Keystones of the Military Justice System: A Primer for Chiefs of Justice*

Major Lawrence J. Morris
Deputy Shaff Judge Advocate
Headquarters, 3d Infantry Division

Introduction: Fewer Trials, Less Experience

In 1980, the Army court-martialed 5803 soldiers. At that time the Judge Advocate General's (JAG) Corps consisted of approximately 1501 active duty lawyers. Twelve years later, only 1778 soldiers were court-martialed, by a JAG Corps consisting of approximately 1675 officers.[1] A sixty-nine percent drop in courts-martial, accompanied by an eleven percent increase in the size of the JAG Corps, translates into a Corps with markedly less trial experience.[2]

A JAG Corps with less trial experience means, after a time, that the supervisors and trainers of those trial counsel also have less trial experience. The paradox, of course, is that trial counsel need more supervision and guidance, because the reduced case load gives them less opportunity to gain and learn from experience.[3]

This article offers perspective for chiefs of criminal law, regardless of their experience level, but is geared to those judge advocates with relatively little military justice experi-

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[1] Court-martial statistics reflect all special (SPCM) and general courts-martial (GCM) in a fiscal year. All figures are furnished by the Office of the Clerk of Court, United States Army Legal Services Agency. The breakdown is as follows:

	GCM	BCD SPCM	SPCM	Art. 15
FY 80	1,353	*4,450	-	151,371
FY 84	1,459	*1,889	-	113,914
FY 88	1,631	923	182	91,898
FY 90	1,451	772	149	76,152
FY 91	1,173	585	92	60,269
FY 92	1,168	543	70	50,066
FY 93	915	327	45	44,207

*Combined statistics for "straight" special courts-martial and those empowered to adjudge a bad-conduct discharge.

Consider the above statistics in light of the number of judge advocates on active duty and the number of judge advocate captains (who try virtually all cases) on active duty. The source for these figures is the Personnel, Plans, and Training Office, Office of The Judge Advocate General, and are as follows:

	Judge Advocates	CPT Judge Advocates
FY 80	1,501	1,011
FY 84	1,788	1,075
FY 88	1,770	1,070
FY 90	1,751	1,054
FY 92	1,671	1,022
FY 93	1,612	966

The 5803 courts-martial in fiscal year 1980 translates to 3.8 courts-martial per judge advocate and 5.73 per JAG captain. Fiscal year 1993 rates are .80 courts-martial per judge advocate and 1.3 per JAG captain, a 77% reduction in the court-to-captain ratio. Other variables to consider, however, include the increase in specialties—such as acquisition law—since 1980, and the complexity of the cases tried. Additionally, the percentage of contested cases has increased slightly, from 37.4% in 1989 to 43.8% in 1993, meaning better opportunities for advocacy and experience. The judge-alone ratio has remained virtually constant at about 65%. Regardless, many fewer courts-martial exist to be spread among an almost constant base of captains; the result has to be a sharp reduction in the JAG Corps' experience base.

[2] The increase in the number of GCMs in fiscal year 1988 may be attributable to *United States v. Solorio*, 483 U.S. 435, 107 S. Ct. 2924 (1987), in which the Supreme Court effectively expanded the jurisdiction of the military justice system. General courts-martial have only declined 14% from 1980 to 1992. Most of the overall decline in courts-martial stems from special courts-martial, which declined by 86%. This may reflect, *inter alia*, an increased tendency to try serious, felony-like offenses, including child abuse, and a decline in the prosecution of military offenses, such as absent without leave (AWOL) and disobedience. The overall decline in courts-martial also may reflect the effects of the 1982 revision of *Army Regulation 635-200*, which made administration separations easier, reducing the special court-martial load for minor offenses and greatly reducing the number of repeat offenders who are court-martialed. *See* DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS: ENLISTED PERSONNEL (17 Sept. 1990) [hereinafter 635-200].

[3] See David L. Hayden et. al., *Training Trial and Defense Counsel: An Approach for Supervisors*, ARMY LAW., Mar. 1994, at 21.

ence, on the premise that this experience, while helpful, is not indispensable to effectively performing as a chief of criminal law.[4] The chief, as an experienced attorney and officer, can offer valuable assistance and impose needed order and systems in many areas, even if he or she did not try a large number of criminal cases. The chief can be most effective by running the criminal law bureaucracy in a command-sensitive manner (moving cases swiftly, ensuring that accurate advice is given, preempting ill-considered decisions), coaching trial counsel, and ensuring that cases are tried well and in a timely manner.

Functional Supervision

Although the Army is trying fewer cases, the government must perform a number of important, nearly ministerial, steps correctly in every case. Chiefs should ensure that several practical, prophylactic, and proactive measures are carried out properly.

Panel Selection

The chief should monitor the panel selection process. The process should be as institutionalized as possible so that the actors—from the clerk to the convening authority—understand their roles, and that the government can defend the process as always having operated in the same correct manner. For example, the commanding general (CG) should routinely send out a letter seeking nominees several weeks before he or she is to select the panel. The criminal law section should compile the list for the staff judge advocate (SJA) to present to the CG, who should take time to review it before making the selections. Written advice from the SJA, which reiterates the Article 25 criteria for member selection,[5] should accompany the list of nominees. The SJA also should advise the CG that anyone in the CG's jurisdiction can be selected, regardless of whether that individual has been nominated. In some jurisdictions, this point is reiterated by providing the CG with an "alpha roster" of all soldiers in the jurisdiction, in addition to the list of nominees.

Although the SJA normally will make the presentation to the convening authority and orally reiterate the written information regarding the Article 25 criteria on every occasion, the chief should supervise the process of seeking nominees, assembling them for the CG, and ensuring that a coherent method for designating primary alternate members is presented. The nomination process "is a solemn and awesome responsibility and not one to be taken lightly or frivolously."[6] Tampering with the nomination process—such as, stacking the pool with perceived supporters of "hard discipline"—can taint and invalidate the entire selection process, even when the convening authority properly applies the Article 25 criteria.[7]

Varying philosophies exist on how long panels should sit and whether some members should be carried over to subsequent panels. Factors to consider in deciding how long panels sit include the number of trials panels typically hear and field and training obligations. To ensure that experienced panel members sit, carrying over some members from prior panels is useful—so long as the members are not carried over because of any perception about how they voted. Panels should be replaced at about the same intervals, avoiding the perception or charge that they are replaced capriciously. Panels commonly sit for about six months. In busier jurisdictions, panels may sit for as little as four months, but that means going through the selection process three times a year. More frequent turnover, coupled with retention of some panel members, reduces panel "burn out" (evidenced by frequent requests for excusal) and guarantees a base of experience on each panel.[8]

Another approach, used in some jurisdictions, is for the CG to select two panels to sit simultaneously—that is, two GCM panels and two BCD panels—and to alternately refer cases to the panels. The advantage is that court membership is less burdensome, because panels only hear half the cases. Disadvantages include that members still sit for an entire year and face the possibility of panel duty interfering with leave and field duty for a year. Additionally, the government will have to be able to prove that cases are mechanically referred alternately to the "red" and "blue" panels, so that if one panel acquires a tougher reputation, the government is prepared to defend against manipulating the system (stacking or manipulating referrals) to place certain cases in front of the perceived tougher panel. Large, geographically dispersed jurisdictions, especially overseas, may select more than one panel to serve simultaneously by dividing the jurisdiction geographically. Again, this practice is permissible and efficiently uses resources—such as, court personnel and court reporters—while not compromising an accused's rights. When multiple accused are facing trial, the "conflict" cases can be referred to the panel from the other geographic area.

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[4] Most organizational structures refer to the "chief of criminal law." This article will use the more common, though unofficial, term, chief of justice.

[5] "[T]he convening authority shall detail as members . . . [soldiers who], in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." UCMJ art. 25(d)(2) (1988). The further the SJA deviates from reiterating and explaining the Article 25 criteria, the greater the risk of improper conduct. *See* Teller, *Issues Arising From Staff Judge Advocate Involvement in the Court Member Selection Process*, ARMY LAW., Feb. 1988, at 47. Although not the SJA, the chief can serve as a counterweight to any SJA inclination of becoming involved in the selection process by reminding the SJA of the perils of this involvement.

[6] United States v. Smith, 27 M.J. 242, 252 (C.M.A. 1988) (Cox, J., concurring).

[7] United States v. Hilow, 32 M.J. 438, 441 (C.M.A. 1991). Nominating authority's submission of tainted nominees was not cured by convening authority's intended application of Article 25 criteria because the convening authority was unaware of the improper screening criteria applied by a nominating authority who sought "supporters of a command policy of hard discipline." *Id.* The nominating authority violated Article 37's stricture that "[n]o person . . . may attempt to coerce or influence the . . . action of any convening authority with respect to his judicial acts." *Id.* at 443.

[8] At some installations, such as Fort Bragg, North Carolina, where a brigade must be ready for deployment at all times, panels sit for as little as one month. This keeps the panel selection process in perpetual motion and guarantees that more soldiers serve as panel members, but because of numerous drawbacks—increased opportunity for error, expenditure of resources in the nomination and selection process—it should not be the preferred practice when not operationally necessary.

General court-martial convening authorities (GCMCAs) vary in their preferences for information about potential panel members. Some request Officer Record Briefs (ORBs) and *Department of the Army (DA) Forms 2* and *2-1*. As an aid to applying Article 25 criteria, reviewing these forms is permissible, but no requirement to consider any particular information exists. Some jurisdictions extract Article 25-related information on each nominee, providing the CG with information regarding length of service, education, time in service, and military education level. Chiefs of justice should apprise their SJAs of recent developments in the law governing panel selection, so that, for example, CGs understand that they may not use rank as a controlling criterion when choosing members.[9] The convening authority should be attuned to the difficulties created by selecting several members of the same command. When one or more panel members are in the rating chain of another, it not only raises the specter of improper influence (rebuttable on voir dire, but an issue) but also has the potential of unduly burdening a particular unit, whose leadership may be negatively impacted by service on courts-martial. This increases the likelihood of the need for frequent excusals and the attendant disruptions of that process. Not all rating chain conflicts will be obvious (nor are they automatic disqualifiers); a method to further uncover them—while providing other useful information to counsel—is to routinely distribute court member questionnaires as provided in the *Manual for Courts-Martial (Manual)*.[10]

Inclusion Permissible

While excluding potential panel members for improper reasons is inappropriate, including members to ensure a representative mix of members is not objectionable. Convening authorities may take into account the rough demographic composition of their communities to ensure, for example, that they include women or minority group members on the panels that they select.

Junior Convening Authorities

General court-martial convening authorities normally are sensitive to potential pitfalls in the panel selection process. Rarely will they seek opinions about individual panel members or insert inappropriate considerations into the selection process. Chiefs may have to monitor the selection process more closely at the special court level, however, because special court-martial convening authorities (SPCMCAs) select panels less often and are more likely to have greater personal knowledge of potential members, as well as of a pending case or cases. Use a process that mirrors the one used to select general courts: seek nominees from all summary court-martial convening authorities; provide a packet to the SPCMCA; brief orally and in writing on the selection criteria; and then publish a convening order after the SPCMCA makes the selections.

The final potential pitfall involves excusals, alternates, and vice orders. Create a mechanism, at the time a panel is selected, by which alternates are automatically detailed.[11] Additionally, have a mechanism, ideally memorialized in a local supplement to *AR 27-10*,[12] by which the CG delegates to the SJA limited authority to excuse a certain fraction of panel members—such as, one-third—without CG approval. This provides crucial flexibility close to trial when last-minute contact with the convening authority might not be practical or desirable.

Do Not Reconfigure Panels After Bad Results

Panels sometimes produce results that do not appear to be warranted by the evidence or that seem not to have fully recognized the aggravating evidence. This perceived lenience cannot form the basis, however, of a convening authority's decision to "reassess" the panel's suitability by reapplying the Article 25 criteria. Such tampering "is inconsistent with the spirit of impartiality of Article 25 and the limitation on command influence contained in Article 37 of the Code."[13]

Drafting Charges and Specifications

Counsel take nearly irrevocable steps in shaping a case at a stage in which they often show insufficient interest or attention. Poorly drafted charges and specifications can damage or doom the government's case at the outset.

Use the Manual

Counsel should adhere strictly to the form specifications, always using them to draft charges. Furthermore, chiefs should review charges before preferral and consult the form

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[9] In United States v. Smith, 37 M.J. 773 (A.C.M.R. 1993), the CG wrote "Get E8" or "Get E7" from specific units several times on a court member selection document. The Army Court of Military Review (ACMR) found that the CG "initiated a top-down enlisted member selection process that began and ended with one criterion, grade, to the exclusion of those criteria he was statutorily required to consider." *Id.* This inflexibility in applying Article 25 criteria rendered the trial *void ab initio*, meaning that no former jeopardy existed, but requiring a retrial. Such an episode argues in favor of the SJA's presence with the CG throughout the process—as well as stopping and correcting the problem at its source.

[10] The *Manual* lists eleven standard questions that may be posed to panel members. MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 912(a)(1) (1984) [hereinafter MCM]. Appending these questionnaires to panel selection letters, signed by the CG, should motivate most members to return them in a timely manner. Counsel should routinely review them before trial to study their panel and to avoid annoying the panel by requiring members to recite information already provided to the government. Counsel should make the questionnaires available to the defense.

[11] When an automatic detailing provision occurs prior to trial, time permitting, publishing a supplemental convening order, which reflects the detailing and excusals, is advisable. Although redundant, it avoids the need to account for each member on the record, explaining the automatic detailing and perhaps attaching the CG's selection lists as appellate exhibits. When automatic detailing occurs on the day of trial—such as, when a panel falls below quorum, requiring the automatic augmentation of a predetermined number of alternates—counsel must be prepared to include the written automatic detailing provision as an appellate exhibit and account for contacts made, in descending order, with all alternates.

[12] DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE (22 Dec. 1989) [hereinafter AR 27-10].

[13] United States v. Redmond, 33 M.J. 679, 683 (A.C.M.R. 1991). Here, the SJA believed that an acquittal and a light sentence were "disturbing," and he prompted the convening authority to select a new panel.

specifications when doing so. Charges never should be preferred that omit words of criminality—such as, "a woman not his wife" or "wrongfully"—or that deviate in any material manner from the *Manual* form specifications. Drafting is a trial counsel's job, not a clerk's responsibility. At a time when the case load was greater, expecting reliable clerks to prepare draft specifications was reasonable, but today the lawyer alone has the responsibility to draft legally sufficient specifications. Additionally, expecting the chief to review every specification that is preferred in his or her jurisdiction is not too unreasonable.[14]

The Rare Case

In rare circumstances the *Manual* may not provide adequately for an offense. In these circumstances, chiefs should guide counsel through careful research to help draft Article 133 or 134 specifications that either assimilate state law (where applicable) or the United States Code,[15] or that adequately describe the conduct and assert that it is either conduct unbecoming, service discrediting, or prejudicial to good order and discipline. Be selective in using novel specifications; *Manual* provisions provide adequately for the conduct in question, and the novel specifications are subject to heightened and often fatal scrutiny.[16] When determining what and whether to charge, chiefs need to focus counsel (and complaining commanders) on the gravamen of the offense by forcing them to articulate what it is about the conduct that is offensive or irritating. Forcing them to answer that question will help reveal conduct that is truly derelict from that which is merely ignorant, inane, or indiscreet. While counsel should be liberal in the initial drafting of charges, they should consider them carefully before recommending that a convening authority refer them to trial. "[A]s the case proceeds to prosecution, the Government must make a good faith assessment of its case and withdraw any charges which it cannot substantiate by competent, legal evidence."[17]

What to Charge

Chiefs can help counsel determine how to "package" criminal misconduct so that the charges adequately reflect the accused's conduct without under-representing the seriousness of the conduct or, at the other extreme, appearing to unreasonably multiply charges. Unreasonable multiple charges risks (1) evoking unwarranted sympathy for the accused, (2) burdening the government with proving relatively minor charges, and (3) confusing or distracting a panel.

Counsel should be encouraged to draft and consider every possible offense covered by the conduct. In a case in which two soldiers left work early, beat up two people, and took their money, this could yield charges of failure to repair, conspiracy, kidnapping, communicating a threat, assault, robbery, attempted murder, and obstruction of justice. A chief, by virtue of experience and detachment, can talk counsel through the many concerns in such a scenario: whether a failure to repair, though warranted by the evidence, may seem like "piling on" and would not warrant additional punishment; whether the kidnapping, although warranted by the case law that finds kidnapping in instances of almost incidental movement, will conflict with a panel's sense of kidnapping as a sustained deprivation of liberty. Additional concerns to consider include: whether conspiracy, although hard to understand and unlikely to generate additional punishment, might be worth charging to emphasize the theory behind punishing conspiracy—that two or more individuals intent on committing a crime make it more likely to happen and therefore constitute a greater public danger; whether communicating a threat should be charged to ensure that the evidence can be presented to the court, averting a fight over uncharged misconduct,[18] or whether the law governing *res gestae* is broad enough to make the postincident conduct admissible in any event.

The chief's critical role is making counsel realize that they are more than mere scriveners when drafting charges, and at this early stage they are obliged to try to assemble a coherent theory of the case. It often makes sense to err on the side of over-charging and then to reassess the case after the Article 32 investigation is complete. Chiefs should be liberal in recommending that charges be dropped after the Article 32 and before referral. This provides for a more concise charge sheet at trial and, because prereferral dismissal is without prejudice, preserves the charges for later use. Intentional multiplicity has the benefit of avoiding squabbles over uncharged misconduct and the confusing, dense instructions over lesser included offenses. Chiefs must guide counsel through charging strate-

[14] Chiefs should guard against some counsels' practice of using the *Judge's Benchbook* for drafting specifications. Unlike the *Manual*, this is not a primary source of the law, and its changes are not as reliably distributed. Rely on it for instructions, but follow the *Manual* for drafting.

[15] Many counsel leave the Basic Course with a hazy sense of the Assimilative Crimes Act. Chiefs cannot afford to have such sketchy knowledge. Simply, the Act assimilates state criminal codes only on installations that have exclusive federal jurisdiction.

[16] *See, e.g.*, United States v. Pete, 37 M.J. 521 (A.C.M.R. 1994), in which the government was found to have improperly charged a soldier with conspiracy to organize a strike in violation of the United States Code, as incorporated through Article 134. The ACMR found that a group of National Guardsmen, who met after hours to plan a stunt that included a bus trip back to their home station, did not violate the unionizing prohibitions of the United States Code. One factor in the ACMR's analysis was the government's decision not to pursue the arguably more applicable mutiny provisions of the Uniform Code of Military Justice (UCMJ). "[T]here is evidence . . . that a fact-finder could have relied upon in determining that the appellant engaged in conduct that violated several provisions of the UCMJ." *Id.* at 524 n.6. The teaching point is not to get innovative when drafting specifications before exhausting the fundamentals of the Code.

[17] United States v. Asfeld, 30 M.J. 917, 929 (A.C.M.R. 1990). The government tried to charge sexual harassment under *AR 600-21*, which *AR 600-50* incorporated by reference. The ACMR found the regulatory provisions to be "no more than a policy statement," ruling that such incorporation violates the "canons of construction by which regulatory provisions are interpreted." *Id.* at 923.

[18] Military Rule of Evidence 404(b) provides that evidence of a person's character or of a particular character trait is not admissible to show that a person acted "in conformity therewith," but may be used to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." MCM, *supra* note 10, MIL. R. EVID. 404(b). This is one of the most litigated areas of trial practice. This article is not intended to treat the area comprehensively, but to alert chiefs that, at the earliest stages of the criminal process, the decision of how to charge a case should include discussion of methods of proof, which includes critical assessments of the likelihood of prevailing in a motion to suppress 404(b) evidence; the more likely that the government is to lose such a motion, the more it makes sense to include a seemingly peripheral or trivial charge for the purpose of preserving a vehicle through which to place the evidence before the fact-finder.

gies, all along preparing them to keep focused on the core charges and expecting consolidation of some charges and specifications after findings.

Take the Long View: Think of Pleas, PTAs, and the Theory of Your Case

The *Manual* prohibits "unreasonable multiplication of charges,"[19] but nothing legally prohibits, for example, charging 100 different bad checks in 100 different specifications. The chief can help counsel understand the drawbacks involved in this strategy, however, which include the following: (1) boring a panel and appearing to exaggerate the accused's criminality; (2) not affecting the likely punishment, while exponentially increasing the maximum punishment; (3) frustrating judges, who would have to conduct a more exhaustive providence inquiry; (4) creating greater opportunity to err in findings, publication of results of trial and other trial-related documents; and (5) creating a cumbersome posttrial review. Drafting "mega-specs" in such circumstances—placing conduct in intelligible, digestible groupings such as time periods or victims—often serves many interests, including efficiency, without sacrificing the government's case or appearing to concede that the misconduct is not serious. This does not mean that counsel should be intimidated by multiplicity; circumstances exist in which counsel should expressly charge mirror-like offenses that are not multiplicious and warrant being charged separately to emphasize the accused's opportunities for reflection, calculation, and, perhaps, the aggravating nature of the conduct.

Insist on Full and Continuing Disclosure

Avoid Discovery Battles

Discovery battles are among the most fruitless of exchanges between counsel. In every case, trial counsel should make a written disclosure of all Rule for Courts-Martial (R.C.M.) 701 and section III evidence. They should not become involved, however, in extended battles with the defense over minutiae. Disclose everything that is remotely material. If served with a word-processed, generic discovery request, respond to the relevant portions and ignore the rest. Let the defense approach with a specific request when necessary; if the defense seeks information that is trivial or truly not material—such as, medical records for all witnesses—then let them take it to the military judge.[20]

In any close case, the government normally should disclose. The disclosure requirements are based on fairness, justice, judicial economy, and that the government is in exclusive control of government information. The government should remove any obstacles to the defense's gaining information in control of the government; it need not, however, go out and obtain it for the defense. The underpinnings of the rules are fairness and efficiency, not defense convenience. The defense, for example, sometimes focuses on the agent activity summaries (*Criminal Investigation Division (CID) Forms 28*), or the "left side" of the CID file, because it occasionally contains unedited directions and criticisms by CID agents. Some CID officials are stingy in releasing the documents that should be released, even though they rarely are momentous. Trial counsel should intercede for the defense, but the defense then must go to CID to inspect the documents.[21]

The ethical rules and the *Manual* make the Army an "open file" jurisdiction, in which the government is expected to keep few surprises to itself. If ethics and the *Manual* are not enough to motivate full disclosure, consider these additional reasons:

Nondisclosure Can Be Harmful to Your Case

Failure to disclose potentially exculpatory, *Brady*-type information can trigger a variety of sanctions, ranging from simply ordering discovery to prohibiting a party from introducing the evidence.[22] In extreme cases, calculated failure to disclose can rise to the level of constitutional error and require reversal.[23] Counsel need to know that the more specific the defense request, the more strict the burden on the government, especially in the military, to disclose the evidence.[24] Military

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[19] MCM, *supra* note 10, R.C.M. 307(c)(4) discussion.

