
Fort Blank, Missouri
ATTN: SJA
Fort Blank, Missouri

1. Pursuant to the provisions of paragraph 117b, d, Manual for Courts-Martial, 1969 (Rev.) request permission to take the oral deposition of Master Sergeant Henry J. Simms, Headquarters Company, 20th Maintenance Battalion, at the Office of the Staff Judge Advocate, Fort Blank, Missouri, at 0900 10 August 1969. Said deposition is to be taken in connection with the charges and specifications in the pending General Court-Martial against Private Thomas Sublette, Headquarters Company, 20th Maintenance Battalion, alleging the willful disobedience of Master Sergeant Simms' order.

2. Master Sergeant Simms has been ordered to depart his present station on 12 August 1969 and to proceed to Headquarters, United States Army Europe, APO New York 09403, on a permanent change of station. The pretrial investigation indicates that he will be a necessary prosecution witness concerning the specifications and charge alleging willful disobedience of orders. It is anticipated that on oral deposition Master Sergeant Simms will testify that:

On the afternoon of 6 August 1969, while he was First Sergeant of Headquarters Company, 20th Maintenance Battalion, he gave an order to Private Sublette to mow the lawn in front of the Company Dayroom (Bldg. T-400). This order was given in the presence of Lieutenant Ferguson. He and LT Ferguson then left the accused who said nothing concerning the order. When he returned about five minutes later Private Sublette had disappeared without mowing the lawn. He did not see Private Sublette again until the following day.

HIRAM TRUST
CPT, JAGC
Trial Counsel

¹ Counsel should carefully read paragraphs 115, 117 and 145a of the Manual before using any of the forms contained in this appendix.

² Counsel should permit opposing counsel to inspect, or should serve a copy of the deposition request and accompanying papers upon opposing counsel prior to submission of the deposition request. See MCM 117b.

FBCS A-250 (1 Aug 69) 1st Ind

9 August 1969

SUBJECT: Request to take Deposition, United States v. Thomas Sublette, RA 12345678, Headquarters Company, 20th Maintenance Quartermaster Battalion, Fort Blank, Missouri

Headquarters, Fort Blank, Missouri

1. Pursuant to the provision of paragraph 117, Manual for Courts-Martial, 1969 (Rev.), Captain Omar Pleas, JAGC, Office of the Staff Judge Advocate, Fort Blank, Missouri, is directed to cause to be taken the deposition of the following named person, to be used in evidence in the trial by court-martial of Private (E-2) Thomas Sublette, Headquarters Company, 20th Maintenance Battalion, Fort Blank, Missouri:

MSG Henry J. Simms, Headquarters Company, 20th Maintenance Battalion, Fort Blank, Missouri

2. Captain Hiram Trust, JAGC, and Captain Roger Tort, JAGC, this headquarters, each certified in accordance with Article 27(b), Uniform Code of Military Justice, are directed to represent the prosecution and the defense, respectively, in the taking of the subject deposition to be used in the court-martial of Private (E-2) Thomas Sublette.

3. Copies of this correspondence will be furnished the trial counsel and defense counsel.

FOR THE COMMANDER:

JAMES A. BRIDGER
Captain, AGC
Asst. Adjutant General

(B) Suggested Form for Deposition on Oral Examination.

UNITED STATES

vs

PVT E-2 Thomas Sublette, Jr.

RA 12345678, Headquarters Company

20th Maintenance Battalion

Fort Blank, Missouri

} DEPOSITION

Deposing³ Officer: Let the record reflect that this deposition proceeding commenced at 0900 hours, 10 August 1969, at the Office of the Staff Judge Advocate, Fort Blank, Missouri, pursuant to authority attached hereto as Inclosure 1. Present at the taking of the depositions are:

Captain Omar Pleas, Deposition Officer.

Captain Hiram Trust, Detailed Trial Counsel, certified in accordance with Art. 27b and previously sworn.