[20] See *TCAP Memo No. 75* (Mar. 1992) for sample answers to a standard defense discovery request and to a defense urinalysis discovery request.

[21] Note that "inspect" actually carries a greater meaning in this context. If the defense has the right to inspect an item, then it has "the right to photograph and copy" it. *See* MCM, *supra* note 10, R.C.M. 701(h).

[22] *Id.* R.C.M. 701(g)(3). Brady v. Maryland, 373 U.S. 83 (1963), the seminal case on prosecutorial disclosure, has been clarified in subsequent cases, increasing the burden on the defense to make specific requests. The more specific the request, however, the greater the burden on the government to comply. *See, e.g.*, United States v. Agurs, 427 U.S. 97 (1976); United States v. Bagley, 473 U.S. 667 (1985). Little is gained and much is risked when trial counsel try to calculate how much they have to disclose. The fairest and safest course is a liberal disclosure policy.

[23] United States v. Eshalomi, 23 M.J. 12, 28 (C.M.A. 1986).

[24] United States v. Green, 37 M.J. 88, 89-90 (C.M.A. 1993). Requested impeachment evidence must be disclosed. Military prosecutors' "heavier burden" to disclose "springs from the generous discovery principles announced in Article 46." Although how to test for prejudice in the event of nondisclosure is in dispute, counsel should not decide whether to disclose based on a calculation of the likelihood of prevailing on appeal. *Id.* at 91 (Wiss, J., concurring in part and result). *See also* United States v. Stone, 37 M.J. 558, 568 (A.C.M.R. 1993) (error to fail to disclose that government witness under investigation for travel fraud but harmless under the circumstances because of nature of his testimony). The defense does not have an absolute right to background evidence on government witnesses, but the government has a significant burden when it seeks to withhold such information. United States v. Lonetree, 35 M.J. 396 (C.M.A. 1992). The Air Force Court of Military Review repeats that "discovery is not a constitutional right . . . [but] a procedural matter within the discretion of the rulemaker to regulate," reminding trial counsel that the more specific the defense request the greater the burden on the government to respond fully. *See* United States v. Branoff, 34 M.J. 612, 620 (A.F.C.M.R. 1992).

appellate courts will hold prosecutors to a high standard of disclosure, regardless of any potential defense sandbagging.[25]

Nondisclosure Can Be Professionally Harmful

The Army Rules for Professional Conduct reinforce the disclosure requirements of R.C.M. 701 and constitute an independent basis for counsel to disclose all potentially exculpatory evidence and unprivileged mitigating sentencing evidence.[26] Failure to comply with these rules can subject a counsel to investigation and sanctions.[27]

Full Disclosure Puts Pressure on the Defense

The purpose of open discovery is not some hazy sense of "fairness" designed simply to "level the playing field," but judicial economy and fostering the truth-seeking function of a criminal trial. When the defense is confident that it has seen virtually all government evidence, it can more rationally decide whether to contest the case or to plead guilty to all or some of the charges. The requirement to disclose sentencing evidence, as well as merits evidence, further helps the defense assess the government's case and gauge the accused's prospects.[28] The defense also does not have to irrationally "plead up" to certain offenses for fear that the government has held back especially powerful evidence for an ambush at trial.[29] Although "trial by ambush tactics are discouraged . . . even intentional nondisclosure of discoverable evidence does not inevitably require . . . that the evidence be excluded."[30] Courts will determine whether there is "reasonable doubt that appellant would have been convicted had the evidence been disclosed,"[31] a balanced standard but one to which the government does not want to subject itself after the fact.

Full Disclosure Corporately Helps the Government

As it becomes known that by rule and practice the government operates openly, the defense knows it can normally rely on representations made by the government, fostering better communications, faster movement of cases, and greater faith by soldiers in the integrity of the justice system. A number of scholars have emphasized the close link between the fairness and perceived fairness of the system and its effectiveness. Gilligan and Lederer wrote that, "If discipline is perceived as unfair, personnel will likely distrust superior authority and have diminished institutional loyalty."[32] Government manipulation of the discovery process is the kind of conduct that could contribute to soldier distrust of the system.

Required Defense Disclosures

Further extending the goals of the discovery process, in 1991 the Drafters of the *Manual* began requiring the defense to disclose to the government all witnesses it plans to call (other than the accused) and all sworn or signed statements made by those individuals.[33] Ensure that counsel are aware of the *Manual* provisions. While pretrial disclosure is mainly a government burden, the defense also must notify the government of certain defenses, including alibi, lack of mental responsibility, and innocent ingestion. This notice is not satisfied by merely stating an intention to rely on the defense, but requires details such as "the place or places at which the defense claims the accused to have been" and "the circum-

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[25] Even if the defense knows or should know about certain evidence, the government must seek it out and deliver it, especially when specifically requested. United States v. Simmons, 38 M.J. 376, 381-82 (C.M.A. 1993). There is "an affirmative duty on trial counsel to make [evidence] available to the defense" even if it "could be discovered by a reasonably diligent defense counsel." *Id.* at 382. *See also* Crim. L. Note, *Trial Counsel Must Review Law Enforcement Files for Evidence Favorable to the Defense*, ARMY LAW., Sept. 1994, at 42.

[26] "A trial counsel shall: (d) Make timely disclosure to the defense of all evidence or information known to the lawyer that tends to negate the guilt of the accused or mitigates the offense and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the lawyer, except when the lawyer is relieved of this responsibility by a protective order or regulation. . . ." DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS 3.8(D) (1 May 1992).

[27] DEP'T OF ARMY, REG. 27-1, LEGAL SERVICES: JUDGE ADVOCATE LEGAL SERVICE, ch. 7 (15 Sept. 1989).

[28] MCM, *supra* note 10, R.C.M. 701(a)(5). When the defense asks—which it routinely does, in its boilerplate discovery requests—the government must let it inspect any documents to be introduced during sentencing, and must tell the defense whom the government will call to testify.

[29] In United States v. Trimper, 28 M.J. 460 (C.M.A. 1989), the Court of Military Appeals (COMA) concluded that the government should have disclosed to the defense the results of a private (positive) urinalysis that the accused had conducted. Though the government did not plan to use it on the merits—and only used it on the defense in a rebuttal to the accused's sworn denials of drug use on the merits—the court found that the evidence was "material to the preparation of the defense" and probably would have prompted the accused to "have testified in a more restrained manner if he had been aware" that the government knew the results of the private test. *Id.* at 468-69.

[30] *Id.* at 468-69. The COMA upheld the government's failure to disclose material evidence in this case partly because the trial judge found that nondisclosure was not "part of a cunning prosecutor's scheme to 'ambush' appellant when he testified." *Id.* at 469. Had it been otherwise, the COMA said that "the grounds for excluding the evidence would be stronger." *Id.*

[31] United States v. Simmons, 33 M.J. 883, 886 (A.C.M.R. 1991), *rev'd in part*, 38 M.J. 376 (C.M.A. 1993) (noting that "*Brady* does not require disclosure of evidence that could be discovered with due diligence").

[32] GILLIGAN & LEDERER, COURT-MARTIAL PROCEDURE 6 (1991). "A justice based system . . . is based upon fairness, and to be functional, must be so perceived by the personnel operating under it. It encourages individual responsibility and institutional loyalty." *Id.* at 7. Jurisprudential scholars make the same point. "[T]o have an internal point of view toward at least certain laws logically requires that one have an internal point of view toward . . . the system as a whole. The acceptance of certain laws requires the acceptance of the system of which they are a part." T. BENDITT, LAW AS RULE AND PRINCIPLE 107 (1978). *But see* E. LUTTWAK, THE PENTAGON AND THE ART OF WAR 201-02 (1984). Incidentally, Gilligan and Lederer's *Court-Martial Procedure* is a masterly two-volume publication that combines detailed practical guidance with interesting treatment of the legal and philosophical moorings of the military justice system.

[33] MCM, *supra* note 10, R.C.M. 701(b)(1)(A).

stances under which the defense claims the accused innocently ingested the substance in question, and the names and addresses of the witnesses upon whom the accused intends to rely."[34] The nondisclosure sanctions of R.C.M. 701(g)(3) apply against the defense as well as the government, although judges tend to be more cautious in assessing sanctions against the defense. Regardless, the government should aggressively assert the *Manual* provisions.

While the government should be scrupulous in complying with its discovery requirements, the government is properly, lawfully aggressive when it seeks to force the defense to comply with its disclosure duties. Chiefs must train counsel to exploit these provisions and help them couch presentations to military judges that hold the defense accountable for its conduct. Seeking sanctions in most cases would be unproductive and contentious. A good chief can help counsel distill the case law, however, and determine when the defense has materially altered the government's ability to fairly present its case, distorted the adversary process to gain a tactical advantage,[35] or caused "surprise, harassment, and undue delay,"[36] a possible consequence when, for example, an innocent ingestion defense is sprung at the last minute, requiring a delay to obtain witnesses and experts to rebut the defense. More troublesome for most counsel on a day-to-day basis is defense's flouting of the local rules of court that require, for example, five days notice of motions. Judges rarely enforce these provisions against the defense, but the government should assert the *Lucas*[37] line of cases, especially when late notice prejudices the government's ability to respond effectively to the motion, because of matters such as witnesses who have either moved or left the service. By encouraging counsel to comply with the government's disclosure obligations, the chief can set a tone of ethical responsibility and candor. By insisting on defense compliance with the discovery rules, the chief also will make clear that counsel will enforce the *Manual* conscientiously, while fairly, aggressively asserting the government's case.

Reciprocal Discovery

Counsel also must be aware that defense disclosures trigger government responsibility to disclose information it possesses that would rebut these defenses.[38] The government should seek, in the appropriate case, to bar the defense from presenting evidence when it has failed to comply with a disclosure or notice requirement. The Supreme Court has held that the Sixth Amendment right to present a defense is not absolute and the defense's failure or refusal to comply with notice requirements can result in barring the right to present this evidence.[39] However, reciprocal discovery works both ways. The provisions requiring the defense to disclose "books, papers, documents," when requested by the government were added when the *Manual* was substantially altered in 1984, the greatest change since 1969. Trial counsel should not place too much emphasis in these provisions, however, because they only apply when the defense has made such a request of the government (hence "reciprocal" discovery), and when the defense intends to offer the items on its case in chief. In practice, the government is so liberal and up front with its disclosures that they most often are made before and not pursuant to a defense request, meaning that reciprocal discovery rarely applies. When the government anticipates that the defense might conduct independent testing, it may be wise to deviate from the "open file" practice and not disclose until the defense asks, thereby preserving the right to reciprocal discovery.[40] Accordingly, reciprocal discovery is no "magic bullet" for the government, although counsel should faithfully assert it. Like most other discovery provisions, it is a rule designed to keep trials moving so that there is no need for a delay for the government to, for example, consult its experts to place a report from a defense expert in context.

Coach and Lead

The most important roles a chief can perform are supervisor, developer, and coach of trial counsel. A chief who has tried numerous cases should be able to rely on experience to guide less-experienced counsel. A comparatively inexperienced chief, however, still should be able to draw on his maturity, detachment, and military and legal experience to guide junior counsel. There are as many styles and philosophies on coaching counsel as there are counsel and chiefs. However, to actively engage in the development of counsel, not from an "I'd do it this way" perspective, but from a viewpoint that intensifies the experience of any one court-martial or hearing, is crucial. Counsel learn from their mistakes, but they learn more when those mistakes are filtered and interpreted by someone who not only can diagnose the error but also can talk them through solutions and alternative approaches to future cases.[41]

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[34] *Id.* 701(b)(2)(B).

[35] Taylor v. Illinois, 484 U.S. 400 (1988).

[36] Michigan v. Lucas, 111 S. Ct. 1743, 1748 (1991).

[37] *Id.* at 1743.

[38] MCM, *supra* note 10, R.C.M. 701(a)(3)(B).

[39] In *Lucas*, the Court upheld a Michigan trial judge's exclusion of rape shield evidence because of the defense's failure to comply with a statutory notice provision. *Lucas*, 111 S. Ct. at 1743. While the Michigan statute's 10-day notice requirement is more specific than Military Rule of Evidence (MRE) 412, which has no such time limit, counsel should assert *Lucas*'s principles when they seek to preclude the defense from raising a defense or from introducing evidence when it has failed to comply with notice requirements. *See also* United States v. Nobles, 422 U.S. 225 (1975) (defense forbidden from calling investigator when it refused to disclose his written report); Taylor v. Illinois, 484 U.S. 400 (1988) (defense's willful refusal to disclose defense witness permitted preclusion).

[40] The defense would be obliged to disclose the information if it called an expert to testify, but reciprocal discovery would guarantee its timely disclosure. Still, this provision does not enable the government to gain access to information—such as a soldier's privately-conducted positive urinalysis test—because the defense would not plan to introduce this evidence on its case-in-chief. *See infra* notes 101, 102; *see also* United States v. Trimper, 28 M.J. 460 (C.M.A. 1989).

[41] For an excellent treatment of the chiefs as developers of counsel, see Coupe & Trant, *The Role of Chiefs of Military Justice as Coaches of Trial Counsel*, ARMY LAW., Aug. 1987, at 6.

Puncture Assumptions

The role of experience is less to dictate "what I would do" than to be aware that conventional templates do not always apply, and to discourage a trial counsel's tendency to latch on to easy answers and assumptions. Every trial cliche has its basis in reality, but each can lull a prosecutor into complacency or a false sense of security.

"He'll Never Take the Stand."

Counsel assume that an accused will not take the stand for a variety of reasons, including: (1) the accused confessed or made admissions that he or she would have to contradict; (2) counsel know of uncharged misconduct to which the accused would have to open the door if the accused denied the offenses; and (3) the accused could not hold to such a ludicrous story under cross. Do not be so sure. Some statements that appear to be admissions may strike panels as relatively harmless concessions, or like the fruit of overbearing police procedures, sloppy investigative work, or shortcuts (remember that many panel members, especially senior noncommissioned officers and current or former commanders have had experience—often through their soldiers—that may make them skeptical of CID or military police testimony). More importantly, do not forget that the accused is a human being who can be both righteous and stupid. The accused may feel that the person that she assaulted deserved it, that she really was entrapped into selling the hashish, or that she can lie with impunity to a military panel—and she may be willing to go down in flames telling her story, notwithstanding her counsel's efforts to stop the immolation.

A trial counsel's fervent hope in virtually every case should be that the accused takes the stand. Counsel always have something with which to confront the accused; if not a prior statement, then the evidence of record itself. Trial counsel always should prepare for the possibility that the accused will testify because: (1) it focuses their minds on possible defenses or mitigating factors; (2) it forces them to organize their proof; (3) it makes them assess their cases skeptically; and (4) the accused just might.[42] Chiefs can be invaluable in Socratically talking their counsel through possible testimony by the accused. Rarely is this testimony wholly invented. Accused lie just like anyone else, admitting the irrefutable and embroidering, twisting, and distorting other information to craft a colorable story. Think and talk it through; a structured process of sifting the evidence for excuses and launching points for evasive stories will pay dividends when the accused testifies.

"They Can't Put on a Good Soldier Defense."

When the COMA ruled that a "good soldier" defense could be presented in any case, the defense saw this to be to their advantage, because it enabled the defense to smother the factfinder with good soldier evidence regardless of the charges. Trial counsel frequently assume this defense is fraught with danger because of a soldier's bad reputation in the unit or that prior Article 15 for sleeping on guard duty. The more senior the accused, the more likely that the defense can craft some version of a good soldier defense. This should motivate trial counsel to scour the accused's past for evidence of misconduct and to conduct extensive interviews at the current and most recent duty stations. Some good character evidence is "an inch deep" and, on probing, witnesses will withdraw their endorsements or moderate their vouching for the accused. Not only is the good soldier defense beatable—it most often is—but counsel should be armed to defeat it, even when it seems to the trial counsel that it is not logical for the defense to present it in the first place.

A chief can be especially useful by helping counsel wisely allocate resources, especially the precious resource of trial counsel energy. Most good soldier defenses that do not relate to military offenses are useless and not worth the expenditure of counsel energy to research and rebut. That an accused charged with rape or some other significant felony, also is a good duty performer is irrelevant—and counsel should treat it as such. Rather than feeling compelled to convert or confront every witness ("would a good soldier rape?" and the like), a better approach for counsel—as in some sentencing cross-examination—would be to assume the good faith of the witness and argue to the panel that (1) the witness probably lacks perspective through no fault of his or her own, and (2) the testimony is irrelevant in any event, because it is possible and not uncommon for an accused to be (or appear to be) a good soldier while also being guilty of such an offense.

"A Panel Would Kill the Accused for [state an offense]" or "The Accused Will Have to Go Judge Alone."

The accused does not have to do anything. The presentation of such a defense might make sense to lawyers who have seen dozens of cases, because a judge alone trial generally is seen to be the better forum in which to advance certain defenses—such as, consent in a rape case, or mistake in a dereliction case. Trial by judge alone generally is viewed as reducing the risk of extreme sentences, while a panel generally is thought to carry a higher chance of acquittal but much less predictability on sentencing. Counsel are drawn to comfortable cliches, such as that a panel is "death" on child abuse or barracks larceny but "light" on bad checks or "buddy distros" (distribution of drugs between friends or roommates).

Negotiations and trial planning should be guided by certain informed generalizations about the tendencies and expectations of panels and judges, but none of these should trigger complacency. Too much can be made of any single case or any single panel. Experience may allow some generalizations about military panels, and they are worth sharing with counsel, who can use the following to sharpen their approach to a particular case:

(1) Military panels tend to be more liberal on findings when the accused has a good

[42] The great criminal defense lawyer Edward Bennett Williams "believed it was almost always necessary to put a defendant on the stand, as failure to testify was as good as an admission of guilt to most jurors." E. THOMAS, THE MAN TO SEE 220 (1991). Few such orthodoxies exist among military defense counsel, although the more experienced and well prepared defense counsel are more likely to put an accused on the stand, believing that they can precisely sculpt the testimony through careful coaching and preparation. Regardless, the trial counsel should prepare for any accused to testify, and marshal as much information as possible to refute the accused's assertions, catch the accused in inconsistencies, and raise questions about the accused's truthfulness.

record, they may be consumed by the beyond a reasonable doubt standard to the point of seeking mathematical certainty and they may intensely mistrust institutions such as the CID or "science" such as radar, breathalyzers, or the mass spectrometer;

(2) On the other hand, military panels consist of educated people, all with at least a high school diploma and a breadth of experience, with an acute sense of what is truth and what is bluster, and their intelligence, their ability to comprehend complex evidence such as DNA analysis or a THC count in nanograms should not be underestimated; and

(3) Military panels can give sentences that strike the experienced counsel as excessively lenient or exceptionally harsh.

Distinctions between officer and enlisted panels are harder to draw, but two main distinctions need to be kept in mind when considering how to approach them: high education levels, and the presence of current or former commanders. The high education levels of officer panels can be a two-edged sword. It makes them analytical and skeptical, but that skepticism can be turned against the government if the case is presented poorly or the evidence is equivocal—such as, be prepared to explain the level of certainty to attach to a "strong indications" assessment by a questioned documents examiner. It also makes them comparatively "liberal" in some instances, perhaps more inclined to indulge a psychological defense or psychological-based mitigation that a less educated panel will disregard.

Much is made of the theory that commanders tend to be the harshest panel members, because of their awareness of the need to support command discipline. Trial counsel are no wiser to retain commanders on panels than the defense is to follow the "strike the senior commander" orthodoxy. Commanders, or those who have commanded, no doubt comprehend the pressures on commanders better than those who have not commanded or who serve in special branches. Still, this generalization cannot substitute for careful counsel preparation by mining ORBs and questionnaires for "profile" information relevant to their particular case.

Remember, most of all, that the choice of forum is solely the accused's prerogative. Counsel should prepare their cases in almost the same manner regardless of forum, and then adjust their arguments and certain aspects of their presentation depending on the forum. Chiefs can help counsel prepare a narrowly scoped but illuminating voir dire. Chiefs need to help counsel avoid the law school-clever trick questions in favor of truly helpful questions. Asking a member how he or she feels about child abuse, or whether the member can consider the maximum punishment normally does not help in deciding whether to keep that member on the panel. Trust members to be essentially candid, and seek to determine whether, because of experience—such as, bad personal or familial incidents with a particular crime—they may have an inflexible attitude or erroneous information about a certain type of offense. Trust them to be able to place crimes on a continuum, that is, not to see a crime simply as "child abuse" but to appreciate the distinction between initial offensive touching and full-scale, repeated sexual or physical abuse.

"That Judge Is Death on [Drugs, Child Abuse, Barracks Larceny]."

Counsel should monitor their judges closely. Although certain judges develop justified reputations for their approach to evidentiary motions and for their sentencing philosophies, as a more detached observer, the chief can help counsel place these perceptions in context. Because choice of forum is exclusively a defense decision, counsel's tracking of judges should enable them to forecast, within a certain band, a likely sentence, thus permitting effective pretrial negotiation. The assessment of the likely forum choice also should motivate counsel to find methods, such as novel rebuttal or sentencing evidence, to encourage a "light sentencer" to deviate from the judge's sentencing philosophy in a particular case.[43]

Judges also develop reputations for control of the courtroom, preferences with regard to presentation of evidence, and manners of address and approach of witnesses. Chiefs must orient their counsel to these preferences and keep counsel from being distracted or intimidated by military judges. That one judge may require judicial notice requests to be in writing while another judge may account for the parties and another insist on a six-foot zone between counsel and witnesses should be immaterial to the outcome of a case—but should be known in advance so that a counsel does not lose focus because of these marginal matters.

Dress Them Up

No matter how few cases that he or she has tried, the chief knows how to wear a uniform—and knows that members may place undue emphasis on how counsel wears a uniform. Chiefs should check counsel's uniform, ensure that brass is shined and properly positioned, awards worn in the right order and hair groomed. Better to risk appearing patronizing to your counsel than to let counsel's good preparation be thwarted by failing to meet the appearance standards of an officer.

Help Counsel Draw Meaningful Distinctions: It Is Not Just Another Bad Check Case

Counsel need to consider a number of "generic" factors in evaluating every case. These factors include the rank of the accused, the accused's length and quality of service, duty position, general technical (GT) score, military occupational specialty, any unusual service or awards, and anything unusu-

[43] *See infra* notes 90-107 for approaches to sentencing. Counsel must think of methods of making concrete the aggravation that in some cases seems relatively predictable or remote. This is especially true in the military's most common cases, such as bad checks, larcenies and low-level drug distribution. Trial counsel should be motivated to find a method of portraying this accused and this offense uniquely, but credibly.

ally mitigating or aggravating about the case.[44] Any of these factors can benefit or harm the accused. That a soldier is a sergeant first-class (SFC), for example, may win a degree of deference because of—in most instances—a strong military record. However, this also means that the SFC has less of an excuse for most offenses than the average specialist. First-time drug use should be dealt with more harshly when the user is a SFC than when the user is a junior soldier. On the other hand, a SFC who deviates from a strong record and bounces checks or commits a dereliction deserves to have his or her strong record weighed against the offense in determining appropriate disposition, because this strong record provides a valid context in which to place the offenses.

Consider bad check cases as an example. Some factors to consider in parsing the evidence, the strength of the case, and the appropriate level of disposition, include: rank of the accused, number and dollar amount of checks, time period in which they were written, victims, restitution (how much and whether it was voluntary), location of the banks and original checks (affecting trial cost and delay), any valid mitigation, such as a legitimate gambling addiction (is this an after-discovery convenience or has the soldier sought help, been treated by a qualified therapist?), and family needs.

These distinctions need to be drawn, not only for developing counsel, but for commanders. One of the most common questions counsel receive from commanders is, "What's the going rate [for a particular offense]?" After emphasizing that disposition must differ based on, *inter alia*, the gravity of the particular offense, the soldier's record and other factors, the counsel should be able to engage the commander in much the same analysis as discussed above. Commanders' most commonly expressed concerns are: (1) How long will it take to get this case to trial? ("I just want the soldier out, I don't care how"); and (2) The individual is otherwise a good soldier. Trial counsel must be sensitive to the command's concerns,[45] but they also are best equipped to affect the disposition of offenses, because their advice generally does not carry the potential taint of command influence and, because of their exposure to most of the assaults or bad check cases in the jurisdiction, counsel can give a credible sense of where this particular offense fits on the continuum of seriousness and, when appropriate, the extent to which a "good soldier" defense is likely to—or should—make a difference.

The Chief Also Must Avoid Cliches: Coach Substantively

Think Like a Defense Counsel

This is easy to say, but hard to do. Teach counsel to think like the defense by walking them through their proof analysis sheets and adding a column in which they enter a likely defense response. The response can range from directly disputed evidence—"the accused was not there," "the lighting was bad," or "the chain-of-custody is weak"—to a mere "make the government prove it," and dwell on reasonable doubt. Additionally, counsel must evaluate nonelemental factors, such as motive. In a drug case, the defense may concede the scientific validity of the drug test (fruitless to dispute) but concentrate on how much that a clean-living SFC would have to lose such that he or she would not dare try drugs. The government must be prepared to supply a motive or to concede that while no obvious motive exists, suggest, without sounding defensive, that the government is not required to prove one, by reminding panels that some people are just evil and some criminals are stupid or irrationally daring.

Prepare Cross-Examination in Advance

Counsel need not be mind readers to accomplish this. The best methods are to lay out all of the undisputed evidence in the case as well as any statements that the accused may have made and then try to envision the mind set of someone whose sole motivation is the weaving of an exculpatory story from facts that the accused believes the government knows. Look for ways in which the accused can appear to be candid but still weave a plausibly exculpatory story. In a drug case, it might mean for the accused to admit to having attended a party, but to insist that she was served spiked punch or brownies; it may be to admit that the urine is hers but to insist that the chain of custody was sloppy. In a child abuse case, it may be for the accused to insist that the child is confused or has exaggerated the offense as a result of an aggressive teacher or a manipulative and angry spouse. In a rape case, the accused may admit to intercourse but insist that consent was given. There are countless scenarios and frequently more than one in a given case.

Counsel should try to construct a defense of at least superficial plausibility and then line up—literally line up, mark, and prepare to offer and introduce—evidence that chips away at the constructed story. Practice short, pointed, and leading questions, and be confident that the supporting materials are in order, so that they can be selected effortlessly during the cross. Rehearse the cross with an experienced counsel or the chief playing the accused. The chief can then model the cross-examination after the counsel attempts it. The actual questions are not the most important part of the exercise—they will change according to the actual story told at trial—but the structure of the exercise and its aggressive, relentless, leading nature will pay immense benefits at trial.

Rehearsing cross-examination gives counsel a rough sense of how this cross will play at trial, and gives them a jump in extemporaneously composing their questions and assembling the proof and props that they may want to use. Such work is

[44] MCM, *supra* note 10, R.C.M. 306(b) discussion, states the following:

> In deciding how an offense should be disposed of, factors the commander should consider include: (A) the character and military service of the accused; (B) the nature and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense's effect on morale, health, safety, welfare, and discipline; (C) appropriateness of the authorized punishment to the particular accused or offense; (D) possible improper motives of the accuser; (E) reluctance of the victim or others to testify; (F) cooperation of the accused in the apprehension or conviction of others; (G) availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction; (H) availability and admissibility of evidence; (I) existence of jurisdiction over the accused and the offense; and (J) likely issues.

[45] Commanders' paramount concern traditionally is the time it takes to get to trial (not to be confused with processing time), which is addressed later in this article.

invaluable, especially in early trials or complicated trials. Do not limit it to the accused. Use it for obviously partisan defense witnesses and for character and sentencing witnesses. There should be virtually no mystery to cross-examining defense witnesses other than the accused. The prosecutor must interview every witness before trial, usually at least twice. Counsel should hold their fire until trial (no sense leaving your best work on the cutting room floor by tipping off the defense), but thoroughly explore all avenues with every witness. Chiefs should teach counsel to preserve helpful pretrial disclosures or admissions by witnesses.[46] Counsel also will learn that not all cross has to be confrontational, tense, or highly dramatic. Many witnesses are ignorant or neutral and can provide valuable information for the government, sometimes unwittingly.[47]

Prepare for a Guilty Plea as Though it Were a Contest

While this is frequently honored in the breach, it yields immense dividends when counsel comply. First, pleas are "busted" from time to time, and nothing reverberates more clearly than being able to announce that the government is ready to proceed—and then proceeding. This deters the accused from misleading the government and sends a message that a late-inning stunt is not likely to yield what the accused or defense may have hoped for: a clumsy, half-hearted government effort, long delay, or dismissal or acquittal on some charges. It also yields trial-equivalent preparation experience for a counsel when the plea goes through as planned. Finally, preparation with contest-like intensity is guaranteed to yield a sharper sentencing proceeding, meaning better cross-examination, more offense-specific aggravation, and a fully focused argument by the government.

In preparing for a guilty plea, counsel should have a clear sense—communicated directly by the chief who has consulted previously with the SJA—of their latitude in disposing of minor offenses during the providence inquiry. If, for example, an accused pleads guilty to the major offenses but waffles or is improvident to a relatively minor offense, the trial counsel should understand the extent of their authority to bind the government to the pretrial agreement despite the minor deviation. Dismissal of a failure to repair or a concession that an item was not worth more than $100 may be, depending on the context, not worth a dispute when serious misconduct remains before the court. Chiefs must make clear to counsel the extent of their authority, and let them know to take a recess in the event of uncertainty.

Prepare the Closing Argument First

This is a useful cliche for counsel, also infrequently practiced. Early preparation of a closing forces counsel to look at a case as an integrated whole. When counsel have to coherently argue an accused's guilt, they must address all of the evidence in the case, weaknesses and strengths. Failure to do this early permits counsel to make the strong parts of their cases stronger while averting attention from weaknesses. Early preparation forces them to address the weak proof on a particular element or the nagging doubt about lack of motive or poor identification. This should prompt a request for increased investigation, re-interviews, further testing, or any of several options to strengthen the case. The chief should require that counsel provide a draft closing, which the chief will criticize and discuss with counsel, further refining strategy. The chief also can intercede, when necessary, on counsel's behalf in seeking more work by CID or whatever is necessary to strengthen the case.

Prosecution Memoranda as a Preparation Tool

Some jurisdictions (and some federal and local prosecutors) use prosecution memoranda as a more structured substitute for the practice of writing a closing argument first. The memos take many forms[48] but their common characteristics are: (1) a prose capsule of the facts; (2) a proof analysis section that addresses every element of every offense; (3) a candid assessment of government weaknesses, defense strategy, and proposed responses; and (4) sentencing information and proposed terms of pretrial agreements. While prosecution memos are especially suited to large jurisdictions with far-flung counsel, some method that forces counsel to cogently outline their cases in writing imposes a critical focus that otherwise may not sharpen until the Article 32, or trial, if at all. They also provide a window into the thinking processes and writing skills of counsel.

Try the Elementary Cases Well (There Are NO Simple Cases)

Counsel generally try the exotic cases, such as those involving constitutional issues or novel scientific evidence, well. These energize counsel and give them the opportunity to test and apply their research and advocacy skills developed in law school. The great majority of courts-martial, however, involve drugs, larceny, bad checks, assault, and AWOL. Counsel who can try these cases can try most any case. The skill, discipline, and techniques used to prepare the average case are the same ones needed to try complex cases. Counsel's work and preparation habits—such as reinterviewing witnesses, performing thorough documentary searches, reviews, and consultation with investigators, experts, and character witnesses—will be developed on the ordinary case. Chiefs must prod and supervise counsel to learn the most from the ordinary cases, so that they feel equipped to try tougher cases, already know the fundamentals of preparation and advocacy, and only need to expand them on the more complex

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[46] Counsel should rarely be in the position of crossing with, "Didn't you tell me when I interviewed you . . . ?" This is a lazy cross that some judges will forbid on the grounds that it converts counsel into a witness—that is, it really says to the panel, believe me, not the witness. The better approach is to have a witness present during all interviews, whom the prosecutor can call in rebuttal. The best method is to swear a witness to testimony before a trial on an ordinary sworn statement form (*DA Form 2823*), and use it to confront the contradictory or evasive witness.

[47] *See* FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION (1903) (which remains the classic in the field). For an excellent contemporary work *see* P. BROWN, THE ART OF QUESTIONING, 30 MAXIMS OF CROSS-EXAMINATION (1987). Brown's maxims are understandable and easily assimilated ("Don't Be Indignant" and "Plan and Replan Your Sequence"). The examples that he furnishes are memorable, illustrative, and often humorous, without the cuteness or incredible endings featured in some other texts or speeches about cross-examination.

[48] *See infra* appendix A.

cases. Complacency in simpler cases breeds shortcomings in tougher cases later on.

Exploit the Government's Burden: Use and Prepare for the Rebuttal Phase of Trial

If it is rebuttal, how can counsel prepare? Trial counsel may feel that they do not know what the defense is going to say. Sure we do. Preparation does not mean merely scribbling out witness exams; it means anticipating a number of possible or likely outcomes. Rebuttal is the most underutilized and most powerful tool for the government.

In preparing a child abuse case, for example, counsel will have access to enough evidence and be able to glean the defense strategy sufficiently to determine whether the defense will be accident, permissible parental discipline, or denial. In a drug case, trial counsel should be able to determine whether the defense will be good character, entrapment, bad urinalysis chain of custody, or some eclectic combination. Anticipate the defense approach, and seek any possible rebuttal evidence. In child abuse cases, interview experts from whom "profile" evidence might be admissible in rebuttal to a good soldier or fabrication defense. In a urinalysis case, prepare a toxicologist who can assure the factfinder of the scientific validity of the Army's program and help refute novel defenses such as spiked punch or brownies. Regardless of the case, think about the likely defense approach and assemble whatever evidence might be available to rebut it. Be aggressive but realistic through all stages of preparation. Do not allow defense assertions of certainty, superficial contradictions, or that the defense has an "expert"[49] to deter the government from trying a case or pressure it into accepting a deal. The more certain trial counsel are of the defense, the more comfortable they can be in holding back the evidence for rebuttal: it has more impact after the defense has been presented, and judges are more liberal in assessing the admissibility of rebuttal evidence than on the government's case-in-chief.

Chiefs can keep counsel from outsmarting themselves in this area. Deliberately holding back evidence in the hopes of a knockout rebuttal punch has risks. Courts' increasing tendency to require pretrial disclosure, even of some rebuttal evidence, makes withholding of any evidence a risk. Additionally, hoarding damning or dramatic evidence in anticipation of testimony or evidence that never is produced can leave trial counsel punchless, reserving evidence that never makes it to the courtroom. If the evidence would be relevant on the merits, it normally should be presented at that time. Some evidence is only relevant in response to the defense case. That evidence should be aggressively and creatively pursued. In some instances, counsel will not be able to use all evidence that they have prepared. Better in any event to enter the courtroom fully prepared and to have anticipated the need for rebuttal.

Counsel Development

"You have to be able to string more than one bead at a time. That's the nature of this job."
—Thomas V. (Mack) McLarty[50]

Assuming that preparation is the foundation of good advocacy, chiefs can help counsel string simultaneous beads by orienting them to resources and employing practices that intensify their experience. Counsel must feel free to ask the "dumbest" of questions without fear of retribution or a notch against their Officer Efficiency Reports. An atmosphere in which counsel are intimidated or embarrassed when asking elementary questions encourages guessing, sweeping problems away, and bad results farther down the line. Counsel should, however, know to come to the chief armed with an idea of the scope of the problem and where to look for an answer. A chief thwarts his own teaching function when he furnishes easy answers without encouraging counsel to investigate the obvious sources of information, starting with the *Manual*. Numerous creative and supportive methods exist by which a chief can lead, prod, and develop counsel, by carefully treading the line between "spoon feeding" and tossing them prematurely from the nest.

Emphasize Second-Chairing

Too few courts-martial occur for counsel to acquire enough experience by only trying cases solo. Therefore, whenever possible, a contest should feature two counsel, one clearly in a lead role and one clearly in a supporting role. Merely sitting next to a counsel while he or she tries a case is an almost useless experience after a case or two. The chief should carefully monitor a new counsel's steps into the water so that it begins with the wetting of a toe (perhaps reading the boilerplate and the information from the front page of the chart sheet), progressing to partial immersion (one carefully scripted direct exam, then introduction of a piece of evidence, then a cross-examination) and finally total immersion (lead counsel in a contest). The second chairing must be followed in every case by a critique of both counsels' performances. This should augment the "bridging the gap" critique conducted by the military judge. Recent case law limits the depth and usefulness of bridging the gap sessions.[51] Chiefs should not rely on them as substitutes, or even vital supplements, to their other coaching roles. Additionally, they only represent one perspective

[49] An expert seems to be available for any point of view, especially in fields such as psychiatry. Counsel could heed the advice of commentator Charles Osgood:

> The world is full of experts, but with every breaking story,
> The experts seem a whole lot like Professor Irwin Corey.
> Because they are authorities, they stand out from the throng,
> The problem being that they are so very often wrong.

C. OSGOOD, NOTHING COULD BE FINER THAN A CRISIS THAT IS MINOR IN THE MORNING 197 (1979).

For a more pointed and insightful reference, *see* P. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM (1991), a compelling treatment of well-publicized distortions of science, including the Bendectin scare and the Audis that were said to spontaneously jump into gear. It is a critical but balanced perspective on the fallibility of "science."

[50] Terance Hunt, STARS & STRIPES, Oct. 19, 1993, at 13, col. 1 (McLarty is President Clinton's Chief of Staff).

[51] United States v. Copening, 34 M.J. 28 (C.M.A. 1992) (diminishing the scope, depth, and candor of judges' comments in "bridging the gap" sessions).

for counsel to consider. The judge's perspective is invaluable as a detached, experienced view of the proceedings. On some points, however, the chief may have good prosecutorial reasons to insist on certain strategies or practices which a judge might find time consuming or distracting but which serve the government's interests. The chief should demarcate each counsel's responsibilities so that counsel cannot shrug that evidence or witnesses "fell between the cracks" because of ill-defined roles. When time allows, the chief should second-chair a case. The critique will be sharper and more substantive, and the junior counsel will get to see the chief perform, providing valuable training and enhancing the chief's credibility.

Throw the Book at Them

Counsels' starting point for answering most questions should be the *Manual*. When counsel approach a chief for guidance, an easy first question from the chief should be, "What does the *Manual* say?" Counsel should get used to the chief taking out the *Manual* whenever a question is raised, and they should be conditioned to come to the chief having checked what they believe to be the applicable *Manual* provisions and seek guidance on possible ambiguities or conflicts.

Counsel need to approach the *Manual* as a sort of procedural code, roughly akin to rules of criminal procedure that they may have consulted in their home states. The *Manual* is especially critical in answering questions for which law school does not prepare a lawyer, such as the scope and limitations of an Article 32 investigation, or the factors that a convening authority should consider when disposing of charges. Counsel's other primary source is *AR 27-10*, which contains additional procedural guidance, and whose third chapter is the best, albeit tortuous, source for resolving many questions regarding Article 15s.

Interpret Case Law

Most counsel are competent researchers, having recently left law schools that emphasize research skills. They need to realize that case law is not a starting point for many questions of military law (especially military criminal procedure) and that the *Manual* frequently answers their questions. They then need to place military case law and other legal sources in context, starting with the United States Constitution.[52] The more "military" the issue, the more applicable are the decisions of the military courts. When interpreting issues such as multiplicity or residual hearsay, the chief can help counsel distinguish an important or pivotal case from one that simply takes an unimportant chip out of settled case law and might mislead counsel into an inaccurate assessment of the strength or weakness of their case.

Complexity—and the need for direction—also arise when a line of federal cases and military cases interplay. The most prominent areas involve the Fourth Amendment, and the extent to which a soldier has a lesser expectation of privacy because of his or her military status, and, more specifically, in the urinalysis area, now fairly well settled, in which questions arise about the reasonableness of inventories, searches and seizures, as well as the government's proof requirements on issues such as knowledge of wrongfulness.[53]

Help counsel understand the structure of the justice reporters. Chiefs should insist that counsel view military case law as a whole and not consider 1975 to demarcate a sort of B.C./A.D. line between eras, simply because the military switched printers, ending publication of the "red books," the fifty-volume set of *Court-Martial Reports*, and initiating the *Military Justice Reporters*, published by West Publishing Company. New counsel should be encouraged to browse through both sets of reporters, familiarizing themselves with different indexes.[54] Chiefs should at least be aware that the West key numbering scheme was reordered in 1985 and that cross-referencing indexes appear at the front of all subsequent volumes. There is no cross-reference between the two sets of books.

Stay Current

The chief should read all appellate decisions as they arrive in the office. The chief must drill trial counsel to do the same. Frequent discussion of evolving case law keeps trial counsel up to date. Junior counsel fail to read cases more often out of frustration than laziness. They are bewildered by the law and struggle to find a context in which to place each new case. Chiefs can help counsel understand why a particular case is important—for example, why the court chose to make this opinion a reported decision as opposed to a memorandum opinion. In a short time, counsel will realize that they are developing their own command of a body of law so that each subsequent case makes more sense. Depending on the size of the jurisdiction and the skill and experience of counsel, the chief can assign counsel responsibility for "digesting" case law, dividing responsibilities according to levels of court or topic areas. The chief can do some or all of this, sharing his or her skill and experience, and demonstrating that the chief is not "above the law." The process may have more impact, however, when counsel are assigned to accomplish some of it

[52] "The primary sources of military criminal law are: The United States Constitution, The Uniform Code of Military Justice, the Manual for Courts-Martial, Department of Defense directives, Service Regulations, other regulations and orders, military case law." GILLIGAN & LEDERER, *supra* note 32, at 25.

[53] In United States v. Mance, 26 M.J. 244 (C.M.A.), *cert. denied*, 488 U.S. 942 (1988), the COMA ruled that counsel must expressly prove, in cases of illegal drug use, that the accused's use was unlawful, by showing knowledge of the substance by the accused. Three types of innocent knowledge exist: (1) the accused was aware that the substance was a drug, but unaware that it was illegal; (2) the accused was unaware of the presence of the drug in another lawful substance—such as, a brownie or a drink; and (3) the accused honestly believed that the substance was innocuous, but it really was a proscribed drug—such as, the white powder that the accused thought was sugar really was cocaine. *Id.* at 249. *See also* United States v. Hunt, 33 M.J. 345 (C.M.A. 1991).

[54] The *Military Justice Reporters* follow the familiar and traditional key number system. The *Court-Martial Reports* feature a more specific and descriptive index. It provides more information, but requires more time for the researcher to understand the organizational scheme (the books are perhaps most famous for the index entry, "*Chicken*, Indecent acts with") but the case law is no less valid. Counsel are sometimes deterred from looking in the "red books" because of the need to begin research anew.

and the chief then contributes his or her perspective. Depending on the number and location of counsel, this can be accomplished in writing or at periodic meetings.

Familiarize Counsel with Good Secondary Sources

Review and have access to indexes of *The Army Lawyer*, *Military Law Review*, and the *TCAP Memo* so that you have an idea of articles that may have been written in important, contested areas of the law. Counsel, for example, should consult excellent, timeless articles on issues such as urinalysis or bad checks the first time they have such a case.[55] Those with evidentiary issues also should consult the evidentiary supplements to the *TCAP Memo*, self-contained treatments of evidentiary rules, and the publications of The Judge Advocate General's School, including the *Trial and Defense Counsel Handbook*.[56]

Every library also should have a copy of the *Military Rules of Evidence Manual*[57] and *Court-Martial Procedure*.[58] *Military Rules of Evidence* is the most comprehensive source of interpretation of the military rules and it addresses the Federal Rules when applicable. Counsel must be sure to read the cases, however; advocacy by headnote is sloppy and dangerous. The two-volume *Court-Martial Procedure* is the most comprehensive and contemporary treatment of court-martial practice, and it includes a thorough, interesting, historical, and philosophical treatment of military justice. A good library also should have Imwinkelried's *Evidentiary Foundations* [59] and Mauet's *Fundamentals of Trial Techniques*.[60] Both Imwinkelried and Saltzburg should accompany counsel into the courtroom, and counsel should feel free to request a recess during a discussion of an evidentiary issue to do research. An additional reason to carry Saltzburg is that judges are familiar with it, consult it often, and tend to give it considerable weight.