³ Pursuant to paragraph 117(b)(7) of the Manual, the Deposing Officer is responsible for administering all oaths and for maintaining an orderly deposition hearing.

Captain Roger Tort, Detailed Defense Counsel,
certified in accordance with Art. 27b and pre-
viously sworn.

PVT E-2 Thomas Sublette, Accused.

MSG Henry J. Simms, Deponent.

Let the record further reflect that Sergeant Simms is
present to testify as a witness for the prosecution in
the forthcoming general court-martial convened by
General Court-Martial Convening Order No. 18,
Headquarters, Fort Blank, dated 23 August 1969
case United States v. Thomas Sublette, PVT E-2.

Trial Counsel: Counsel representing the accused is requested to state
any objection he has pertaining to the taking of this
deposition including the notice of taking, time to
prepare, or formal defect in the proceedings.

Defense Counsel: There are none. (I object _____.)
As Deposing Officer: I will now swear the reporter,
Mrs. Norine Scribble: "You swear (or affirm) that you
will faithfully perform the duties of reporter to this
court. So help you God."

I will now swear the deponent, Master Sergeant
Simms: "You swear (or affirm) that the evidence you
are about to give shall be the truth, the whole truth,
and nothing but the truth. So help you God."

DIRECT EXAMINATION

TC: Will you state your full name, grade, organization, and armed force?

A. Henry J. Simms, Master Sergeant, RA 13691234, Headquarters Com-
pany, 20th Maintenance Battalion, United States Army, Fort Blank,
Missouri, sir.

Q. Do you know the accused in this case?

A. I do, sir.

Q. If you see him present, will you point him out and identify him by
name?

A. Private Thomas Sublette, sir (indicating accused).

TC: Let the record reflect that the deponent indicated the accused as he
identified him by name. (To witness) Directing your attention to
6 August 1969, what were your military duties on that day?

A. I was First Sergeant of Headquarters Company, 20th Maintenance
Battalion.

* * * * *

TC: On 6 August 1969, about an hour after you gave the accused an order
to mow the lawn, what did Lieutenant Ferguson relate to you con-
cerning the accused?

DC: I object to the last question as calling for hearsay.

Officer Taking Deposition: The objection of the defense counsel will be noted and made part of this record.⁴

* * * * *

TC: Will the reporter mark this document as Deposition Exhibit (1) for identification. Sergeant Simms, do you recognize Deposition Exhibit No. (1)?

A. Yes, this is an informal receipt we regularly use in the unit. The amount of tools and the date of the transaction was written on it by me and was signed by Private Sublette on the date of the transaction. This is the original.

TC: Let the record reflect that defense counsel was shown and examined Deposition Exhibit No. (1) for identification. A copy will be substituted.

* * * * *

CROSS EXAMINATION

DC: I have no further questions.

TC: Will you state where you can be located on 14 August 1969, the proposed date of this trial?

A. I am being transferred on a permanent change of station pursuant to par. 267 DA 505 dated 5 Jan 69. My address on 14 August will be Headquarters, United States Army, Europe, New York 09403.

TC: When do you intend to depart Ft. Blank?

A. In the morning.

TC: Do you waive reading and signing this transcript?

A. Yes, sir.

TC: Does the accused object?

DC: No.

TC: Let the record reflect that these proceedings terminated at 1650 hours this date,⁵ 10 Aug 1969.

(C) Presentation of deposition to court.

Depositions are documentary evidence and must be properly authenticated before being admitted into evidence. In addition, counsel must be able to prove the unavailability of the deponent in accordance with Article 49(d). There are three possible methods for the admission of a deposition into evidence:

(1) By stipulation as to the unavailability of the deponent and as to the authenticity of the deposition;

(2) By proving the unavailability of the deponent⁶ and by calling the deposing officer to authenticate the deposition; and

⁴ The officer taking the deposition makes no ruling on objections. The objections made at the taking of the deposition are ruled on by the military judge (president of special court-martial without a military judge).