Be Familiar with Related Disciplines

Commanders are not likely to respect or have patience with a distinction between the criminal law and administrative law sections of a JAG office. They are more likely to consider their trial counsel as "my JAG," to whom they turn for advice on any remotely legal actions. Consequently, counsel need to understand the rudiments of administrative law, especially the enlisted separation system.[61] They also should know enough about areas such as reports of survey and line of duty investigations to be able to give cursory advice in these areas—and turn to the right resources to get the right answers. It is not enough for a trial counsel to know rules such as the limitations on reductions at summary courts-martial (only one stripe for SFCs and above); they also must know enough about issues such as separations, bars, and reliefs for cause, to give integrated, complete advice about all possible options, likely results and important requirements relating to counseling and opportunities to respond. Counsel also should know enough about Article 139 claims to make sure that victims are apprised of their rights in this area. Counsel must know all options available to a commander before their advice as to any one option can be considered persuasive and well-grounded.

Touch Every Case Every Day

This is a workable aphorism that should be cross-stitched in every trial counsel's office. Counsel literally should touch every case every day. The sheer discipline of pulling out every case file to review it and do something about that case keeps the case from fading as a result of inattention. That "touching" can be anything from the important but routine work of trial preparation—reinterviewing witnesses, checking personnel records, telephoning CID to clarify an ambiguity, revisiting the crime scene—to the occasional top-to-bottom re-look of a case. Every so often counsel should reread the entire file from scratch, forcing themselves to read every line of every statement and every exhibit; invariably this process yields more questions—and insights—and deepens counsel's understanding of the case, further tightening the case and reducing the chance for surprise at trial.

Just as counsel should touch their cases daily, so too should the chief be in daily contact with counsel. Depending on the number of cases and counsel that the chief supervises, the chief's contact with each case likely will not be with the same depth as the trial counsel. The chief should review the pretrial and posttrial reports and dockets, determine the status of the cases, and select one or more cases to focus on that day, taking the opportunity to discuss strategy with counsel at that particular stage of preparation.

Seek Opportunities for Advocacy

Counsel frequently deride the opportunity to practice before administrative separation boards because: (1) they are not courts; (2) the rules of evidence do not apply; and (3) they might encourage bad habits. Although true, the better approach is to practice advocacy in any setting available,

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[55] Especially helpful articles that counsel should consult the first time that they have cases in these areas include the following: Fitzkee, *Prosecuting a Urinalysis Case: A Primer*, ARMY LAW., Sept. 1988, at 7; Hahn, *Preparing Witnesses For Trial—A Methodology for New Judge Advocates*, ARMY LAW., July 1982, at 1; Hitzeman, *Due Diligence in Obtaining Financial Records*, ARMY LAW., July 1990, at 39; Richmond, *Bad Check Cases: A Primer for Trial and Defense Counsel*, ARMY LAW., Jan. 1990, at 3; Warren & Jewell, *Instructions and Advocacy*, 126 MIL. L. REV. 147 (1989).

[56] CRIM. L. DIV., THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-310, TRIAL COUNSEL AND DEFENSE COUNSEL HANDBOOK (May 1993).

[57] SALTZBURG, ET. AL., MILITARY RULES OF EVIDENCE MANUAL (1991).

[58] *See* GILLIGAN & LEDERER, *supra* note 32.

[59] EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS (1989).

[60] THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUE (1991).

[61] *See* AR 635-200, *supra* note 2.

rather than to wait for the fewer available opportunities to advocate in court. Although an administrative board lacks the rigor of a trial, it requires counsel to interview and prepare witnesses, cross-examine, work within rules (albeit the comparatively liberal strictures of *AR 635-200* and *AR 15-6*[62]), organize proof, and persuade a board of decision makers. Chiefs should help counsel take advantage of representing the government at separation boards, flying evaluation boards and, if possible, labor hearings. Magistrate courts at continental United States (CONUS) installations also offer valuable practice in organizing proof and examining witnesses, often with minimal preparation. Coach counsel before and afterwards to further develop their skills.

Train

Do not just rehearse the next case, but prepare by drilling. Combat arms soldiers spend most of their time training—a large percentage of it in realistic field settings—and trial counsel perform their wartime mission daily. The Army's peacetime mission is to train for its wartime mission so that: (1) there will be no wartime mission, because enemies will be deterred by our readiness; and (2) if there is war, the Army will be ready.[63] Just as we deploy with units to training exercises, we must better emphasize the day-to-day training needs of our counsel through scenarios that are as realistic for lawyers as Fort Irwin, California, or Hohenfels are for combat officers. We have the advantage of performing our wartime mission when we court-martial a soldier or give legal advice. This does not mean that we cannot benefit from training that is realistic and challenging.

Rehearsing for trial is one form of training. Additionally, chiefs of justice can create simple drills to test and develop counsel. They need not be elaborate scenarios, but should be designed to teach one or two discrete, digestible points. Rather than having a meeting at which counsel orally review recent COMA decisions (itself a useful exercise), it may be more effective to have them study a significant new decision by, for example, modelling the direct examination of a serology or battered child expert or constructing a direct exam that meets the requirements for proof of wrongfulness. Counsel could profit from being given a file that contains witness statements and CID reports and then being asked to draft charges. They also could draft a response to a defense motion to suppress a confession or physical evidence. To prepare these exercises, a chief need not start from scratch, but can draw from recent decisions and case files—real files often contain more wrinkles, inconsistencies, and challenges than most conjured scenarios.

Besides episodic training as described above, counsel can benefit from structured, monitored progression through the justice process. The 3d Infantry Division (3ID) has created a program that includes a reading requirement (essentially a barebones list of references for the Army prosecutor) and a series of steps through the court-martial process from the drafting of charges through acting as lead counsel in a contested case with members. The program lays out a process that is designed to increasingly challenge the counsel while ensuring that he or she is observed and receives the benefit of a critique at every stage. It is akin to a soldier's Mission Essential Task List (METL).[64] The American Bar Association also urges continuing training for prosecutors, a fact that chiefs can rely on when seeking time and funding to train their counsel.[65]

Counsel also should train CID agents and military police. They receive periodic updates through their own channels, but not all read or comprehend them. They will listen best to the counsel on whom they rely for day-to-day advice and who help them out in the courtroom. Take the time to regularly update agents on military case law, *Manual*, and regulatory changes, as well as to train them about testifying and investigative work. This has many collateral benefits, including the knowledge counsel will gain in preparing for the classes and greater trust between agents and lawyers. Consider integrating them into your training sessions. No one plays a CID agent better than a CID agent. Then ask a strong or experienced agent to reciprocate with a CID-led training session.

Send Counsel to the Crime Scene

Even in the dullest cases, counsel can benefit from a visit to the crime scene. Going to the scene of a violent crime, to check the lighting, angles, avenues of approach and the like, is important. A visit to the scene of a bad checks case can yield, for example, information that the finance office has posted a sign that suggests that bad checks will be "covered" by finance and resubmitted through the drawer's bank—implying a sort of immunity for playing the float. Regardless of how many cases he or she has tried, the chief can reinforce the wisdom and value of a crime scene visit by accompanying the counsel and helping make the scene visit useful.

Counsel should have a "kit" from which they select the needed items before going to the crime scene. Counsel may need to bring along a tape measure or ruler, a camera and sketch paper, flashlight or binoculars. Getting to the scene close in time helps "lock in" the scene as it appeared at the time of the offense, especially when weather can change the appearance of a scene in which variables such as mud, lighting, foliage, and traffic might affect the evidence. Counsel should try to formulate their questions while at the scene. This will help them concentrate on how to verbally describe or graphically depict that which the panel will not see in person. Visiting the scene with witnesses or law enforcement

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[62] DEP'T OF ARMY, REG. 15-6, BOARDS, COMMISSIONS, AND COMMITTEES: PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (11 May 1988).

[63] "The Army's primary mission is to organize, train and equip forces . . . to achieve and sustain the capability to deter and, if necessary, to win wars. . . . The objective of all Army training is unit readiness." DEP'T OF ARMY, REG. 350-41, TRAINING IN UNITS, para. 3-1 (19 Mar. 1993).

[64] *Id.* para 3-4. A true METL includes conditions and standards for each mission essential task. Under the 3d Infantry Division training plan, the standards are graded on more of a "go" "no go" basis, with the emphasis on the critique delivered by the trial observer, typically the chief of justice, senior trial counsel, or officer-in-charge. *See infra* appendix B.

[65] "Training programs should be established within the prosecutor's office for new personnel and for continuing education of the staff." ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 3-2.6. (1980). When seeking Army financial support for legal education and seminars, JAG offices should couch the sessions as "training" as opposed to "continuing legal education," so it is obvious to decision makers that it fits in the rubric of traditional military training.

personnel will educate counsel on those parties' perspectives and force a discussion of how to describe the scene to members who have not had the advantage of personal observation.

Insist that Counsel Write All Direct Exams

Review, rehearse, and redraft them. Computers eliminate any excuse for not constantly drafting and redrafting—and thereby rethinking—direct exams. Well-scripted direct exams also help witnesses feel well prepared. They know not only what counsel are going to ask, but the sequence of the questions. They also know that an item of information that, in the witness's mind is one thought, might be drawn in a careful series of four or six questions. The witness, properly rehearsed, will give the answer in fourths or sixths, confident that counsel will draw it out in that manner, rather than prematurely or confusingly blurting the "punch line" before counsel has—for evidentiary and logical reasons—led the witness through a series of mini-questions.[66]

Rehearse

Counsel should rehearse arguments and direct witness exams. Ideally they should rehearse cross-examinations as well.[67] Rehearsal intimidates counsel because it is time consuming, and leaves them open to the hackneyed cross, "How many times have you rehearsed this with Captain *X*?" Better to endure that hackneyed cross-examination (and prepare your witness for the truthful, if equally trite "he only told me to tell the truth") than to stumble through a witness exam in which neither party is sure of the direction. There is nothing better than, pardon the oxymoron, "rehearsed spontaneity." Judges and panels appreciate a good show, but they also expect that counsel will have prepared, and will forego some flash in the interests of clarity and brevity. Rehearsal in the nature of putting words in a witness's mouth will be obvious enough, as will the defense's desperation if it can cross on nothing more substantive. Rehearsal is the only way to find the holes in counsels' arguments and ensure familiarity and smoothness in their witness exams. Rehearsal also helps establish a bond or rapport with witnesses. This enables them to trust the trial counsel and look to them for guidance and direction in court—such as, when to speak after an objection is made. Rehearsing in front of a mock panel often is unnecessary, but in counsel's early cases or in especially significant cases, they can be useful. Do not put too much reliance in the feedback from such a panel, especially if composed of an aberrant population of lawyers and legal specialists, but use it more to sharpen trial counsel's skills.

Follow—and Then (Try to) Enforce—the Rules of Court

Each judicial circuit publishes rules that govern matters such as notice and service of motions and wear of the uniform. Trial counsel should be scrupulous in following the rules so that they can approach the judge with clean hands. Though judges rarely will hold a defense counsel's failure to follow the rules against a client—such as, by refusing to consider a late motion—the government and the system (speedy justice, perceptions of fairness) will profit from the government's compliance and judges' efforts to enforce the rules against the defense. Beware the Pyhrric victory, however. Forcing an issue to conclusion at the trial stage, only to have it overturned on appeal because of ineffective assistance of counsel serves no one. This does not mean to "pull one's punches," to pander to the defense, or to eschew calculated risks. It does point to another key role of the chief, however: temper counsel, when appropriate, and take the longer view of the government's role, which is a conviction that will be sustained on appeal.

Use Article 32s

An Article 32 waiver should make a difference only when it truly speeds up a case or spares overwhelming expense or witness anguish, and is accompanied by a promise to go to trial quickly in a situation when an especially fast trial would serve the government's interests—such as, a speedy trial clock or processing time problems, a difficult accused. Costs are not the factor they once were at Article 32s, because of the 1991 *Manual* change that finds witnesses who are more than 100 miles from the site of the Article 32 to be unavailable,[68] meaning that their sworn statements are admissible over the objection of the defense, and that the investigating officer no longer needs to undertake the ill-defined "weighing" process in determining whether a witness must be produced.[69] Witness trauma is a legitimate concern that should be considered with care and sensitivity. A child victim, or a victim of sexual offense or especially violent crime should be spared, if possible, from having to tell that story too many times. The defense's sometimes stated willingness to "spare the victim" may be grounded in the fear that the victim will solidify his testimony, and the hope that the victim will absent himself before trial. Conversely, the Article 32 investigation can smoke out conflicting stories and alert the government early to weaknesses in consistency, demeanor, or articulateness. Assess victims objectively. Do not underestimate their resilience or their willingness and ability to tell their story to a panel in the presence of the accused. Our desire to shield victims is sometimes misguided and grounded in a belief that they invariably cower or disintegrate on the stand. Some victims require extremely

[66] One caveat, do not give the witness a copy of the scripted witness exam. This raises issues relating to suggesting answers, and counsel open themselves to being ambushed on cross by an alert defense counsel who brandishes the script in front of the panel, or has the opportunity to request it under the Jencks Act if the witness has written on it, creating a discoverable statement.

[67] Peter M. Brown describes an encounter with Lloyd Paul Stryker (author of *The Art of Advocacy*) in which Brown discovered the famous and skilled Stryker standing before a mirror, rehearsing the peroration of a speech to law students. "He revealed that English barristers invariably rehearse their examinations and speeches, while Americans, believing such preparation unnecessary, vain, or even shameful, are reluctant to do so. So English speakers are invited for after-dinner flourishes more frequently than Americans are. A lesson here." BROWN, *supra* note 47, at 21.

[68] MCM, *supra* note 10, R.C.M. 405(g)(1)(A).

[69] Although the list of factors remains valid guidance in determining the availability of a witness who live less than 100 miles from the site, arguably such a witness is presumptively available, and the government should be prepared in most circumstances to produce the witness.

tender handling. All require respect and attention. There is, however, often a surge of confidence and certitude for a victim when testifying. The government should not lightly or prematurely "deal away" what is for some a cathartic or therapeutic experience.

The defense occasionally attempts to make an Article 32 into more than it is. A chief with a long view of the case can help a counsel avoid being drawn prematurely into battle. An Article 32 investigation is not a grand jury proceeding, notwithstanding the frequent references in the press to its being the equivalent of a grand jury. The accused has rights at an Article 32—presence, counsel, right to cross-examine—that are unavailable at grand juries. Conversely, the Drafters clearly chose not to provide certain rights frequently sought by the defense, including the right to a verbatim transcript. The government should not commit itself, except in the most unusual cases—such as, possible capital referral—to production of a verbatim transcript. The *Manual* provides only for summaries of testimony. In the average Article 32, clerks should not even carry recording equipment into the proceeding. The marginal value of recording the Article 32—defending against an attack against the summary as inaccurate or incomplete—is outweighed by the consumption of time and resources, and the bad precedent of appearing to concede to the defense a procedural right that the Drafters have specifically chosen not to provide. The government may record the proceeding but refuse to create a transcript for the defense, turning over a copy of the tapes and permitting the defense to make its own transcripts. This is a complicated decision that requires weighing several factors. Most often, the practice of recording the Article 32 is an unnecessary logistical burden, creating requirements for transcribing and safeguarding tapes that the government need not undertake. It also "locks in" potentially weak or undeveloped government testimony in a seemingly "harder" form than a summarized transcript. Chiefs also should consider, however, two key factors before making the decision: (1) type of crime or (2) location. Crimes involving volatile or emotional victims warrant the government memorializing testimony as soon as possible because a witness may lose emotional steam, succumb to pressure, or develop sympathy for the accused. This occurs most often in intra-familial sex crimes and other crimes against persons. Location is important when it is practically difficult to enforce service of process—such as, an OCONUS jurisdiction in which witnesses are returning to the states (give little weight to ardent and sincere promises to return for trial) and cases involving non-United States witnesses. The reach of Article 46 should not extend to forcing the government to create a transcript for the defense.[70] Although Article 32 testimony now is admissible as prior sworn testimony, regardless of whether the defense avails itself of the opportunity to cross-examine the witness,[71] preserving that prior testimony should not require a verbatim transcript.

Be Willing to Lose—and Do Not Keep Score

Th' most ardent advocate o' anything
is th' feller who can't lose.[72]

Permit Nonpunitive Acquittals

Undue emphasis on winning a case leads to a timidity that has several negative effects: (1) creating a willingness to deal cases for dismissal of tough-to-prove charges or too-low quantums of punishment; (2) producing a command and community perception that criminals do not account for their behavior, undercutting faith in the justice system and vitiating the deterrence function of the courts; (3) creating a situation where the defense community holds out for even better deals and concessions; (4) placing pressure on counsel to cut evidentiary or ethical corners; and (5) establishing an implicit vote of no confidence in trial counsel, who should go to court armed with the knowledge that a "loss" in a properly-charged, well-prepared contest does not mean professional failure. A scorecard filled with convictions is not necessarily a measure of success.[73]

All of which is not to say that cases should be taken to trial for the academic exercise, only that the cliche, "some cases have to be tried," does apply at times. When too much emphasis is placed on winning, many of the above factors conspire to produce poor justice—not fewer convictions, but a less fair and predictable system.[74] Besides, counsel's preening about victories is usually misplaced. The government should "win" most of the time: few soldiers who are truly not guilty should pass through all of the military justice system's screening "gates" and have to hinge their fate on a contest. Additionally, defense counsel count their "victories" by a different standard. A defense counsel has done his or her job well in having charges dismissed, affecting the level of disposition, or negotiating for a favorable sentence cap.

The chief should, however, "know when to fold 'em." Not all counsel are experienced or dispassionate enough to view a case with detachment. They are, at times, intimidated by the seeming complexity of a defense motion or so spurred by their

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[70] "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence . . . ." UCMJ art. 46 (1988).

[71] The COMA ruled in 1989 that notwithstanding defense protests, defense opportunity to cross-examine at an Article 32 hearing is sufficient to qualify the testimony as admissible former testimony under MRE 804(b)(1). United States v. Connor, 27 M.J. 378 (C.M.A. 1989). The COMA was not explicit about the method by which the former testimony must be preserved, but a verbatim transcript is the most defensible method. If the government does not want to take on the burden of routinely creating verbatim transcripts in anticipation of possible witness unavailability, it could record the testimony on tape when it perceives the possibility of an unavailable witness, and create a verbatim transcript if necessary.

[72] F. Hubbard, *New Sayings by Abe Martin* (1917) *in* A DICTIONARY OF LEGAL QUOTATIONS 3 (1987).

[73] Lord Devlin commented, "If the success of a system of criminal prosecution is to be measured by the proportion of criminals whom it convicts and punishes, the English system must be regarded as a failure." *Id.* at 34.

[74] This article mentions predictability several times. Predictability is not meant to presume that results can be predicted with certainty or that sentences can be precisely calibrated, but that participants in the system should have a rough sense, based on past practices and results, of the relative severity of the case and the reliability of government practices. This predictability makes it easier for defense counsel to chart their strategies and fosters confidence in the system by observers and collateral participants such as commanders, witnesses, and disinterested soldiers.

identification with the victim that they do not see the case with the skepticism that a panel will apply. The chief can help counsel see through a *Duga*[75] string cite and determine whether they are likely to lose an Article 31 motion, or help counsel understand that a social worker's perspective on whether child abuse occurred does not translate into a panel's satisfaction that child abuse occurred beyond a reasonable doubt. Even the comparatively inexperienced chief is still one layer removed from the counsel who tries the case. The chief can enforce legal perspective by ensuring counsel do the basic blocking and tackling of trial work: preparing witnesses; reading entire cases—not just headnotes; Shepardizing; and drawing meaningful distinctions based on law and fact. The chief can enforce factual perspective by interviewing an occasional witness and playing the "Devil's Advocate" in posturing potential cross-examination and alternative defense theories.

Do Not Remake Counsel in Your Image and Likeness

So long as a tour in the courtroom is considered a prerequisite for advancement in the JAG Corps, chiefs of justice will supervise counsel from a wide variety of backgrounds, talents and limitations, all of them about to be ushered into court. The chief's job is to emphasize and draw out the strengths of a particular counsel. If a counsel is not an extraordinary oral advocate but a strong researcher, emphasize that preparation is the great equalizer in trial work—and be sure to rehearse that counsel thoroughly. If a counsel speaks well but is not a strong researcher, work hard on his or her motion practice and pretrial research.[76]

Effective oral advocacy does not necessarily equate to theatrics; it merely means presenting information in an understandable manner. Compelling advocacy is only a bonus—and rare. The strong advocate should be encouraged to exploit that strength but not be blinded to its limitations: a clanging cymbal with little substance behind it.

Debrief, Develop Counsel's Philosophy

Tell Relevant War Stories

War stories have gotten bad press. A war story that runs to the "in my day" variety or constitutes a boss's puffing about his or her past is useless and tiresome. A good story about a learning experience or novel technique, however, is an experience intensifier for a junior counsel. Chiefs should draw on their experiences and those they have observed and pass them on to younger counsel. A war story will carry greater impact if it is a story about a loss or a spectacular gambit that did not work as envisioned. The counsel who audaciously experimented or simply got sloppy (as in asking a "why" question on cross) can educate a junior counsel with conviction, credibility, and even humor. Counsel have enough mistakes to make on their own. If a war story makes an otherwise theoretical point concrete, then counsel will make one fewer mistake or be emboldened to test a technique or strategy that they might otherwise have been reluctant to venture.

Read, Understand Critiques of the Justice System

The military justice system is not subject to nearly the critiques that it endured a generation ago when Vietnam, *O'Callahan*,[77] and books like *Military Justice is to Justice as Military Music is to Music*[78] shaped a popular perception of military justice as warped and capricious. One source suggests that perception may change during a peacetime of a smaller fighting force in which every service member's contribution—and the cost of training, retaining and discipline—are subject to greater public scrutiny.[79]

Counsel should be encouraged to read critiques of the military justice system, regardless of their bent. While many are flawed, they can be instructive and thought-provoking. Even harsh critiques serve a purpose. Because trial counsel may remain in the JAG Corps as managers, leaders, and policy makers, they are well-served to develop at least an acquaintance with critiques of the system. Finally, such critiques may have been read by panel members or commanders, and may

[75] 10 M.J. 206 (C.M.A. 1981).

[76] The JAG Corps could heed one of the theses of *Crisis in Command* and realize that not all officers have to be good at everything—that is, an officer who is not attuned to the courtroom can serve well in other positions. Trying to wedge square pegs into round holes is fruitless and does not necessarily serve the Corps, especially a Corps whose courtroom mission comprises a decreasing percentage of its total workload. *See* GABRIEL & SAVAGE, CRISIS IN COMMAND 127-28, 133-35 (1978) (emphasizing that officers should not be put on a "Peter Principle" treadmill that promotes them past their levels of competence, and noting that someone who may make a fine company commander for a large portion of his or her career should not be forced by ticket-punching career pressures to advance to positions for which he or she may not be well-equipped).

[77] O'Callahan v. Parker, 395 U.S. 258 (1969). This landmark decision required that the military demonstrate a "service connection" before it could try soldiers for off-post offenses. Together with its follow-on case, Relford v. Commandant, 401 U.S. 355 (1971), which set out the 12 so-called "Relford factors" for assessing service connection, it spawned years of litigation and cumbersome pleading strategies designed to maximize or justify court-martial jurisdiction.

[78] R. SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC (1969). Sherrill, an editor of the liberal magazine, *The Nation*, wrote an essentially antimilitary screed, the stridency of which masked an occasionally sensible proposal for reforms, some of which were enacted. A widely circulated book with a similar bias was *A Murder in Wartime*, by J. Stein. At the other end of the spectrum *see* W. GENEROUS, SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE (1973); J. BISHOP, JUSTICE UNDER FIRE (1967). Generous's book, while sympathetic to the military's need for good order and discipline, is not merely an apologia for the military justice system, and its historical treatment of the UCMJ is excellent. Bishop's is a bit more of a polemic, but also interesting and reflective of the ferment of the times. A more recent, narrow in scope book is R. SHILTS, CONDUCT UNBECOMING: GAYS AND LESBIANS IN THE U.S. MILITARY (1993). It indicts the military justice system and, more pointedly, the administrative separation system. It contains numerous flaws and inaccuracies regarding procedure and some of its anecdotes have been revealed as inaccurate. Nonetheless, it is a widely circulated, well written critique of the military.

[79] "For most Americans, military justice is an arcane field of little relevance to their daily lives. But in the leaner Defense Department budgets of the post-Cold-War era, maintaining the integrity of U.S. fighting forces will be more important than ever." "Navy Justice," U.S. NEWS & WORLD REP., Nov. 9, 1992, at 46.

influence their views of the system. Joe McGinniss' treatment of CID bumbling in the Jeffrey McDonald murder case is an example of how the most ordinary of errors early in an investigation can harm a case and generate a lack of confidence in military investigators, one that McDonald was able to exploit at an Article 32 that recommended dismissal of charges against him.[80] Interested counsel could delve further into the development of the justice system by reading the congressional hearings following both world wars in which abuses of the system were documented and detailed.

Today the military justice system, despite its post-*Solorio* broadened reach, is subject to little public scrutiny or criticism. Counsel should be conversant, however, with contemporary critiques, especially when they may reflect the mindsets of commanders and noncommissioned officers (NCOs) whom trial counsel serve. For example, Edward Luttwak, the highly respected and prolific military critic, has written that the nonjudicial punishment system is too liberal and grants too many rights to soldiers. He proposes a system in which NCOs operate the Article 15 process "without any formal procedure at all," leaving commanders free to help soldiers who have "problems that are more or less serious but nonlegal, and whose morale and performance could be restored by the caring advice and friendly direction from his commanding officer," currently encumbered by the "qualifications and complications [that] have encrusted the workings of Article 15 over the years."[81]

Luttwak's central point—"that military justice is now geared to the fullest possible protection of individual rights, without regard to the morale and discipline of the group as a whole"[82] —is highly debatable and should concern JAGs sworn to uphold the Constitution, even when inconvenient. It likely does, however, express an opinion that a JAG will encounter from time to time. An experienced chief, especially one with non-JAG military experience, can guide a counsel on how to explain and comprehend a perspective that affirms soldiers' rights while comprehending the peculiar pressures that inhere in operating an army.[83]

Debrief the Cops As Well

One of counsel's most important and overlooked jobs is to help law enforcement officials develop. After a difficult trial, when counsel want to begin to prepare for the next trial, it may seem distracting to take the time to discuss a CID or MPI agent's testimony. This is, however, invariably time well spent. They should be coached on their responsiveness to counsel's questions (including their familiarity with the case file), their candor and appearance of candor to the fact finder, and their presentation, both verbal and physical.

Go to the Field

Panel members quickly form a perception of counsel's credibility based on the word pictures counsel draw and counsel's realistic appreciation of military stresses and culture. Counsel—especially those with little or no military experience—can quickly gain this appreciation by taking advantage of and seeking opportunities to learn. This means asking questions of fellow soldiers and absorbing information, but what it means most is taking the opportunity to do what they do, especially training and going to the field. A counsel who has ridden in an M1A1 tank or bore-sighted a Bradley Fighting Vehicle, watched an MLRS fire, or eaten a meal served out of mermite has some appreciation for what the soldier does—and can, *inter alia*, explain more credibly and vividly, why a barracks thief corrodes discipline and trust or why a soldier committing a "victimless" crime such as drug use can endanger fellow soldiers and the mission.

Do not place undue emphasis here. Judge advocates are professional lawyers who should not feel pressure to pose as something they are not. They are, however, lawyers and soldiers, and they serve the Army and the Corps best by doing all they can to understand and appreciate the Army. A chief can help acquaint counsel with military culture and terminology. In one hotly contested case, a civilian defense counsel tried to impeach a soldier based on prior testimony about her having attended a "GI party."[84] A beneficent military judge intervened to tell the attorney that attendance at such a party did not necessarily reflect a propensity to beer and dancing. A trial counsel should never make such a mistake, and he or she should know how to tell a CUCV from a HMMWV and other basics that panels and commanders will expect the counsel to know. The alert chief can be translator and guide in this area. Again, a collateral benefit exists. A growing emphasis is being placed on operational law, as commanders rely more on lawyers to help them confront issues in low intensity conflict and peacekeeping operations, the presumed battles of the future. The more counsel are conversant with the language and culture of the field, the more credible they will be as all purpose legal advisors. When brigades deploy they will take their captain-trial counsel with them. Commanders presume that counsel know their way around the courtroom. They will trust their counsel even more if they sense that they can deliver sensible advice in the operational law area.

Do Not Over-Emphasize Oral Advocacy

Counsel, chiefs, and evaluators must resist the temptation to place too much stock in a counsel's rhetorical abilities or style. While important, the emphasis on oral advocacy often

[80] The errors in that case included the accidental commingling of fibers at the crime scene, failure to take fingerprints and hair samples from the victims' bodies, mixing up a pony's hair with McDonald's, a destroyed footprint in a blood stain, and CID/MP fingerprints found in blood stains on McDonald's seized *Esquire* magazines—which agents had read at the crime scene. J. McGINNISS, FATAL VISION 191-92 (1983). The television movie based on the book, while carrying the flaws of any "docudrama," can be a good springboard into an OPD discussion about the importance of early JAG involvement in criminal investigations.

[81] LUTTWAK, *supra* note 32, at 202.

[82] *Id.* at 201.

[83] Luttwak believes that "outright domination of civilian priorities is very clear" in military justice, but that "the peculiar tension between amity and discipline that any good fighting unit requires" does not justify extending the protection that America reserves for individual rights. Because of the military's "civilianized" justice system, he laments, "officers devote extreme care and much time to laborious legal procedures in dealing with the small number of habitual troublemakers—even if they must thereby neglect the rest of their command." *Id.*

[84] A "G.I. party," is not a social gathering, but rather a clean up or detail, usually involving the barracks.

masks an inability to offer a more meaningful critique and is, therefore, often superficial and of marginal value to the counsel. Colonel Wiener has observed:

> What is advocacy? Believe me, it is not raising one's voice and shouting in court; it is not putting on a show at trial . . . ; nor is it arguing one's case to the public before a television microphone. . . . [A]dvocacy is, very simply the art of persuading another, or others . . . to agree with the position that is being advanced.[85]

Advocacy should not be interpreted narrowly, however. It involves every aspect of the case, from drafting charges precisely and comprehensively, to moving the case aggressively, to courtroom performance. Courtroom advocacy should not be interpreted merely or even primarily as oral advocacy—and oral advocacy should not be pigeon-holed as mere oratory.

Courtroom advocacy involves, most of all, exhaustive preparation. A lawyer's style is an aspect of oral advocacy. Although certain aspects of style merit attention, a critique that focuses on style—such as, hands in the pockets, jingling keys, sucking on a pencil, too many "ums"—is often a cheap critique that distracts counsel from more consequential matters. A well-prepared counsel with a dry style, but one that is within herself, is much more effective than the stylistically smooth but ill-prepared counsel, whose hollow preparation is conspicuous.

Be confident enough to offer criticisms and suggestions that transcend mere stylistic quibbles. Counsel commonly err in the following areas:

> Repeatedly incanting "the evidence will show" in opening statements. Counsel should mention, early in the opening statement that "the evidence will show" what they are about to argue. Many counsel, fearful about possible objections for arguing during the opening, feel that they must sprinkle their opening with "evidence will show." This practice is unnecessary, defensive, and distracts the panel.

> Gratuitous use of "let the record reflect" instead of simply stating a point or accomplishing something. The record will "reflect" that counsel is saying or doing something whether he or she uses that tiresome preface or not. Therefore "all parties present . . ." is permissible; skip the preface.

As one lecturer used to say, in trial work it's important to be yourself—unless you are a total [expletive], in which case, you better be someone else.[86] Style and delivery are not unimportant. A compelling presentation arrests a panel's attention and can transform a marginal case into a victory. A critic should not focus unduly on style, however, because (1) it is partly personal and the critic must be sensitive to the speaker's inherent gifts or limitations, and (2) excessive focus on style may mask the trial attorney's (or the critic's) unfamiliarity with the substance of the presentation and encourage a form-over-substance approach to trial work.

Speak the Language Right

Counsel should not use hackneyed Army speak, or CID speak ("she exited the blue in color vehicle"). They must know how to properly use military terminology, however, especially on sensitive matters. Counsel should say "junior enlisted" soldiers, not "lower enlisted"; should refer to all members of the Army as "soldiers," not "service members"; and should be aware of local decrees—such as, change barracks to dormitories or soldiers' quarters. An experienced chief can keep his or her ear tuned to improper usage when rehearsing counsel's arguments and witness exams. New counsel also need to know to use terms like charges and specifications ("not counts") and to make important distinctions such as explaining that a member was excused by the acting SJA (permissible), not the assistant SJA (unlawful).

Keep Oral Advocacy in Perspective

> *"Eloquence is like a flame: it requires fuel to feed it, motion to excite it, and it brightens as it burns."*
> —*William Pitt*[87]

A final point about advocacy. Its frequent de-emphasis is often misunderstood. The de-emphasis is commonly based on (1) a belief that "anyone can make an argument," (2) the humility of the speaker, and (3) a belief that triers of fact generally are impervious to oral advocacy. Advocacy can be overemphasized the way that good penmanship can be overemphasized in the computer age. However, good advocacy is more than good speaking. The smooth speaker who is poorly prepared is the empty vessel who will lose the case. The good advocate will speak clearly—even if undramatically or without flamboyance—and present a cogent message to the judge or jury. It is in this sense that strong advocacy cannot be overemphasized and in which rehearsal and fine-tuning of arguments yields immense benefits; it is the essence of the power of persuasion.

Only when a counsel is forced to articulate the theory of his or her case—in person, orally, in English, to other individuals—that the flaws and hidden strengths are most apparent. Even invaluable tools such as proof analysis worksheets are no substitute for having to articulate a theory and to explain facts plainly to lay people who will determine whether a free person is convicted and what the punishment will be.

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[85] Wiener, *Advocacy at Military Law: The Lawyer's Reason and the Soldier's Faith*, 80 MIL. L. REV. at 4, 5 (1978).

[86] On the other hand, cheap imitations or one-upmanship, especially when egged on by more experienced counsel, also can be damaging, distracting, and embarrassing. As Yogi Berra said, "If you can't imitate him, don't copy him." P. DICKSON, BASEBALL'S GREATEST QUOTATIONS 43 (1991).

[87] William Pitt, translating a Latin epigram, *in* W. MANCHESTER, THE LAST LION 32 (1983).

Avoid Error

Cases rarely are overturned based on improper argument, but counsel need to absorb an understanding of when argument needlessly stretches the bounds of propriety. Not only might an argument risk objection or a curative instruction, but too much rhetoric should be a sign to a coach or chief that the trial counsel is masking uncertainty about the case or the law with wordiness. In this area, sheer lack of experience—lack of exposure to others' arguments—can trigger arguments that, while logical in the lunchroom, are clearly improper in the courtroom.[88]

Critiques Based on Performance In-Court

"You can observe a lot just by watching."
—Yogi Berra[89]

Use and Adapt the NITA Method

There is nothing magical about the National Institute for Trial Advocacy (NITA) method, but it serves as a good reminder for coaches that superficial critiques do not teach counsel anything, and that critiques should be substantive, so that the point is retained and incorporated, and not just regurgitated in a rote manner in the coming case. The critiques should be sufficiently prescriptive that the counsel knows how to do something differently the next time that he or she walks into court. The NITA method capsulizes the technique as *headnote-playback-model*, where the coach (chief) gives a headnote or capsule of the teaching point, "plays back" counsel's words, and "models" one way to do it better.

The coach uses the *headnote* to orient the counsel to the importance of what he or she is going to say. It is not necessarily too elementary to say, "Leading questions are important in cross-examination, because they keep you in control of the evidence that is being disclosed and make it more likely that the witness will tell the truth. They help you shape the evidence." Proper *playback* consists of saying, "You asked the question in this manner, 'Did they give you the chance to read over your statement?'" A proper *modeling* would be, "Isn't it true that you had the chance to read over the statement before signing it?" As with any teaching technique, it must be adapted to the situation and the counsel's maturity. It does provide a valuable construct, however, especially for the less-experienced coach. It orients the listener and disciplines the coach, making it more likely that the counsel will absorb a discrete point or two. It keeps a critique from degenerating into a wide-ranging, formless discussion about trial advocacy. Unstructured discussions can be useful, especially in group settings, but the NITA method should be used to correct specific, performance-based errors, so that counsel are better armed with concrete techniques, approaches, and methods of analysis that they can immediately apply to their next case.

Let the Counsel Talk

In most instances, counsel will have some explanation for why they asked a question, failed to ask a question, or failed to offer certain evidence. Hear them out. But also be firm and prescriptive in your critique. A "tactical decision" is the last scourge of all trial attorneys. Sometimes it is true, but sometimes it covers for an unfamiliarity with rules of evidence or case law, or betrays an atmosphere of intimidation fostered by the judge or experienced opposing counsel. Help counsel unemotionally analyze the state of the case at the time of the important decision—and help them retain that analytical construct for when they face similar cases in the future. No one likes to be criticized, so the critique should include hearing out the recipient of the critique. A collegial critique, however, should not have its blows softened to the point that the counsel walks away without a clear sense of how to approach the problem differently. The goal is not for the counsel to bludgeon herself with the error, but to develop a method for attacking it differently in the future. In this sense, the pressure should be on the chief, who gets no points for a "Why didn't you object?" or "Why didn't you ask this question?" critique, but earns his pay by hearing counsel's reasons and helping counsel understand the better approach, complete with citations to rules or cases as appropriate.

Avoid Halftime Talks

Nothing can rattle a counsel more, and cause greater damage to a case, than midcase critiques. If something truly pivotal needs to be corrected—that is, if failure to correct it risks acquittal—then approach counsel on a break. Otherwise, let the counsel try the case and do not hector them during trial, either by second-guessing, prodding and demanding explanations during breaks, or by note-passing and whispering during trial.

Reinforce Counsel's Role: Seek Justice, Do Not Blame the Referees

Part of the critique should reinforce the unique role of a prosecutor, which is not to win convictions, but to seek justice. A disappointing loss sometimes can challenge counsel's commitment to, or comprehension of, this role. No practice is more righteous, futile, or sour than blaming the military judge for a ruling or rulings that, counsel conclude, swayed the jury, affected the government's evidentiary posture, and determined the outcome of the case. Just as the poor loser in basketball gripes about a key travelling call that was made or not made, counsel's bitterness at judges, even when justified, enable counsel to miss the larger point—where the government could have done better. Judges sometimes rule incorrectly. More often, judges choose from conflicting but malleable precedents and make rulings for which a quasi-policy underpinning exists. It will always be so. Rather than blaming the judge, a productive part of the critique is to understand why the judge

[88] For example, arguing that the panel should reject the "brownie defense" because "if you buy [sic] here today, you're going to hear it a million times again back in your units" improperly preyed on "the personal interests of the court members as members of the military community" and "argued that the innocent-ingestion defense should be rejected to discourage other soldiers from raising it." United States v. Causey, 37 M.J. 308, 311 (1993). Counsel should not have to appeal to this type of prejudice. They should be able to orient panels to the ludicrousness of the defense in the context in which it was raised, as well as its extreme scientific implausibility.

[89] DICKSON, *supra* note 86, at 45; *see also* "You can see a lot just by observing." Y. BERRA, IT AIN'T OVER . . . 9 (1989).

made the ruling (usually they will tell you), so that counsel can better understand how to approach similar situations in the future. It is stronger leadership and more effective mentoring to help counsel understand why a judge ruled the way that he or she did than to reinforce this indignation at the judge's presumed ignorance.

Exploit the Experience

One way to make the most of the diminishing number of trials is to convert counsel's successes and errors into experience for all counsel. One way to do this is to second-chair cases, as previously discussed. Another method is to enforce a system of sharing experiences, by debriefings at periodic continuing legal educations, and by sharing motions, experts, and data bases. The larger the jurisdiction, the more "bang" per trial can be extracted by as many counsel as possible. The chief should be at the center of this process, helping to ensure that every experience, good or bad, is an experience multiplier for all.

Read the Records

No chief can watch all of every trial. The chief must, however, read every record cover to cover. While reading the record, make notes and approach counsel with pointers and questions. Asking counsel to "redo" all or part of a witness exam, or to consider how to better pose voir dire or cross examination is not demeaning. Using this method enables counsel to "self-diagnose" their errors and work through their own prescriptions for next time. There will not be a next time for that case, but they will remember the lesson best, because they "fixed" a case they were familiar with and they will face similar issues in future cases.

Exploit the Sentencing Phase of Trial

Do Not Be Deterred by Horner-Ohrt

The biggest boon to the defense bar in the area of sentencing has been the misunderstood decisions in *United States v. Horner*[90] and *United States v. Ohrt*.[91] These cases stand for two simple propositions: that opinion testimony may not be based solely on the severity of the offense,[92] and that a sentencing witness may not recommend a particular sentence.[93] They have been expanded, however, with the record-protecting assistance of many trial judges, into a clamp on the government case in sentencing. The government also has been a party to this dampening of the sentencing phase by (1) not firmly arguing the limitations of *Horner-Ohrt*, (2) foolishly trying to "push the envelope" in an area of marginal impact in most courts-martial, and (3) failing to prosecute the rest of its sentencing case aggressively and creatively. When faced with a clear trend in the law such as the *Horner-Ohrt* juggernaut, a chief's job is to carefully analyze the law and provide counsel the guidance and equipment—such as, precise case cites, finely scripted questions,[94] alternative areas of argument and proof—to present a powerful sentencing case. Do not place disproportionate emphasis on something that in most instances does not matter much. A commander's opinion of a felon's rehabilitative potential should be irrelevant in most instances. In the few cases in which it does matter—an offense without obvious aggravation[95]—then a commander's well-grounded perspective can assist a panel in determining whether to discharge the accused. The better practice is to heed the courts' concern that questions regarding rehabilitative potential are a euphemism for discharge, and to inquire about it only when such an opinion is likely to sway the panel. These opinions are useful only in the marginal cases addressed above and are much more important at BCD-special courts, in which the offenses are less aggravated than at general courts, which try the most aggravated offenses.[96]

Do the Basics

Never forget to introduce the *Manual*-required evidence during sentencing, including personnel records and Article 15s. These often provide a window on the kind of soldier that the accused has been. Most members are true experts at reading between the lines on those documents. They see not only the obvious—how long it took the accused to make rank, whether he or she ever was reduced, and what schools the accused has attended—but they complete a mosaic of the accused by looking at time on station (was the accused a homesteader at a "soft" installation?), types of jobs (challenging or easy out?), skill qualified test (SQT) score (compare with GT; is the accused less intelligent than average or, on the other hand, is the accused bright, with even less excuse for the misconduct?), and SQT percentage (which places the raw score in perspective). A chief can be especially educative in

[90] 22 M.J. 294 (C.M.A. 1986).

[91] 28 M.J. 301 (C.M.A. 1989).

[92] *Horner*, 22 M.J. at 296. *See also* United States v. Cherry, 31 M.J. 1, 5 (C.M.A. 1991); United States v. Herring, 31 M.J. 637, 640 (N.M.C.M.R. 1991) ("Q. Do you have any other reason for your opinion [than the offenses today]? A. No sir. No sir, I don't.").

[93] *Ohrt*, 28 M.J. at 304. *See also* United States v. Kirk, 31 M.J. 84, 88 (C.M.A. 1990) ("I think it would be, you know, a waste of Air Force resources to retain her."); *Herring*, 31 M.J. at 639.

[94] The best guidance is to fully develop the witness' basis for knowledge and then to ask only this neutral question: "In your opinion, does the accused have rehabilitative potential?" United States v. Stimpson, 29 M.J. 768, 770 n.2 (A.C.M.R. 1989).

[95] A relatively narrow band of offenses exists in which an accused can make a credible argument for retention. Minor, purely military misconduct for which the command might bear some responsibility (disrespect to a superior who commands disrespect purely because of rank, dereliction in running an arms room with an archaic SOP), "buddy distribution" of marijuana, a short AWOL, or an impulsive bar fight are the sorts of offenses that require context: Is this an aberration by an otherwise solid soldier from whom the Army should get its investment repaid, or is it the final straw of a marginal soldier of weak character? In these circumstances, a properly grounded opinion regarding rehabilitative potential is useful.

[96] The discharge rate at general courts-martial has remained well above 80% (84.8% in fiscal year 1993, down from average 87.4% previous four years), suggesting that energy could be better put toward seeking appropriate confinement, while the discharge rate at BCD-special courts-martial dropped to 54.1% in fiscal year 1993, down from an average of 63% the prior four years.

this area, helping counsel to "read" these forms with the perspective of an experienced soldier, helping them avert the occasional error (confusing SQT percentage with SQT score), and helping them understand the use to which a panel of experienced soldiers and officers will put them. The chief also should help counsel consider exploiting fundamental rules of evidence such as MRE 803(18), which permits introduction of learned treatises as substantive evidence.[97] Find treatises on topics such as the harmful effects of drugs. Find a sponsor who is (or can become) familiar with the article and vouch for its weight in the field. Then have the witness lay the foundation for it and offer it into evidence. Employ judicial notice for acknowledged classics in fields such as drug use, child abuse and accommodation, posttraumatic stress, and rape trauma. Counsel can then read the treatise to the panel, giving the topic in question a greater ring of truth and providing counsel a springboard for later argument.