⁵ The officer taking the deposition should not conduct an independent examination of the witness. The appropriate certificate of the officer taking the deposition appears following this point (see DD Form 456).

⁶ Note that pursuant to paragraph 138c of the Manual the military judge or president of a special court-martial without a military judge may relax the rules of evidence as to the proof of the availability of witnesses.

(3) By proving the unavailability of the deponent and requesting the court to take judicial notice of the signature and authority of the deposing officer on his attesting certificate.

TC: I request that the reporter mark this exhibit Prosecution Number 1 for identification.

REPORTER: This will be Prosecution's Exhibit 1 for identification.

STIPULATION.

TC: The Prosecution and the Defense, with the express consent of the accused, stipulate that Sergeant Henry J. Simms, witness for the Prosecution, is presently unable to appear and testify at this trial because (e.g., he presently is assigned to Headquarters, United States Army, Europe, APO New York 09403, located in Germany, and that Prosecution Exhibit 1 for identification is a true and authentic oral deposition of the testimony of Sergeant Henry J. Simms.

TC: I now show Prosecution Exhibit 1 for identification to defense counsel and the accused.

TC: Do Defense Counsel and the accused consent to the stipulation of fact and the authenticity of Prosecution Exhibit 1 for identification?

DC: The Defense Counsel and the accused consent.

TC: The Prosecution offers Prosecution Exhibit 1 for identification into evidence as Prosecution Exhibit 1 and I submit Prosecution Exhibit 1 to the military judge (president of special court-martial without a military judge).

MJ: Prosecution Exhibit 1 for identification is admitted into evidence as Prosecution Exhibit 1 and the words for identification may be deleted.

PROOF.

TC: The Prosecution offers Prosecution Exhibit 1 for identification as the oral deposition of Sergeant Henry J. Simms. Prosecution calls as a witness . . . (or offers documentation as to the absence and unavailability of Sergeant Henry J. Simms).

DC: [Defense counsel offers no objection or cross-examines the witness or questions the offered documentary evidence.]

TC: In order to properly authenticate Prosecution Exhibit 1 for identification, the Prosecution calls as a witness [the deposing officer]. [The deposing officer is called, examined and testifies as to the authenticity of the document.]

DC: [has no objection to the authenticity of the document, or cross-examines the deposing officer.]

TC: Because of the established absence of the deponent and the proper authentication of Prosecution Exhibit 1 for identification by the deposing officer, the Prosecution requests that Prosecution Exhibit 1 for identification be admitted into evidence as Prosecution Exhibit 1. I submit Prosecution Exhibit 1 to the military judge (president of a special court-martial without a military judge).

DC: I have no objection.

or

I object because . . .

MJ: Prosecution Exhibit 1 for identification is admitted into evidence as Prosecution Exhibit 1.

PROOF PLUS JUDICIAL NOTICE.

TC: [follow the same format as in PROOF.]

TC: Pursuant to paragraph 147a of the Manual the Prosecution requests the military judge (president of a special court-martial without a military judge) to take judicial notice of the signature of [the deposing officer] as a person authorized to administer oaths, and as to his authority as deposing officer in his attesting certificate as to the authenticity of the oral deposition Prosecution Exhibit 1 for identification.

DC: No objection.

or

I object because . . .

MJ: Judicial notice is taken of the authority and signature of [the deposing officer].

TC: Because of the established absence of the deponent and the proper authentication of Prosecution Exhibit 1 for identification, the Prosecution requests that Prosecution Exhibit 1 for identification be admitted into evidence as Prosecution Exhibit 1. I submit Prosecution Exhibit 1 to the military judge (president of a special court-martial without a military judge).

DC: I have no objection.

or

I object because . . .

MJ: Prosecution Exhibit 1 for identification is admitted into evidence as Prosecution Exhibit 1.