The basics of sentencing also include calling witnesses, especially victims, even when they only say what normally would be "expected." So what if the mother of a rape or murder victim is only going to express her grief? It may be the only rape or murder that your panel is going to see, and there is nothing ordinary or routine about the heartache of a victim or those close to a victim. Helping counsel humanize the victim need not be complex or calculated; for example, in a case in which a child was scalded by the mother's boyfriend, a physician testified that the child could not be touched for weeks because it would cause him intense pain.[98] This formed the foundation for a natural but evocative argument that the eight-month-old child not only suffered from the burns but was deprived of the human contact that he craved—and which to that point in his life was the only balm for him when he hurt; no one could explain to the infant that his mother could not hold him because it would impede the healing process.

Be Creative

In the appropriate case, seek attention-getting methods of orienting a panel to a crime. Some examples include: a training film showing Bradley Fighting Vehicles, Multiple Launch Rocket System launchers, or combat medics in action, when making the point that drugs and a certain MOS do not mix; bringing in a car door in a vehicular homicide case; offering a live infant to the members as demonstrative evidence in a shaken baby case. Use medical illustrators, available in medical centers as well as academic institutions, to create precise renderings of injuries. These enable counsel to present the "constellation of injuries" on one or a series of illustrations, are less gorey than photographs, and attune panels to the seriousness of the injuries while providing experts a familiar set of props from which to work. Counsel should be encouraged to create their own videotapes or photographs—or to direct legal clerks in creation of them—in appropriate circumstances. Again, do not forget the basics, such as an enlarged photograph of a crime victim.

Incorporate Victims When Appropriate[99]

Regardless of whether you incorporate victims into the sentencing phase of trial, they should be linked with one person, ideally not a prosecutor, who will function as the victim-witness liaison. This contact is required by regulation and law,[100] but should be offered regardless, out of simple justice and compassion. The quality and intensity of victim-witness programs vary widely, but it is a JAG responsibility that must be taken seriously. At a minimum, the victim-witness liaison should orient the victim or witness to the military justice system (procedures and terminology), keep the person informed of case developments (hence the "liaison" aspect of the title), inform the person of sources of help (physical and mental health care, financial assistance), and the availability of state, federal, and, when overseas, host-nation services.[101] Victim-witness services should continue after trial. The liaison or his or her successor should follow the case and pass information regarding potential input into parole and clemency boards and early release date to victims. When JAG offices give victim assistance the sort of priority traditionally given to processing time, the JAG Corps will be a model of attentiveness.[102]

Hard But Fair Blows

Counsel can become consumed with creative name calling in the sentencing phase of the trial. Few panels will increase their sentences based on characterization of an accused as a

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[97] *See* MCM, *supra* note 10, MIL. R. EVID. 803(18), which states as follows:

> Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice [are admissible]. If admitted, the statements may be read into evidence but may not be received as exhibits.

[98] Counsel should feel freer than ever to present evidence of victim impact and to argue it passionately. The Supreme Court reversed itself in 1991 and permitted the government to introduce victim impact directly. Payne v. Tennessee, 111 S. Ct. 2597 (1991). Some of the guidelines provided in prior military cases probably still apply. *See, e.g.*, United States v. Whitehead, 30 M.J. 1066, 1071 (A.C.M.R. 1990) (parental impact testimony permissible because of the kind that "could reasonably be expected from virtually any parent who lost a child").

[99] For a good primer on the Victim-Witness program, *see* Foote, *Victim-Witness Assistance*, ARMY LAW., June 1991, at 63.

[100] AR 27-10, *supra* note 12, ch. 22.

[101] For a good treatment of victim-witness responsibilities, albeit written from a lay perspective, read C. BROWN, FIRST GET MAD, THEN GET JUSTICE (1993). This book also contains an excellent state-by-state index of victim-witness services.

[102] The Office of the Staff Judge Advocate, Fort Knox, Kentucky, recently instituted the extremely helpful practice of forwarding, via form letter, information regarding clemency board dates and minimum and maximum release dates of prisoners held at its Regional Confinement Facility (RCF). The information is sent to the JAG office that tried the case, which then has the responsibility of notifying the witnesses. This cooperative approach gives the field the information it always has needed and found hard to receive in a reliable and timely manner. The JAG office linked to the RCF is in the best position to gather and transmit the information to the JAG office that tried the case. That office, even later in time, is still best suited to transmit the information to victims and witnesses; it merely must institute mechanisms to track these individuals, something easily accomplished as part of the trial process.

"thief" or "rapist." Counsel are permitted wide latitude in sentencing rhetoric, but the name-calling arguments—although cathartic and dramatic—are not as substantive as pointed, specific reasons why strong punishment is warranted. Less time calling a soldier a "drug abuser" and more time reiterating why the Army cannot afford to have a Bradley driver who also is a user will bear more fruit for the government.[103]

Not Those Sentencing Factors Again

The military officially recognizes five factors to be considered in sentencing cases: rehabilitation, general deterrence, specific deterrence, retribution, and protection of society from the wrongdoer.[104] A good argument may touch on one or all of the factors, depending on the case. Chiefs should help counsel avoid the dull predictability of reciting the factors and trying to plug in facts or justifications. All counsel should be acquainted with the factors and, depending on the case, emphasize the appropriate ones; do not stop at the factors as a template. Consider other factors when appropriate,[105] and do not mince words: if retribution is a legitimate factor—especially in violent crimes—counsel need not dress up the argument as something else or apologize for it.[106]

Do Not Forget Your Audience.

Counsel may approach an officer panel differently than an enlisted panel. Chiefs must help counsel understand the finer points of these distinctions as they apply to a particular case. Officers, better educated and more broadly exposed to the social sciences, may be more lenient sentencers than NCOs, who may in other instances be sympathetic to an accused.[107] The idea that either type of panel generally issues harsher sentences is one of the trite shortcuts that substitutes for serious thought. Simply, in evaluating how to approach a panel in a particular case with particular facts, counsel must include a member's likely sentencing philosophy in the equation. No single factor determines that philosophy, but the member's experience is one of those factors, and a member's experience is shaped, in part, by his or her status as an officer or enlisted soldier, and the education, training, and culture endemic to each.

Moving Cases: Negotiations and Pretrial Agreements

Counsel are under multiple and sometimes conflicting pressures: to prepare thoroughly but move cases quickly; to try cases ethically but to win convictions in tough cases; to save government resources, but not to make foolish concessions in negotiations. The chief is alternately the buffer and prod, counsellor and rigid bulwark, in supervising and energizing and keeping the negotiation process honest.

Listen

Let the defense talk first. The government should not deal a five-year case for ten years, simply because the defense suggests ten years. It is elementary negotiation, however, to let the party with the most to gain—the accused who otherwise faces the maximum punishment—to assume the initial risk of proposing the terms. Do not focus on the sentence cap at the expense of following closely the charges to which the defense signals a willingness to plead guilty. An absurdly low defense offer, either as to charges to which they would plead, or as to quantum, gives the government a sense of the defense's good faith and the extent to which the government should bother devoting resources to working out an agreement.

The defense may have a point. The defense's rationale, especially at an early stage, can be more illuminating and important than an initial offer as to disposition. The defense may be aware of significant weaknesses or equitable matters that affect the government's case. Information about the soldier's record or family may assume great importance in the proper context, as will information about the victim, the chain of command, or treatment of similarly-situated soldiers. Listen to the defense. It may soften the government's position. If it does not, it at least provides a window to the accused and the defense case.

Negotiate Candidly

Nothing is gained and much is lost in the trite "split the difference" negotiating style in which the government states an absurdly high number and the defense an absurdly low number, only to arrive at the number in each other's heads. The dance is not offensive in and of itself, but the government can gain a reputation for bluff and a lack of seriousness. The government should guard its reputation and credibility jealously. After determining in what narrow punishment range the offense fits, counsel should make that clear to the defense and then be prepared to try the case if the defense does not accept it. The long-term effect on the government's credibility will be substantial: the defense will know that the government

[103] *See, e.g.*, United States v. Toro, 37 M.J. 313 (C.M.A. 1993) (permissible to argue that accused nowhere "acknowledges your findings of guilty"). *Accord* United States v. Edwards, 35 M.J. 351, 355 (C.M.A. 1992) (accused "expressed no remorse or his . . . remorse can be arguably construed as being shallow, artificial, or contrived").

[104] MCM, *supra* note 10, R.C.M. 1001(g), lists all of these factors except protection of society. The judge's instructions tell the panel to "select a sentence which best serves the ends of good order and discipline in the military, the needs of this accused, and the welfare of society." DEP'T OF ARMY, PAMPHLET 27-9, MILITARY JUDGES' BENCHBOOK, para. 2-39 (May 1982).

[105] One factor to consider is moral education. This argument is closely linked to general deterrence, but goes beyond convincing the tempted not to commit a crime. It also means fostering a social atmosphere (particularly persuasive in the separate society of the military) respectful of certain rights and laws. This argument is especially persuasive in "victimless" crimes. Two observers of the justice system argue that appropriate punishments serve the purpose of conditioning the rest of society "assuming they have some exposure to" the crime and punishment. J. WILSON & R. HERRNSTEIN, CRIME & HUMAN NATURE 494 (1985).

[106] When arguing retribution, the government is saying that the sentence is "justified simply on the grounds that it is just, not on the grounds that it is effective." *Id.* at 497. For additional guidance in sentencing arguments, *see* Russelburg, *Sentencing Arguments: A View From the Bench*, ARMY LAW., Mar. 1986, at 50; Thwing, *The Sentencing Argument: A Search for the Fountain of Truth*, ARMY LAW., July 1986, at 35; Advocacy Supplement, *TCAP Memo #65* (May 1991).

[107] Members exposed to the philosophy of the influential Karl Menninger, for example, may have adopted in whole or in part his philosophy that punishment beyond restitution is an inappropriate "moral surcharge" whose source lies "in a spirit of vengeance that is inappropriate in a civilized society." K. MENNINGER, THE CRIME OF PUNISHMENT 203, 218 (1968).

speaks forthrightly and honorably, and both parties will live with the consequences of the decision. Chiefs must ensure that trial counsel negotiate with a clear understanding of the SJA's intentions in a given case; counsel can lose their negotiating strength (and their motivation) if they hammer out a tough deal that is subsequently weakened when the defense approaches the chief or SJA directly.

Negotiate Consistently

Because each case should be considered independently, having a template for types of cases is improper and offensive. The manner in which the government negotiates, and the factors to which it gives weight, should be consistent. Not only is this method just, it provides a healthy, general predictability on which the defense can rely and which forms the foundation for a good faith relationship.

Decide What Is Worth Negotiating

Some cases are so strong and so easy that trying the case, rather than engaging in protracted negotiations, almost would be easier. Give the defense a deadline for a deal and hold to it. Although an accused has a right to plead guilty, the accused has no right to a pretrial agreement.

Decide What Factors Merit Weight—and When

Some factors simply may not be worth negotiating about; others carry different weight under different circumstances.

Clean Pleas

Some prosecutors always insist that the defense plead to everything on the charge sheet. Sometimes the charge sheet reflects a counsel's initial best guess about the posture of the case, and the passage of time and development of evidence reveal specifications that are weak or tenuous. The government should willingly drop weak charges, although it always should be willing to go forward with specifications charged in good faith that might be close calls. However, to insist that the defense plead to everything that the government thinks is important and provable is proper. The defense's frequent excuse that, "I can't get him provident to that" should be met with the rejoinder that, "I can't recommend that the CG sign that." Economy is a major factor in plea negotiations. If the government has to go forward—either on charges to which the defense will not plead, or to prove a charge on which the defense will only plead guilty to a lesser included (such as, wrongful appropriation under Article 134 as opposed to Article 123(a) for bad checks, or a lesser amount of drugs distributed)—then the government normally should reject the deal. Government resources—especially prosecutor preparation time, an undervalued resource—are not being saved and the government should be willing and confident enough to say "no" and prove the entire case.[108] The details of the plea frequently are overlooked in a rush to reach the flashier part of the deal: the quantum. Counsel should spend less time quibbling over the quantum (the great majority of deals should quickly fit into an agreed, rational range) and more time assessing the charges to which the defense will plead guilty. More often than not, the defense senses the government's willingness to talk numbers and hooks the government into dropping charges to which the government should insist the defense plead guilty. The chief is indispensable in monitoring this process, coldly analyzing the government's case and not compromising on strong government charges. Convening authorities often are more concerned with the charges to which the defense is pleading than they are with the sentence cap.

Judge Alone

The government may decide, for example, that a promise to waive a panel will be a prerequisite in virtually all guilty pleas. While lawful and defensible, the government should be prepared to drop its insistence on waiver of a panel. The government may negotiate a two-pronged deal—such as, three years for a judge alone, five years with a panel. Again, such a waiver is a proper factor to consider, given the costs (longer records, more court reporter time, greater processing time), risks (instructional error), and inconvenience (notifying, caring for panel) associated with panel trials.[109] However, purely developmental concerns recommend against an inflexible waiver requirement regarding forum selection: counsel need practice communicating with panels and should not have to wait for a contested murder to gain it. Additionally, appearing before a panel with a guilty plea gives the government a sense of the dynamic (and sentencing philosophy) of the panel.

Waiver of Motions

Generally give waiver of motions little weight. While courts have permitted the waiver of evidentiary motions,[110] a chief should trust his or her ability to discern the relative strength of a defense motion. A defense offer to waive motions usually is grounded in a belief that (1) the government misapprehends the strength of the motion, and (2) it is a loser anyway, not worth preserving for appeal. Only in the instance of a highly consequential motion (a strong search or incrimination issue or an unusual problem such as *de facto* immunity) which the government might lose and which might affect the government's chance of obtaining conviction, should waiver of a motion be given much weight. Some

[108] This attitude distinguishes the military system from most civilian systems in a positive way. Many civilian jurisdictions "plea bargain" in the sense that most citizens understand (and mistrust) the process, by freely swapping pleas to a few offenses or lesser-included offenses in exchange for the certainty of a guilty plea and the freeing of the docket. The military is comparatively better resourced and has fewer pressures to close a case simply to move on to the next case on a crowded docket. The military's attitude should breed greater community faith in the system.

[109] The defense may not waive a panel in capital cases. MCM, *supra* note 10, R.C.M. 201(f)(1)(C).

[110] *See, e.g.*, United States v. Jones, 23 M.J. 305 (C.M.A. 1987) (upholding waiver of search and identification motions); United States v. Gibson, 29 M.J. 3 (C.M.A.), *cert. denied*, 496 U.S. 907 (1990) (upholding waiver of all evidentiary motions relating to statements made by accused's children).

motions—such as, jurisdiction—are not waivable and should not be part of the negotiation process.[111] On a related issue, the government rarely has an incentive to accept a conditional guilty plea—that is, a plea contingent on the government's success in winning a pretrial motion. Barring extraordinary resource savings, these mechanisms provide little for the government, while giving the defense the best of both worlds: a chance to litigate a motion (and consume government preparation time and resources), coupled with the security of a pretrial agreement cushion.

Waiver of Witnesses

The judge will require the government to produce important defense witnesses. The government should not place itself in the position of trying cases on the cheap. If the judge orders the witness, the government should be willing to pay to produce the witness. Again, only in the unusual instance of a required but difficult to produce witness should the government give witness waiver any weight. As a rule, in convening the court, the CG already has determined to commit resources to support the trial.

Restitution

Restitution is a legitimate and underutilized factor in cases of unjust enrichment, bad checks, and destruction of property. The extent to which the restitution has been prompt and voluntary should affect the weight that it receives. Typically, however, significant and *timely* restitution should carry weight in these cases, because it forces the accused to bear the costs of his or her crime and begin to accept accountability. Federal courts also consider it in calculating sentences. Be sure to require payment up front, however, certainly no later than arraignment. Do not be whipsawed by contingent pretrial agreements that, for example, limit a sentence to eighteen months with restitution and twenty-four months without restitution, but do not require payment until convening authority action. In such an instance, the defense will withhold the payment until after trial—and choose not to pay, with impunity, if the sentence is less than eighteen months.

Sparing the Victim

This can be at times very significant or irrelevant. Be skeptical of defense offers to "spare the victim" of a heinous crime from testifying. Usually it is the defense's attempt to spare the accused from the powerful, damning testimony of a victim of child abuse or violent crime. The government should consider, however, the needs and desires of victims (sometimes expressed through a parent or parents) to avoid testifying in open court. The government must be careful not to underestimate the strength and resolve of such witnesses and not telegraph to the defense the opportunity for a windfall when the victim's reluctance is merely a reflection of the extent to which the accused's conduct has been destructive and intimidating.

Speed

Getting a case into the courtroom quickly merits weight. It pleases the command, which otherwise has to live with a soldier, but even more important, it acts as a strong deterrent to others who witness swift justice, and especially to the accused, for whom there is a definite link between offense and sanction. Do not deal for mere processing time, deal only for real time.[112] The government may, for example, agree to nine months and normal docketing, or seven or eight months and a trial within ten days.

Avoid Novel Provisions

Counsel commonly will discuss extraordinary provisions that seek to enforce broader goals or social justice. For example, counsel will seek to limit forfeitures on the condition that an accused make an irrevocable allotment to family members or suspend some of confinement on the condition that an accused receive therapy or counseling. Most have laudable underpinnings, although some are defense attempts to create confusing, unenforceable contingencies that redound to an accused's benefit. While the courts have tended to approve, if not endorse, many unusual bargaining provisions,[113] the government should be wary of these provisions and only recommend their approval in the most extraordinary circumstance. The government should insist, when practicable, that the accused comply with the contingency before sentencing.

Most important, the government should not overestimate its ability to enforce unorthodox contingency arrangements. Once an accused is released based on a promise to receive counseling, there is a large and ill-defined burden on some governmental entity to monitor compliance with these provisions and to seek enforcement through renewed confinement. Additionally, an arguable requirement for due process exists before an accused is returned to confinement. In this area, the government should not vote with its hopes but should stick to clearly enforceable limitations (keeping the burden on the accused to justify parole or early release based on crime and his or her record accumulated during confinement).

Remind Counsel: "I'll Support. . . ."

Counsel do not bind the government in pretrial negotiations and need to keep themselves from being quoted as representatives of the SJA. In reality, counsel do negotiate most of the deals, however, and the *Manual* permits the government to initiate negotiations and to seek specific provisions. The trial counsel should preface all statements to the defense with the caveat that counsel personally will support this to the chief and the SJA, and does not presume to speak for the command or convening authority. This permits critical flexibility, keeps the pressure off the trial counsel, and keeps the government from inadvertently being bound by the statements of a trial counsel.

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[111] The right to appeal also may not be waived at the pretrial stage. *See* United States v. Hernandez, 33 M.J. 145 (C.M.A. 1991).

[112] *See infra* notes 147-164 for further discussion of processing time.

[113] *See, e.g.*, United States v. Gansemer, 38 M.J. 340 (C.M.A. 1993) (permitting an accused to waive right to administrative discharge in lieu of court-martial as part of pretrial agreement).

Chiefs should curb any tendency by young counsel to aggrandize themselves through the negotiation process. The term "negotiation" should not even be taken too literally. Comparatively little "give and take" should occur because the government should settle on the charges that it believes it can fairly prove (and a sensible quantum) and be willing to dedicate the resources to obtain a conviction. After hearing the defense's proposals, the government should deliver its "bottom line." While it should not always be delivered with a take-it-or-leave-it absoluteness, the government has legitimate reasons to seek guilty pleas to particular charges and a certain sentencing cap. Adhering to its proposal is the core of prosecutorial fairness and consistency, which ensures that the accused is treated fairly and that the government obtains a justified reputation for even-handedness and predictability with the defense community. The relative lack of flexibility also keeps counsel from becoming part of a "good cop-bad cop" routine, with the chief or SJA playing one role or the other.

The chief can no more bind the SJA than counsel can, but the defense generally will (and should) consider the chief's word to be more authoritative than the trial counsel's. Chiefs, too, should incant "I'll support" before talking details with the defense. Chiefs should, however, be in constant conversation with the SJA so that the chief's word carries weight and credibility. If the terms or conditions that the chief communicates to the defense are routinely undercut by the SJA, the defense will stop negotiating with the chief, thwarting the process and unnecessarily burdening the SJA, whom the chief should represent.

Counsel must be especially careful in negotiating exchanges of information or making other promises as part of negotiations. First, counsel should make no promises. Second, counsel should be humbled, awed, and intimidated by their power—derivative of the CG's—to bind the government. *Make no promises* to the defense and do not seek defense performance or information "up front" before a deal is signed by the CG. Under these circumstances, the government likely will be found to have bound the government, resulting, in extreme cases, in dismissal of charges.[114] Just as the CG can do this personally, so can trial counsel as the CG's agents, warranting extreme caution and plentiful caveats when negotiating.

Never Send a Deal to the CG Without a Signed Stipulation

Never. Most pretrial agreements contain clauses making them contingent on the parties' reaching agreement on a stipulation of fact. In truth, if the government does not extract defense concurrence before the deal is signed, then the equities shift to the defense. The government, in practice, is going to be unwilling to withdraw from the deal. It will have called off witnesses, redirected its energies, and will be unwilling to answer to the CG for the deal's failure. Additionally, a judge may be reluctant to permit such a withdrawal, further enabling the defense to drive a difficult bargain over the contents. The stipulation is the prosecution's most important exhibit in a guilty plea.

The issue of the content of stipulations is one of the few areas in which the government should be virtually inflexible. Insist that all legitimate aggravation, background, and res gestae appear in the stipulation. Allow no favorable defense evidence in the stipulation. Do not consider the withdrawal of proffered defense evidence—such as, the soldier's upbringing, blood alcohol level, when extenuating, or otherwise strong record or reputation—as defense concessions. The defense must not be relieved of its responsibility for placing that evidence before the court through methods by which the government can test it (authentic documents or the mouth of the accused or defense witnesses). It is permissible and desirable, however, for the government to admit most of its evidence through the stipulation, by incorporating documents, photographs, and physical evidence through the stipulation.[115] This enables the government to better prepare its case and properly forces the defense to acknowledge the government's evidentiary posture before trial. Ensure that incorporation of evidence is seen to be nonexclusive, so that the defense cannot credibly argue to the judge that additional physical evidence that the government tries to introduce at trial is a violation of the stipulation. Most importantly, however, do not forfeit the impact of a stipulation by racing to the CG with a deal so fast that the government plays into the defense's hands and undercuts the purpose of a pretrial agreement: to try a case more efficiently, while giving the accused the certainty that his or her punishment will not exceed an agreed maximum.