Appendix XVII

STIPULATIONS

(A) *Oral Stipulations of Fact.*

TC: With the express consent of the accused it is hereby stipulated by and between the prosecution and the defense that: The accused surrendered himself to military authorities at the post guardhouse, Fort Blank, Missouri, on 1 August 1969. At the time of his surrender, he was dressed in an Army green uniform.

(B) *Oral Stipulations of Expected Testimony.*

TC: With the express consent of the accused it is hereby stipulated by and between the prosecution and the defense that if John Jones were present in court and sworn as a witness, he would testify substantially as follows: "My name is John Jones. I am a member of the Toyson, Missouri, Police Department. On 1 August 1969, Private Joe James came to me at the Bryant Avenue Police Station and told me that he was AWOL from his Army unit and wanted to turn himself in. At the time, Private Joe James was dressed in an Army green uniform."

(C) *Written Stipulations.* Written stipulations of fact usually are placed before the court in the form of exhibits. For example:

TC: Request that the reporter mark this Prosecution Exhibit 8 for identification.

REPORTER: This will be Prosecution Exhibit 8 for identification.

TC: (Offering Prosecution Exhibit 8 for identification to DC.) Does the defense care to examine this?

DC: Yes, thank you. (DC inspects the exhibit.)

TC: (After showing the exhibit to defense counsel and the military judge) Prosecution Exhibit 8 for identification, which is a stipulation entered into between the trial counsel and the defense counsel and the accused, is offered in evidence as Prosecution Exhibit 8.

1. Form for written stipulation of fact (given to the Court).

Fort Blank, Missouri

15 August 1969

Stipulation

It is hereby stipulated and agreed by and between the prosecution and the defense, with the express consent of the accused, that:

The accused surrendered himself to military authorities at Fort Blank, Missouri, on 1 August 1969.

JOHN J. ARTHUR
Captain, JAGC, Trial Counsel

GEORGE R. JOHNSON
Captain, JAGC, Defense Counsel

PETE SMITH
Accused

2. Form for written stipulation of expected testimony (not given to this Court).

Fort Blank, Missouri

15 August 1969

Stipulation

It is hereby stipulated and agreed by and between the prosecution and the defense, with the express consent of the accused, that if John Jones, 545 Lyndale Ave. So., Toyson, Missouri, were present in court and sworn as a witness, he would testify substantially as follows:

On 1 August 1969, I was a member of the Toyson, Missouri, Police Department. On that date, Joe James came to me at the Bryant Avenue Police Station and told me that he was AWOL from his Army unit and wanted to turn himself in. At that time, Joe James was dressed in an Army green uniform.

JOHN J. ARTHUR
Captain, JAGC, Trial Counsel

GEORGE R. JOHNSON
Captain, JAGC, Defense Counsel

JOE JAMES
Accused

Appendix XVIII

REQUEST FOR COURT TO TAKE JUDICIAL NOTICE

A request by the trial counsel or the defense counsel that the court take judicial notice of a fact may be made substantially as follows (see MCM 147a):

TC: Request that the reporter mark this exhibit for identification.

REPORTER: This will be Prosecution Exhibit 6 for identification.

TC: (Offering Prosecution Exhibit 6 for identification to DC and the Military Judge.) Does the defense care to examine this exhibit?

DC: (Inspects the exhibit.)

TC: The prosecution requests that the court take judicial notice that the motor vehicle speed limit on Fort Blank, Missouri, on 23 July 1969, was 10 miles per hour. To assist the court and reviewing authorities the prosecution offers to the court Prosecution Exhibit 6 for identification. Prosecution Exhibit 6 for identification is a true, extract copy of paragraph 3a, Post Traffic Regulations, Fort Blank, Missouri, dated 4 July 1969, supporting the fact to be judicially noted.

DC: No objection.

MJ (PRES): The court will take judicial notice that on 23 July 1969 the motor vehicle speed limit on Fort Blank, Missouri, was 10 miles per hour. Prosecution Exhibit 6 for identification is admitted in evidence as Prosecution Exhibit 6.

Appendix XIX

OFFERS OF PROOF

(A) In Court. (Only permitted in cases where there is no military judge.)
Where there is a military judge, Offers of Proof must be made either at side bar or at a 39(a) session. See B, infra.

DC: I call your attention to 25 June 1969. Did you have a conversation with the accused, Private Robert Stark, on that date?

A. Yes, I did.

Q. Will you state the circumstances under which that conversation took place?

TC: I object to this course of questioning on the ground that whatever transpired during an alleged conversation between the accused and this witness 3 months before the alleged commission of the offense has no bearing on the issues in this case.

PRES: The objection of the trial counsel is sustained. Counsel will please confine himself to matters which are relevant.

DC: Let the record indicate that if Private Benedict Brown, this witness, were permitted to testify, he would state that during a conversation between the accused and Private Brown at Fort Blank, Missouri, on 25 June 1969, the accused stated that he had purchased a ticket to the football game which was to take place in Toyson, Missouri, during the afternoon of 26 August 1969, the time the offense is alleged to have been committed in Rochester, Missouri. During that conversation, the accused further stated that he intended to go to Toyson on 26 August to see the football game.

PRES: The statement of the defense counsel is solely for the record, and the court is instructed that it is not evidence in this case and should not be considered as such.

(B) Out of Court.

If it appears that the offer of proof might be prejudicial, the military judge may direct that the statement be presented at an Article 39(a) session, that it be submitted in writing and attached to the record of trial as an appellate exhibit, or offered at a side-bar conference. An example of an out of court offer of proof follows:

On trial for rape and robbery, the accused was identified by the complainant and her mother as the assailant by reason of his build and familiarity with his voice. The assailant was masked, and carried on his activities in a dimly lit area inside and outside the house. The complainant and her mother, both Vietnamese, prior to the date of the alleged offense, 6 July 1969, had limited business dealings with the accused. The accused's defense was an unsubstantiated alibi.

DC: The defense calls as a witness, Dr. Ok Hak Pi.

Dr. Ok Hak Pi was called as a witness for the defense, was sworn, and testified as follows:

- Q. State your name and address, please.
- A. Ok Hak Pi, 234 Chunchon, Yong-dong-po, Vietnam.
- Q. What is your occupation?
- A. I am a physician and surgeon.
- Q. Are you licensed to practice as a physician and surgeon in Vietnam?
- A. I am.
- Q. How long have you practiced medicine, Dr. Ok?
- A. Twenty-five years this coming June.
- Q. Of what medical school are you a graduate?
- A. I graduated from _____ Medical School in Cleveland, Ohio, in 19____.
- Q. What other study or training have you had?
- A.
- Q. During the course of your practice, have you had any experience in the treatment and diagnosis of venereal diseases?
- A. Yes, I have.
- Q. How many cases of venereal disease, approximately, have you treated?
- TC: The Prosecution objects to this line of inquiry as immaterial and irrelevant. The inquiry is not directed to any fact in issue at this trial. The Prosecution will concede that Dr. Ok is competent and qualified to diagnose and treat all forms of venereal disease, but submits that any testimony regarding venereal disease is totally immaterial and irrelevant.
- MJ: It appears to be immaterial and irrelevant, the objection to this line of inquiry is sustained.
- DC: May it please the court, the Defense will at this time make an offer of proof.
- MJ: The court will recess until 1320 hours so that a hearing may be held out of the presence and hearing of the members of the court. The court recessed at 1120 hours, 10 August 1969.
- MJ: Let the record show that it is now 1120 hours 10 August 1969 and a hearing is being conducted outside of the presence and hearing of the members of the court-martial. It is attended by the accused, counsel for both sides, the reporter, the military judge and the witness, Dr. Ok Hak Pi. The proceedings of this hearing will be transcribed and made a part of the record. Defense Counsel, you may proceed.
- DC: Your Honor, at this time the defense offers to prove, by the testimony of this witness, Dr. Ok Pak Pi, that he examined Lee Nam Sum, the complainant in this case on 9 July 1969, three days after the date of the alleged rape, and that he is able to identify her. Dr. Ok will testify that she, Lee Nam Sum, was suffering from syphilis chancroids on that date and that this is the primary stage of syphilis, usually appearing between the sixth and twelfth weeks. He will testify that she was, therefore, suffering from syphilis on 6 July 1969, and that syphilis is nearly always transmitted through sexual intercourse. He will further testify that, in the stage at which Lee Nam Sum had the disease, it was highly infectious and