Try the Case

When a deal cannot be reached, and the difference is material, be willing to try the case. This means, among other things, not altering trial preparation so that the government is unprepared—because of lack of available evidence or lack of steam—to go forward. The government always should have something to gain from a pretrial agreement: conviction on a difficult to prove charge, or a tangible saving of time, resources, or significant witness trauma. Uncertainty as to outcome or lack of confidence in counsel should not carry weight. Going forward in a close case, regardless of result, signals to the defense that the government will not try to deal a case at all costs, and is willing to bear the risks and costs associated with a contest when it believes the stakes warrant it.

Water, Pencils, and Food for Thought

Many wrinkles are peculiar to military practice. In few civilian jurisdictions do jurors take notes, and nowhere do

[114] In *Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982), the SJA made promises to the defense to obtain verification of intelligence information that had been compromised. In dismissing charges for violation of due process, the COMA found that the SJA has broad discretion in court-martial matters but "it cannot be considered plenary or unrestricted." *Id.* at 338. The SJA, "by his own words, created a reasonable expectation in petitioner that if he satisfactorily cooperated with the command . . . there would be no court-martial." *Id.* at 342. In *Samples v. Vest*, a Tailhook case, the COMA ruled that when "an accused honestly and reasonably believes that an official has promised him transactional immunity and that official has the lawful authority to do so, then the promise is the functional equivalent of a grant of immunity. Due process requires that such a promise be enforced." Samples v. Vest, 38 M.J. 482, 487 (C.M.A. 1994) (citations omitted).

[115] However, do not short change the opportunity to present powerful in-person sentencing impact evidence or aggravation by subsuming this testimony into a stipulation of fact.

they address the judge as "sir," "ma'am," or "colonel." Only in the military is a prosecutor responsible for ensuring that members have sharp pencils, writing paper, full water goblets, and coffee to drink on breaks. Nothing in the *Manual* requires counsel to shoulder these responsibilities. For better or worse, they have developed into tradition.

Care of the Courtroom

Keep the courtroom clean, neat, and orderly. Refrain from gimmicks regarding placement of tables and lectern. If possible, make the defense table face the members so that the accused is in full view of the members at all times.

Care of the Members

The custom in some jurisdictions of providing refreshments for members is a bad practice that should be stopped, not so much because it impoverishes trial counsel, but because a line should be drawn between sensibly caring for members' needs and coddling them or appearing to purchase their votes. While no one should be able to credibly claim that a member sold his or her vote for a pastry or pizza, the specter of the government acting as carry-out service is bad for justice. The government should provide the opportunity for members to order food—which a clerk or bailiff can pick up and deliver—and for which the members will pay. The logistics of many of our installations, especially overseas, make meal breaks impractical, so members should be cared for and their needs anticipated. Other than, perhaps, a courtesy pot of coffee, the costs of food and drinks should come out of members' pockets. Provide the food and provide a method of payment.

Care of Court Reporters

Court reporters are people, not machines. Their job is to produce an accurate record. Chiefs are responsible for supervising production of the record, but again the trial counsel should be told how he or she can help out! Write down and provide to reporters a list of names used and any unusual terms, spellings (foreign words, medical terms), or acronyms. Watch reporters for fatigue and speak up on their behalf when a break is necessary.[116] Speak clearly and at a measured pace. Intercede on behalf of reporters if defense counsel, witnesses, or others attempt to direct court reporters. Finally, remind counsel that reporters cannot do two things at once. When counsel ask the reporter to do something while on the record, counsel should not continue to speak, because the reporter, hands engaged in marking or retrieving an exhibit, cannot balance the mask while accomplishing the task.[117]

Although a chief normally is attuned to the responsibilities of supervising trial counsel, he or she often feels less equipped to supervise court reporters. The chief, not the judge or the chief legal NCO, is their supervisor. Therefore, the chief must enforce their standards and ensure that they remain accountable for their work product and performance as soldiers. Do not permit reporters to benefit or suffer from the assumption or perception that they are free from supervision.

Dealing with Defense Counsel and Procedural Irritations

Pick Your Battles

In an ideal world, procedural mechanisms such as local rules of court, would be applied as aggressively against the defense as they are against the government. They never will be, however, because the stakes—liberty, stigma—are much higher for the defense, and the Sixth Amendment limits a judge's ability to restrict the defense's presentation of its case. Trial counsel should not be shy about insisting on equal treatment and on defense compliance with local rules, but also should realize that mechanical application of rules governing issues—such as, service of motions or forum selection—may yield a short-term victory with the need to retry the case later.[118] Chiefs can help fight these battles for their counsel—enabling them to remain focused on substance—but they also need to restrain counsel when strident assertion of procedural noncompliance might produce reversible error. The more likely result is that the defense will be permitted to call its witness or have its enlisted panel, and the only long-term effect will be on the defense counsel's reputation.

Scrupulously Honor the TDS

It is in the interests of justice, and therefore the government's interests, for the Trial Defense Service (TDS) to thrive. The combination of a vigorous TDS and the MRE is the best guarantee of fair treatment of accused soldiers.

This is in the government's best interests because of the following reasons:

It Is Right

Soldiers have the same Sixth Amendment right to independent defense as civilians. Interference with that right is a most serious constitutional violation. The credibility of the system is enhanced when the government wins a fair fight.

It Is an Important Soldier Service

The Army offers an independent defense service free of charge to soldiers facing courts-martial and other adversary proceedings. As fellow officers and soldiers, prosecutors should ensure a healthy defense establishment. Part of the

[116] In one CONUS jurisdiction, a court reporter needing a break literally raises a "red flag," anchored in balsa wood, which is moved to a position of visibility to the trial counsel when a break is necessary.

[117] Although a trend away from using closed-mask reporting has developed, the majority of reporters continue to use masks. Even reporters who do not use masks must be approached with consideration of their multiple responsibilities, most critically the accurate tracking of exhibits.

[118] In United States v. Summerset, 37 M.J. 695 (A.C.M.R. 1993), the military judge enforced the local rule that normally required five-days notice for enlisted panels. The ACMR found that the judge's failure to balance the cost to the government "place[d] form over substance" and it set aside the findings.

Army's covenant with its soldiers is that it will provide them a free, competent defense to any court-martial charges.

It Reduces Opportunities for Civilian Counsel

The government should be officially neutral on whether civilian or military counsel are involved in a case and must not undercut a soldier's right to hire civilian counsel. However, civilian counsel do incur, as well as benefit from, procedural and logistical problems that military counsel cannot impose.[119] They often receive concessions, such as liberal delays, that military counsel do not win as easily.[120] Not all civilian counsel are more challenging adversaries; some bring a wealth of skill and experience, others practice at the margins and are ineffective and ill-prepared. But, to the extent that the government should care about soldiers wasting their money on civilians when they have the opportunity to receive legal advice for free, the government can reduce the need for these decisions by legitimately bolstering TDS's status. A corollary function of the chief is to intercede on behalf of his or her counsel when they are doing battle with civilians. When dealing with a procrastinating civilian, the chief may have to become more actively involved in the docketing of a case or pressing the government's position for a prompt Article 32 investigation. The chief also can fulfill an important coaching function by advising counsel to (1) not be intimidated by civilian counsel, especially the presumably esteemed and experienced ones; (2) remain focused on the substance of the case, and not to be drawn into personal battles with imperious or ill-prepared civilians; and (3) always protect the record.[121]

The TDS's presumed independence and competence should free it from undue deference by trial judges. As the ACMR observed in 1985, "The [military] trial defense bar has structurally and administratively become an independent entity. This development . . . has transformed an excessively paternalistic system for litigating criminal cases into a truly adversarial one."[122]

Supporting TDS means nothing more than following the rules, including disclosure obligations, and not taking any action to undercut the legitimate concerns raised by the defense, by, for example, granting concessions to civilian counsel (free use of office space and facilities, and greater access to decision makers) that may signal to soldiers an appearance of preference, persuasiveness, or access that TDS counsel do not enjoy. Because a soldier's Sixth Amendment right to counsel is inviolate, the government should not be seen to be trying to place civilian counsel "out of business" in the sense that the JAG Corps has taken on commercial tax preparers. Soldiers have the right to spend their money or to hedge their bets. If any pressure is to be placed on civilian counsel, it will be produced by a vigorous, well-prepared, responsive, and independent TDS.

Personalities

The chief should take the lead in keeping individual personalities from affecting governmental-TDS relations. The chief can set a tone that is neither unduly confrontational nor improperly familiar. Although a social divorce from fellow officers is unnecessary, the chief must help his or her counsel remain sensitive to appearances, including the public appearance of familiarity (going to lunch on the date of trial, conspicuously lounging in each other's offices, and fraternizing on duty) that undercuts the TDS's appearance of independence.

Posttrial Functional Responsibilities

"It is while the case is at the convening authority level that the accused stands the greatest chance of being relieved from the consequences of a harsh finding or a severe sentence."[123]

Because most trial counsel do not develop experience handling posttrial matters, most chiefs of justice, other than those who have served as defense counsel, have little experience in the posttrial arena. Consequently, chiefs must become familiar with the rules governing the posttrial thicket, and recognize the courts' emphasis on the posttrial stage as the period in which the accused enjoys the greatest chance for relief. The chief must take the lead in helping the SJA and convening authority negotiate the legal and procedural hurdles associated with moving a case from sentencing to final action while preserving the rights of the accused. The chief must know enough about production, assembly, and shipment of records of trial to supervise these stages effectively. And, as always, this must be accomplished in a timely manner. Although a

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[119] Civilian defense counsel are more able to plead a crowded docket or previously made vacation plans as excuses for long, judicially-sanctioned delays which are, at times, pretexts for clients to accumulate enough paychecks to pay attorney fees.

[120] Many judges indulge civilian counsel for a number of reasons, including that they are less subject to the strictures of the military system and that many judges have long-standing relationships with them. As Colonel Wiener has observed, "An older lawyer is allowed much more freedom, particularly when he is well known to the court in question." Wiener, *supra* note 85, at 14.

[121] Some civilians, especially those who practice infrequently in military courts or those who are primarily licensed in other nations, such as Panama, commit tantalizing procedural errors of which trial counsel are tempted to take advantage. Chiefs should advise counsel to restrain themselves in such circumstances and take the dull, responsible, "long view" of the case so that the conviction that counsel obtains "sticks" on appeal.

[122] *See* United States v. Means, 20 M.J. 522, 528 (A.C.M.R. 1985).

[123] United States v. Dorsey, 30 M.J. 1156 (A.C.M.R. 1990) (quoting United States v. Wilson, 26 C.M.R. 3, 6 (C.M.A. 1958)).

case no longer is presumptively prejudiced when it takes more than ninety days for posttrial processing,[124] virtually every case should be packaged and enroute to the Clerk of Court's office before three months elapse.[125]

Deferment of Confinement

The defense will commonly seek a deferment of confinement, especially in cases involving officers or senior NCOs convicted of nonviolent crimes. While the burden is on the defense[126] and difficult to meet, deferments differ from many other actions in that the convening authority's rationale must be stated in the deferment action. This requires the chief to ensure that enough evidence is gathered to support the convening authority's decision so that a sound written response can be generated.[127]

Enforce PTR Discipline

As soon as a record is authenticated, a posttrial recommendation should be served on the defense and the accused. The chief should direct the preparation of the document, for the SJA's signature, from a flexible template. A well-supervised legal clerk should be able to assemble a draft PTR, because it is only required to address, in nearly summary fashion, the following: findings and sentence, a summary of the accused's record, a statement about pretrial restraint, whether there was a pretrial agreement and its terms and limitations, and a specific recommendation regarding the sentence.[128] The PTR should be drafted in advance, so that it can be served as soon as the judge authenticates the record. There is no reason to include information other than those items required by R.C.M. 1106. This was one of the more radical changes when the *Manual* was revised in 1984, deleting the requirement for the cumbersome, detailed (and rarely read) PTRs in favor of a concise treatment that triggers the posttrial process and increases the burden and opportunity for the defense to take charge of the process of presenting posttrial materials to the convening authority.[129] Do not, however, be sloppy or hasty. Though comparatively little information is required, that which is required is important. Failure to, for example, accurately reflect the accused's service record, medals, and awards can constitute plain error.[130]

Enforce 1105 Discipline

The defense has ten days from receipt of the authenticated record and PTR to submit clemency matters. Extensions, allowed for up to twenty days (for a total of thirty days after service) should be liberally granted, notwithstanding the *Manual's* requirement of "good cause."[131] The government should be prepared to take action on the submission deadline. The government faces a dilemma when, on day thirty, the defense has not submitted its matters. The SJA may present the case for action, possibly prompting a return for new review and action by the paternalistic appellate courts, or wait a reasonable period of time for the matters, noting in the materials (and in a memo for the processing-time counters) that the delay results from the defense's request for additional time, which you should insist be put in writing. Do not consider the thirty days to be an arbitrary cut-off, when an appointment with the convening authority is not scheduled until some time after day thirty. If, for example, day thirty expires on a Monday and the appointment is on a Thursday, items submitted between Monday and Thursday should be included in the submission to the CG.[132]

This is an area in which undue focus on processing time can result in short-term "good numbers" but the need to do the

[124] In Dunlap v. Convening Authority, 48 C.M.R. 751 (C.M.A. 1974), the COMA held that, in the case of a continuously incarcerated accused, a presumption of prejudice arises when final action has not been taken within 90 days of the end of trial. Now the courts will test for prejudice, but efficient posttrial processing avoids opening the door to defense petitions for relief. *See* United States v. Clevidence, 14 M.J. 17 (C.M.A. 1982) (rejecting rigid rule and suggesting "prejudice" as test, but setting aside findings because of "the evil of inordinate, unexplained [posttrial] delay"); United States v. Banks, 7 M.J. 92 (C.M.A. 1976); United States v. Wiles 30 M.J. 1097 (N.M.C.M.R. 1989). Sheer self-interest should motivate criminal law divisions to move cases expeditiously after trial. The Corps' emphasis on processing time stems in large part from instances of egregious, unexplained delays.

[125] Although 90 days no longer runs the serious risk of dismissal, it generates letters from the Clerk of Court's office, with copies liberally furnished, providing another reason to keep a case moving.

[126] "The accused shall have the burden to show that the interests of the accused and the community in release outweigh the community's interests in confinement." MCM, *supra* note 10, R.C.M. 1101(c)(3).

[127] *See* Longhofer v. Hilbert, 23 M.J. 755 (A.C.M.R. 1986); United States v. Sloan, 35 M.J. 4 (C.M.A. 1992). The *Manual* provides a nonexclusive list of factors that the convening authority "may consider" in acting on the deferment request, including probability of flight, commission of other offenses, obstruction of justice or witness intimidation, offenses of which convicted, accused's character, family, record, and the unit's need for him. All actions on deferment must be in writing and part of the record of trial. *See* MCM, *supra* note 10, R.C.M. 1101(c)(3).

[128] MCM, *supra* note 10, R.C.M. 1106(d)(3).

[129] The substance of paragraph 85c, in the 1969 *Manual*, was deleted. Under the 1969 *Manual*, posttrial reviews could be many pages long, requiring significant trial counsel time to draft the document and indulging the fiction that convening authorities read them carefully. The new procedure presents a summary, realizing that the convening authority may consult the record itself; it contemplates oral supplementation of the written materials by the SJA. *See id.* R.C.M. 1106, discussion; R.C.M. 1105.

[130] United States v. Demerse, 37 M.J. 488 (1993). Failure to address accused's awards from Vietnam service was plain error because of importance of the service. *But see* United States v. McKinnon, 38 M.J. 667 (A.C.M.R. 1993), in which failure to address 15 years' worth of service was not plain error, in part because of the defense's failure to raise the issue.

[131] "The convening authority may, for good cause, extend the period in which comments may be submitted for up to 20 additional days." MCM, *supra* note 10, R.C.M. 1106(f)(6). Nearly anything constitutes good cause, and the standard defense boilerplate ("time to assemble clemency matters") should be indulged here.

[132] "A staff judge advocate who discourages submissions to the convening authority after the thirty-day time limit but prior to action creates needless litigation and risks a remand from this court." United States v. Sosebee, 35 M.J. 892 (A.C.M.R. 1992).

work twice. Recently, the ACMR reminded the government that "it is the staff judge advocate and the convening authority that are ultimately responsible for 'cleaning up the battlefield'" when defense counsel are lazy or incompetent in meeting posttrial deadlines.[133] This counsels caution for chiefs and SJAs. Even when the defense fails to submit 1105 matters, or submits unimaginative, routine matters in significant cases, the government is obliged to protect the accused's interests and ensure that the convening authority considers any information that might benefit the accused. The courts have emphasized that the posttrial clemency stage might be the accused's best and most realistic hope for sentence relief.[134] This fact, coupled with the appellate courts' tendency to hold the government strictly liable for even the defects of defense counsel, means that chiefs should do all that they can to ensure that the record reflects the efforts made to present all potentially favorable information to the convening authority before action.

Do Not Include Information Not Required

Resist any temptation to include gratuitous information in the PTR. Do not make direct reference to the soldier's race or sex.[135] Stick to the *Manual's* requirements and do not embroider them.

Be Careful About New Matters in the Addendum

After the time has elapsed for submission of clemency materials, the SJA may supplement the PTR with an "addendum," addressed to the convening authority, which summarizes the defense submissions and recommends to the convening authority what, if any, relief to grant to the accused.[136] If the defense submissions arguably raise a legal error, the SJA must address it in the addendum, even if only "a statement of agreement or disagreement with the matters raised. An analysis by the staff judge advocate is not required."[137] If the material in the addendum is considered new material, the government must serve anew the addendum on the defense, which again has an opportunity to respond.[138] Normally no reason exists to respond to the defense assertions, unless they are unusually complex or facially valid, or the issue has been well-briefed by trial counsel and may be included in the PTR to give a boost to government appellate attorneys who will handle the case.

The government must not be so fixated on processing that it does not, where appropriate, raise new matters in the addendum (the time for additional defense response is not deductible from the processing time clock). The government should not, however, feel that it must rebut every defense assertion, causing the government to squander resources on marginal issues. The government should fight any tendency to circumvent the rule by (1) not responding to the defense submission in writing, doing so orally when the case is presented to the CG; (2) ignoring it all together; or (3) mentioning it, but aggressively claiming it is not a new matter. All are bad ideas. At this stage the case is virtually over. Do not risk introducing error. If a "new matter" needs to be raised, raise it and serve the defense. Losing a few days at this stage better serves the system and the interests of justice than miscasting the material and having to endure a rehearing or being forced to start the posttrial process anew.

What About a Meeting with the CG?

Convening authorities routinely receive requests for posttrial meetings with accused soldiers and, more commonly, spouses and parents. There is no requirement for the CG to ever meet with anyone. One danger in meeting with one aggrieved party is the difficulty in denying later requests. Choosing to meet one party does not in any sense bind the CG to meet anyone later, it simply sets the sort of precedent that later unhappy individuals will argue to IGs and congressmen. While the better practice is to deny all such requests and for the parties to meet with the SJA, the decision rests solely with the CG. The chief and SJA simply owe the CG their best advice, who may consciously choose to create a precedent that he or she may later break. The CG should never meet with anyone regarding the case without the SJA or chief being present. The CG should be briefed on not committing to anything other than careful consideration of what the party says.

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[133] United States v. Carmack 37 M.J. 765 (A.C.M.R. 1993). Defense counsel's failure to submit anticipated letters or to request delay pursuant to R.C.M. 1106(f)(5) constituted ineffective assistance of counsel. "There is nothing else the convening authority or staff judge advocate could have done . . . to ensure adequate representation," the court noted. "They are stuck and 'left holding the bag.'" Nonetheless, it set aside the action and returned it for a new recommendation and action.

In another case, the ACMR found some room for convening authority flexibility when the defense failed to submit 1105 matters on time and submitted them after the convening authority took action, but before the record was shipped. In this instance, the ACMR found that the convening authority could consider the matters "with a view towards recalling and modifying his earlier action if the action had not been published, or if the accused had not been officially notified, or if the record of trial had not been forwarded." United States v. Maners, 37 M.J. 966, 967-68 (A.C.M.R. 1993).

[134] *See* United States v. Boatner, 43 C.M.R. 216 (1971); United States v. Stephenson, 33 M.J. 79, 83 (C.M.A. 1991).

[135] In one case, the COMA noted that a "Racial/ethnic Identifier" was added to the result of trial, which was part of the record that accompanied the PTR to the convening authority. "We have previously condemned inclusion of such matters in court-martial records . . . . We reiterate our position that the race or ethnic group of the accused has no bearing on military justice and shall not be referenced in official documents pertaining thereto." United States v. Brice, 33 M.J. 176 (C.M.A. 1991) (summary disposition). The COMA condemned references to sex as well as race in the PTR, in United States v. Brannon, 33 M.J. 179 (C.M.A. 1991) (summary disposition). *See also* United States v. Johnson, 33 M.J. 1017 (A.C.M.R. 1991) (memorandum opinion). The *Manual* permits the SJA to include "any additional matters deemed appropriate by the staff judge advocate," including "matters outside the record." MCM, *supra* note 10, R.C.M. 1106(d)(5). This does not grant license to gratuitous discussion of the sex or race of the accused.

[136] MCM, *supra* note 10, R.C.M. 1106(f)(7).

[137] United States v. Williams-Oatman, 38 M.J. 602 (A.C.M.R. 1993).

[138] United States v. Godfrey, 36 M.J. 629 (A.C.M.R. 1992), *reh'g denied*, 38 M.J. 168 (C.M.A. 1993); United States v. Norment, 34 M.J. 224 (C.M.A. 1992); United States v. Narine, 14 M.J. 55 (C.M.A. 1982).

A memorandum of the meeting should be kept. The convening authority who takes final action on the case should be briefed if it is not the same CG, so that a record exists of the convening authority's having considered the information raised at the meeting, if it is not included in the 1105 matters. This information is independent of the material submitted under R.C.M. 1105, unless the defense expressly asks the CG to consider it.

Develop a Principled Basis for Assessing Clemency Requests

Not all clemency requests deserve equal weight, though all must be analyzed. The convening authority will, in certain predictable instances, grant some clemency. Importantly, clemency should be granted when the accused is shown to have cooperated with the government in providing information or testimony for which the accused has not previously bargained. A soldier who provides posttrial assistance that leads to the apprehension or conviction of another soldier should be helped. This has two significant benefits: (1) it sends a signal to the soldier that it is "worth" helping the government and that his cooperation, though often self-serving, was a step toward rehabilitation; and (2) it tells the defense community that soldiers are likely to be helped when they cooperate. If clemency is commonly granted under these circumstances, then the government can negotiate candidly with defense counsel ("clemency is routinely granted") without appearing to make a promise that could be considered sub rosa, or which would subject the same accused to impeachment at trial for having bargained with the government for posttrial testimony.