sexual contact with her at that time, that is, intercourse, would probably result in the transmission of the disease to the person having intercourse with her. Dr. Ok Hak Pi will also testify that he thoroughly examined the accused this morning, 10 August 1969, and that the accused is not now suffering from syphilis, the symptoms of which would be apparent if he had contacted syphilis on 6 July 1969, and did not receive treatment from that date to this. In view of the accused's testimony as to alibi, and his denial that he has ever had, or ever been treated for, syphilis, it is submitted that this evidence is material and relevant on the issue of the identity of the alleged perpetrator. In other words, the fact that the alleged perpetrator was exposed to this highly infectious disease, and the fact that this accused does not have the disease are relevant and material to help establish the proposition that if anyone raped and robbed the complainant, it was not the accused.

TC: To all of which offer the prosecution objects.

MJ: Based on the offer of proof the original ruling is reversed. The objection is overruled. Trial counsel, will you call the court?

NOTE: Fact situation based on *United States v. Allen*, 2 USCMA 266, 8 CMR 66 (1953). See MCM 154c, 57g.

Appendix XX

REPORT OF RESULT OF TRIAL

1 August 1969

SUBJECT: Report of Result of Trial*

TO: Commanding Officer**
Company B, 1st Battalion, 66th Infantry
Fort Blank, Missouri 63891

1. Notification under paragraph 44e, Manual for Courts-Martial, 1969 (Rev.), is hereby given in the case of.

2. ACCUSED	GRADE	SSAN	ORGAN- IZATION
(Last name—First name—M.I.)			
Doe, John H	Pvt E-2	578-26-4777	Co. B, 1st Bn, 66th Inf

3. TYPE OF COURT [] General [x] Special
Convening Authority: CO, 1st Bn, 66th Inf

4. SUMMARY OF CHARGES AND FINDINGS:

GIST OF OFFENSES (including charge and specification numbers)	PLEA	FINDINGS
a. AWOL (Sp and Ch I)	NG	G
b. Larceny (Sp and Ch II)	NG	NG

5. Sentence:*** (Dishonorable) (Bad Conduct) discharge.

Forf: \$50.00 (per month for 6 months) (Total).

CHL: 6 (days) (months) years)

Reduction: (Reduced to Private (E-1)).

Other: (None.)

6. DATE SENTENCE ADJUDGED (or acquittal announced):

1 August 1969.

7. DISPOSITION OF ACCUSED:***

The accused was in confinement prior to trial and was returned thereto immediately following trial.

The accused was not in confinement prior to trial but, having been sentenced to confinement, was returned to his organization (under guard) for disposition under paragraph 21d, MCM, 1969.

*This form is not mandatory. Wherever applicable, authorized abbreviations may be used in its preparation.

**DISTRIBUTION:

1—Immediate CO of accused (original).

1—Convening authority (unless otherwise directed).

1—CO confinement facility (when the accused was in pretrial confinement or the adjudged sentence includes confinement and the convening authority has not directed otherwise).

***Strike out inapplicable words.

The accused was (returned to his organization for duty).

CHAUNCEY WEBSTER
Captain, JAGC
Trial Counsel

Appendix XXI
STATEMENT OF ACCUSED REGARDING
REPRESENTATION BY APPELLATE
DEFENSE COUNSEL

SUBJECT: Request for Appellate Defense Counsel

THROUGH: Commanding General

GCM AUTHORITY

ADDRESS

TO: The Judge Advocate General of the Army
Department of the Army
Washington, D. C. 20310

a. Having been advised that in the event my case is referred to a Court of Military Review I have the right to be represented before the Court of Military Review by appellate defense counsel detailed by The Judge Advocate General of the Army, or by civilian counsel provided by me, or both counsel, pursuant to the Uniform Code of Military Justice, Article 70, I

_____ desire to be represented before the Court of Military Review by appellate defense counsel detailed by The Judge Advocate General of the Army; I understand that I may communicate directly with detailed military appellate defense counsel on legal matters relating to the merits of my case and that such communications should be addressed to: The Judge Advocate General, ATTN: Office of the Defense Appellate Division, Department of the Army, Washington, D. C. 20315

_____ intend to retain at my own expense civilian counsel, whose name and address is _____

_____ have retained or have taken action to retain civilian counsel whose name and address is _____

_____ intend to retain civilian counsel whose name and address will be furnished The Judge Advocate General of the Army.

_____ do not desire to be represented by appellate defense counsel before the Court of Military Review.

b. The following errors or other matter are urged as grounds for relief:

Date

Signature of Accused

Name typed

Grade

SN/SSAN

Note. This document should be prepared in quintuplet and all copies should be signed by accused. The original should be placed in the original record of trial, and a copy placed in each of the other two copies of the record of trial forwarded to The Judge Advocate General. The accused should be furnished with one copy and the Staff Judge Advocate should retain a copy.

Appendix XXII
CERTIFICATION OF ADVICE TO ACCUSED
OF APPELLATE RIGHTS*

HEADQUARTERS

19 _____

SUBJECT: Certification of Advice to Accused of Appellate Rights

THROUGH: _____
GCM AUTHORITY

ADDRESS

TO: The Judge Advocate General
Department of the Army
Washington, D. C. 20310

a. Reference is made to the record of trial by (general) (special) court-martial in the case of _____

(Last name—First name—Middle initial)

(Service number)

(Rank or grade)

(Organization) who was sentenced on _____

19 _____

b. I hereby certify that I have advised the above-named accused of his appellate rights, as follows:

(1) That, in the event his case is reviewed by a Court of Military Review he may, within 10 days after the convening authority's action, forward a request to be represented by appellate defense counsel before the Court of Military Review and that failure to forward a request for such representation within 10 days may be regarded as a waiver of his right to appellate counsel before the Court of Military Review if such board has taken its final action in the case prior to the receipt of such request.

(2) That, in the event his case is referred to a Court of Military Review under Article 69 of the Uniform Code of Military Justice, he has a right to be represented by appellate defense counsel before the Court of Military Review, and that his failure to notify the Court of Military Review of his desire to be represented by appellate defense counsel prior to the time the Court of Military Review takes its final action in the case may be regarded as a waiver of his right to appellate representation.

*The use of this form is not mandatory. If used, it may be adapted to suit local requirements.

(3) That his request, if any, to be represented by appellate defense counsel should be accompanied by a statement of the errors or other matters to be urged as grounds for relief and that, if desired, his trial defense counsel will prepare such statement for him.

(4) That, in the event his case is reviewed by a Court of Military Review, he may, within 30 days after he is notified of the decision of the Court of Military Review, petition the United States Court of Military Appeals for a grant of review and that, if such review is granted, the court need take action only with respect to issues specified in the grant of review and only with respect to matters of law.

(5) That his right to request representation by appellate defense counsel before the United States Court of Military Appeals or the Court of Military Review includes the right to be represented by civilian defense counsel if provided by him.

(6) That at any time within 2 years after the sentence is approved by the convening authority, he may petition The Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court.

JOHN C. DOE
Captain, JAGC
Trial Defense Counsel

By Order of the Secretary of the Army:

W. C. WESTMORELAND,
General, United States Army,
Chief of Staff.

Official:

KENNETH G. WICKHAM,
Major General, United States Army,
The Adjutant General.

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