Do Not Give Double Credit

Submissions may validly state a host of compassionate factors, from the impact on family members to the predictable, indelible stain of a federal conviction. The defense may raise anything, so reasserting facts and arguments advanced at trial is not improper. However, the CG has no obligation to give these arguments new or additional weight when they were heard and presumably considered by the sentencing authority. Additionally, the CG may have considered some of these factors—pleading guilty, the savings of resources in waiving certain rights—in approving a sentence cap as part of a pretrial agreement. That the matters were raised at trial should not in all instances be dispositive. The government must recognize that such a creature as a disparate sentence exists, and it should be willing to correct anomalies when they occur.

Consider the Forum

Some convening authorities are less likely to disturb findings and sentences of panels—as opposed to those from military judges—on the theory that the panels best reflect the sense of the community.

Analyze Other Factors

Look at any factors peculiar to the case, including cooperation with authorities and restitution. Restitution, for example, should be further analyzed to determine whether it was voluntary, and whether it could have been made before trial but was held until after trial to see whether it was necessary—that is, whether the accused beat a deal or received a fine with contingent confinement. Financial obligations should be considered, as military communities may be more amenable to financial clemency than a reduction in confinement. However, the mere existence of heavy financial obligations should not merit inordinate weight, especially when the obligations are a result of an irresponsible or extravagant lifestyle.

Listen to the Trial Counsel

Counsel can, of course, be "too close" to a case, and their recommendations have to be distilled for their understandable biases. The chief should talk to the counsel when clemency is being considered, however, because the trial counsel, as the government representative closest to the case, may provide flavor and background not evident from the record of trial or the defense's submission.

Consider Nontraditional Clemency

An accused may request, for example, that rather than reducing jailtime, the convening authority support the accused being placed in Track III residential treatment for alcoholism. Although this request may be a subterfuge to avoid confinement for a period, it may make sense, given that the government is committed to helping return the convicted soldier to society in the best shape possible. Granting such clemency—or supporting such a request when the convening authority lacks the authority to actually enforce such a transfer—helps the soldier, and can be consistent with the broad principles of discipline that gird the sentencing process.

Consider Anything That the Defense Submits

Do not be stingy in interpreting the requirement that the CG consider clemency submissions. The COMA made clear that Article 60's authorization for the accused to "submit . . . matters for consideration by the convening authority" is broader than R.C.M. 1105(b)'s authorization to submit "any *written* matters." In any event, the UCMJ—as legislation—is superior to the *Manual*—a regulatory creation—and the broader language of Article 60 provides better protection to the accused. Therefore, unconventional defense submissions, such as videotapes, should be presented to the CG for consideration. Although the CG is not required to watch all or part of them, the chief should make sure that someone does so, guaranteeing that an accurate synopsis can be provided to the convening authority.[139]

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[139] In United States v. Davis, 33 M.J. 13, 15 (C.M.A. 1991), the COMA held that Article 60's broad language "include[s] almost any item," so that the convening authority should consider "anything which an accused sends." Rule for Courts-Martial 1105's limitation to "written" matters "clearly is inconsistent with Article 60 and the legislative history of the article." *Id.* at 16. There are logical limits to the extent to which the defense can burden the CG in "considering" material. *See, e.g.*, United States v. Lester, 35 M.J. 657 (A.F.C.M.R. 1992) (convening authority was not required to obtain and read a book mentioned in 1105 submission; this opinion was published in the advance sheets and then withdrawn from the bound volume, but its teaching point remains valid).

Respond to Assertions of Legal Error

The addendum must address assertions of legal error by the defense. Addressing the error does not mean generating a comprehensive brief to answer the defense assertion. It does mean raising it to the convening authority's attention and advising the convening authority about the merits of the claim.[140] The purpose of these rules is not only maximum due process for the accused, but correcting "errors at the lowest level of review."[141] The wisest course is to address any assertions of legal error raised by the defense, even those raised after service of the PTR, before the convening authority takes final action.[142]

Ensure That the Convening Authority Considers All Matters Submitted

The requirement that the convening authority consider anything submitted does not mean that an accused may require that the CG read or view endless submissions. The chief should sift all of the material for the SJA—who may summarize the contents—so that the SJA can accurately represent the contents to the CG, who may seek more information if so desired. The COMA has emphasized that "'consideration' of a videotape does not mean that a convening authority has to view it minute-by-painful minute" or that the convening authority must "read every word on every page" of a long document;[143] an accused may not force the CG to watch The Court-Martial of Private Eddie Slovik or to read *The Red Badge of Courage*. Chiefs must ensure that SJAs are meticulous and even-handed in presenting clemency matters, including recommendations from the sentencing authority.[144] The record should reflect that the convening authority considered everything that the defense submitted, which can be accomplished in a number of ways: (1) the CG can initial documents with a notation such as "noted" or "considered"; (2) the addendum can list all of the defense submissions as enclosures; and (3) an additional memorandum can be prepared for the CG's signature, stating that "I have considered" the following items in making my decision regarding findings and sentence.[145]

Know How to Ship a Record

No one graduates from law school knowing how to write a promulgating order, assemble a record of trial, or package it to the Clerk of Court's satisfaction. The chief of justice, however, must know how to do all of this well enough to exercise sufficient supervision—and to assist when necessary—to ensure that it is accomplished properly. Sources include the *Manual*, *AR 27-10*, the Clerk's Notes in *The Army Lawyer*, and the periodically published Clerk of Court's Notes on Post-trial Processing that provide almost literal page-by-page instructions on assembling records.[146]

The Processing Time Treadmill

"An incompetent attorney can delay a trial for months or years. A competent attorney can delay one even longer."[147]

Nothing captures the attention of supervisory judge advocates—or unites practicing trial counsel in resentment—than the "flash reports" on military justice processing time. The processing time "standings"—originally designed to ensure that no cases violated the ninety-day "Dunlap Rule"[148] —have become, in many quarters, arbiters of the efficiency of military justice operations and, to many, a misleading measure of the quality of justice dispensed. While many good reasons exist to move cases swiftly—especially in the mobile, drawdown Army, and especially overseas—a chief of justice needs to manage processing time adeptly and honestly, while ensuring that cases are tried well and that counsel and criminal law NCOs do not place disproportionate emphasis on slashing processing time.

Place Processing Time in Context: Why It Is Important

"Justice Delayed. . ."

The longer a case takes to go to trial, the more that can go wrong: memories fade; witnesses disappear, PCS, die, or change their minds; evidence is lost or mishandled; a danger-

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[140] MCM, *supra* note 10, R.C.M. 1105(b)(1), (c)(1); 1106(d)(4) (f)(7).

[141] United States v. Hill, 27 M.J. 294-95 (C.M.A. 1988).

[142] Although the error may be tested for prejudice, "in most instances, failure of the staff judge advocate . . . to prepare a recommendation with the contents required by R.C.M. 1106(d) will be prejudicial and will require remand." *Id.* at 296.

[143] *Davis*, 33 M.J. at 16. "[W]e believe that Congress intended to rely on the good faith of the convening authority in deciding how detailed his 'consideration' should be." *Id.*

[144] An expected change to the *Manual* will require the SJA to inform the convening authority of any clemency recommendation made by the sentencing authority, unless the defense expressly requests to the contrary. Previously the Rules left this responsibility to the defense (R.C.M. 1106(d)(3)), but the proposed change would codify case law which has found plain error when the government has failed to call these recommendations to the convening authority's attention. United States v. Clear, 34 M.J. 129 (C.M.A. 1992).

[145] United States v. Hallums, 26 M.J. 838 (A.C.M.R. 1988); United States v. Craig, 28 M.J. 321 (C.M.A. 1989).

[146] There are myriad ways to err in preparing a record of trial, including failing to ensure that the original record contains all original documents, including proof of service of the record and PTR on the accused, and forwarding all excess leave papers and orders transferring the accused to another jurisdiction. When in doubt, call ahead to the Clerk's office; they are willing to provide guidance by phone, especially when the questioner has done some initial spade work in attempting to resolve the issue.

[147] Evelle J. Younger, *quoted in* S. BEHRMAN, THE LAWYER JOKE BOOK 127 (1991).

[148] *Dunlap* v. *Convening Authority*, 48 C.M.R. 751 (C.M.A. 1974).

ous soldier remains free. These are some of the reasons that contribute to the belief that justice delayed is justice denied—not only to an accused whose fate hangs in the balance, but to society and the military community, which have an interest in sanctioning the guilty and in returning a not-guilty soldier to duty. Speedy justice enables the innocent accused to move on. Conversely, as time passes, and the nexus between the conduct and the sanction becomes more attenuated, the equities tend to shift in favor for the guilty accused. The chief must ensure that counsel focus with sufficient intensity on a case at an early stage and maintain that intensity by not letting a case languish.

Reduce the Pressure for Bad Deals

While commanders are interested in discipline in the broad, theoretical sense, they generally are most interested in disciplining the particular soldier facing charges. As a case begins to age and the accused (who is flagged and normally not performing his official duties) continues to take up space that could be filled by a productive soldier and requires special care (time off to travel to defense counsel's office, unit witnesses to Article 32s, 39(a) sessions), the commander becomes less interested in a particular disposition of the case and most interested in its completion. His focus is discipline "flash-to-bang," not the JAG Corps' processing time arithmetic. This motivates some commanders to support dispositions that they would otherwise reject: less time in confinement, chapter 10s. The command and the interests of discipline, then, are served by speedy processing of cases. An accused should not receive a windfall because of the government's inefficiency.

Someone Is Keeping Score[149]

The JAG Corps, for better or worse, keeps track of processing time with excruciating detail. If not the chief, then the chief's superiors will be rated, in part, on processing time. A busy jurisdiction should strive to be in the middle of the pack on processing time, reflecting a general efficiency in getting cases to trial. Conspicuously slow processing time may indicate inefficiency. Watch for an anomaly in a certain category of processing time—such as, preferral-to-trial or action-to-dispatch—inspect your processes for causes, and allocate resources to correcting systemic problems.

Reducing Processing Time

Processing time can be managed and reduced internally without resorting to gimmicks or making concessions to the defense in exchange for "eating" processing time.

Track Processing Time Internally

The chief must have a reliable, easily understood system for tracking processing time. Several versions are present in the JAG Corps. Select one that fits your purposes and docket size and use it. Whichever system that you select, the pretrial system should show the accused, charges, counsel, and dates for the following: earliest offense, date of discovery, preferral, action at the special and GCM levels, Article 32 date, date that the Article 32 report was completed, date of referrals, service of charges on the accused, and the trial date. It also should reflect written defense delays and should compute raw time and government time. Some programs can incorporate a "red/green/amber" system that rates cases depending on various markers.[150] A mechanism for pre-preferral tracking of significant cases should exist that ensures that cases are not lost simply because the processing time clock has not begun, and that commanders do not forget to flag soldiers.

Do Not Rush to Preferral

Do not prefer hastily just because a crime has been committed. If a soldier is not in pretrial confinement, preferring charges, before other required procedural matters occur, accomplishes little. However, the trial counsel must be sensitive to the salutary effects of prompt preferral, including the important perception by soldiers, victims, and the accused that the command reacts swiftly to crime.

Line up Evidence and Witnesses Before Preferral

Waiting to prefer should not be a license for counsel or law enforcement to approach the case in a leisurely manner. It is, rather, an opportunity to perfect a case by reconducting interviews, taking exemplars, and getting evidence to the lab. Consequently, on preferral, the government can credibly announce that it is ready to proceed.

Draft Charges Carefully

Carefully written charges, drafted after a clear analysis of the available evidence, helps focus counsel on the key issues that the government must prove, eliminates unnecessary defense motions—such as, bills of particulars—and makes for a better prepared case. Counsel who draft charges hastily or prematurely often are required to later amend or dismiss charges that initially should have been written properly.

Identify Article 32 Investigating Officer (IO) Before Preferral

The first step after preferral of a likely GCM is appointment of an Article 32 officer. Counsel should obtain a name from the command before preferral, so that the IO can clear his or her calendar and serve notice of the Article 32 hearing on the day of preferral.

Prepare Forwarding Indorsements so That All Are Signed on the Day of Preferral

Efficient legal clerks should prepare all of these documents, at the direction of the trial counsel, so that a case goes from preferral through all levels of command on the same day. Trial counsel should keep the commanders—who will be

[149] "Your concern should extend to how well the case is tried, not merely processing times or conviction rates." Policy Letter, Office of The Judge Advocate General, subject: Providing Prosecution Services (30 Nov. 1988) [unnumbered policy letter].

[150] For example, one day from preferral through the SPCMCA would be green, two days would be amber, and three days would be red. The markers should be different for a self-contained GCM jurisdiction, as at a CONUS installation, compared to more far-flung jurisdictions in Korea and Germany, where some travel time for transmitting packets to and from headquarters must be taken into consideration.

asked to make forwarding recommendations—apprised of the case as it develops to avoid any surprises in the forwarding process.

Limit the Delay-Granting Authority of Article 32 IOs

Investigating officers should be issued standard letters from special court convening authorities that grant them narrow authority to approve, in writing, delays for a short period of time, such as seven or ten days. Require SPCMCA approval for longer delays. This keeps the defense from receiving delays informally, or from pressuring the IO, who is frequently a peer, into "gentleman's" delays, which escape the scrutiny of the SPCMCA, the official who should be more attuned to the need to move a case expeditiously.

Closely Monitor Clerks in Processing Article 32 Reports

This is solely in the government's control. Article 32s should be summarized accounts of the proceedings. They should take priority over most other duties and be produced in a matter of days.

Prefer Charges Early in the Week

Preferral on a Friday only means "eating" a few days before the case can progress. Prefer early in the week and seek an Article 32 investigation that same week.

Serve the Accused Within a Day of Referral

There should be no "dead time" after referral. The chief knows when referral is coming and should be prepared to serve immediately. When serving soldiers in remote locations or confinement facilities, it is permissible to serve via facsimile or to arrange with someone to conform a copy of the charge sheet to reflect service of charges.

"The Government Is Ready"

Be prepared to honestly seek a trial date three or five days after service of referred charges. If a dispute with defense about the trial date arises, seek an immediate arraignment and an Article 39(a) session to set a trial date. There is no need to waste time arguing with the defense over responsibility for processing time. After the passage of three or five days, the government may insist on arraignment.[151] Arraignment stops the speedy trial clock and enables counsel to assert on the record the government's willingness to proceed.[152] Once arraignment has occurred, however, it is more difficult to change the charges, which demonstrates in turn, the importance of carefully crafted charges at preferral.[153]

Get All Delays in Writing

Never agree to informal or handshake defense delays. "I'll cover you with delay" is the defense counsel's equivalent of "the check is in the mail." Get the delay in writing. Unless the delay has been approved by the convening authority or the military judge, do not count on deducting it from either clock.[154]

Be Aware of Both the Speedy Trial Clock and the Processing Time Clock

They are not the same thing. That a case has good processing time does not necessarily mean that the time will be deductible for speedy trial purposes. Ensure that delays are documented and justified in accordance with *United States v. Carlisle*[155] and its progeny. Most delays will count for both, but the speedy trial clock is by far the more important and less forgiving.[156]

Reproduce Exhibits Rapidly

Counsel must understand that their responsibility extends beyond the courtroom. They should ensure that community resources—such as, the Training Aids Support Command—are aligned to reproduce exhibits properly and in a timely fashion. For example, photographs should be five by seven inches (never Polaroids), ideally in color and, when relevant,

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[151] "In time of peace no person may, against his objection, be brought to trial . . . in a general court-martial case within a period of five days after service of charges . . . or in a special court-martial within a period of three days after service of charges." UCMJ art. 35 (1988). Strictly, the five days is really a week, because the date of service and the date of trial are excluded. *See* MCM, *supra* note 10, R.C.M. 901 discussion.

[152] MCM, *supra* note 10, R.C.M. 707(b)(1). The government should be ready to go when it represents that it is ready. A prepared, alert, or daring defense counsel could take advantage of the ritual incantation "The government is ready."

[153] *See id.* R.C.M. 603.

[154] "All . . . pretrial delays approved by a military judge or the convening authority shall be excluded when determining whether the [speedy trial clock] has run." *Id.* R.C.M. 707(c). This 1991 change to the *Manual* provides a flexibility not previously present. Should the government abuse it however, by getting convening authority approval for specious delays, expect the appellate courts to circumscribe its scope.

[155] "*ON DAY NUMBER 1, EVERYONE ASSOCIATED WITH A CASE SHOULD KNOW WHAT DAY WILL BE NUMBER 120.*" United States v. Carlisle, 25 M.J. 426, 428 (C.M.A. 1988).

[156] The speedy trial clock no longer can be calculated with total certainty. Although the *Manual* requires trial within 90 days for soldiers in pretrial confinement (*see* MCM, *supra* note 10, R.C.M. 707(d)), in 1993 the COMA ruled that the requirement of Article 10, UCMJ, that "immediate steps shall be taken to . . . try" a soldier in pretrial confinement "or to dismiss the charges and release him" is paramount to the *Manual*. The UCMJ's statutory requirement trumps the regulatory requirement of the R.C.M. (by which the President promulgates regulations pursuant to statute). Therefore, counsel always must be prepared to defend against an Article 10 motion. The *Manual* provision remains valid but not controlling. The 90-day *Burton* speedy trial rule is dead. Although 90 days and "even longer periods of delay" are often justifiable, "[w]e happen to think that 3 months is a long time to languish in a brig awaiting" trial, and an Article 10 motion would lie "where it is established that the Government could readily have gone to trial much sooner." United States v. Kossman, 38 M.J. 258, 261 (C.M.A. 1993), overruling United States v. Burton, 44 C.M.R. 166 (C.M.A. 1971).

rulers or color charts should be placed next to items.[157] Many exhibits can be reproduced before trial, at which point the trial counsel can ask the judge on the record to permit substitution of photographs or other depictions, and actually present the substitutes to the judge for marking and admission.[158]

Turn Around Errata Quickly

Counsel need to realize the significance of their review of the record, but must not be consumed with editing it. Unlike congressmen and the *Congressional Record*, counsel do not have the privilege to "revise and extend" their remarks. All counsel discover themselves having said something they regret or which they could have said better. Better to learn from it than to struggle with trying to alter the record. In reviewing records, counsel should concentrate on their arguments and the significant parts of the trial that could have jurisdictional impact: entry of pleas, return of findings, and sentencing. They also should correct significant misspellings and ensure that technical terms are accurate.

Monitor Court Reporters

Reporters have the curse and advantage of holding jobs that are highly quantifiable. Set a standard of page production to which reporters will be held accountable. A standard should be flexible enough to account for many variables, such as inarticulate speakers, the use of interpreters and highly technical testimony. A typical reporter should be able to produce about eight pages of testimony per hour spent typing, or about forty record pages per day. Chiefs should monitor not only reporters' page production but also the quality of their work. Reporters need to use spell check or consult counsel before taking a guess at spellings and acronyms (as previously noted, counsel share responsibility for the accuracy of records). Chiefs should review records and errata, watching a reporter's accuracy and efficiency closely and providing extra guidance and training for new or struggling reporters.

Chiefs should not operate on a rigid "first-in first-out" basis. In consultation with the lead reporter, the chief should consider the number of records in process as well as the near-term docket. It is often more efficient to bring to completion one or several guilty pleas before tackling a protracted contest. Furthermore, in jurisdictions with several court reporters, strongly consider using reporters as teams. This is especially easy in the era of open-mike reporting, in which reporters are not beholden to their voice tapes. Although the reporter actually present for the testimony should be *marginally* better prepared (because of presence in court, anticipating tenor and gaps), this is outweighed by the efficiency (and, collaterally, team-building) forced by tape sharing and shift work in court.

Pre-Position Posttrial Reviews

Exploit the lag time between the end of trial and authentication by the military judge. During this time, a draft PTR should be prepared and staffed so that the SJA can sign it on authentication. The information required for the PTR—result of trial, background data on the accused—will not change between the end of trial and authentication. The only matter to alter will be the clemency recommendation, if any, and this is more likely to be included in the addendum than in the PTR itself.

Pre-Position Promulgating Orders

The posttrial clerk should draft the promulgating order simultaneous with drafting the PTR. The information is most fresh at this time, and the important tedium of reading the entire record to ensure that charges are not dismissed or pleas re-worked does not have to happen twice. The "prom order" then can be scrutinized by the legal administrator and the chief under calm conditions so that on final action by the CG, the order can be published. Shipment of the record becomes a priority on approval by the convening authority, so drafting the prom order at that time is dangerous for two reasons: (1) it is a time consuming process that will delay shipment of the record, and (2) drafting it in haste greatly increases the risk of producing an incorrect document, triggering the further labor and embarrassment of generating a corrected copy after the Clerk's office spots an error.[159]

Carefully Supervise Preparation of *Forms 490* and *494*

Ensure that *DD Form 490*—the "blue cover" of the record of trial—accurately reports the processing time, and that any defense delays are reflected in the remarks section and supported by allied papers or approved on the record. The chief also should ensure that the *DD Form 494*, the Court-Martial Data Sheet, is accurate. The trial counsel should fill out the first column, followed by the posttrial clerk under the chief's supervision. To avoid incurring the wrath of the Clerk's office, double check the entries, ensure that slashes and not check marks are used, and that the answers in the convening authority's column are consistent with the trial counsel's entries.[160]

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[157] An excellent source of guidance in this area is an unofficial document entitled, "The Clerk of Court's Notes on Post-Trial Administrative Processing of Courts-Martial," by Mr. Fulton, the Clerk of Court, U.S. Army Judiciary (Oct. 1992). It is available from the Clerk's office.

[158] Ordinary physical evidence—such as, weapons and drugs—as well as facsimile evidence, can be photographed ahead of time and the substitute photographs accepted on the record. It will help move the case quickly after trial, endearing the counsel to reporters and case processors, and permitting them to focus sooner on future cases.

[159] The promulgating order is another exceedingly technical document that must be drafted with great care. It is the actual record of the accused's conviction and must be perfect. Sources to consult include appendix 17 of the *Manual*, occasional Clerk of Court notes, and an unofficial but helpful document entitled, "Checklist for Preparing and Reviewing Summarized Initial Court-Martial Promulgating Orders," produced by the Clerk of Court, United States Army Judiciary (23 July 1990).

[160] The *DD Form 494* is rife with ambiguities and compound questions. Do your best to answer them accurately, using LSAT-style logic that dictates that if any part of the answer is "no" then the answer to the entire question is "no." For example, question 45e asks (referring to whether the PTR was served on the defense counsel), "If no, did the accused waive in writing the right to submit matters and was the action taken subsequent to the written waiver or did the time periods provided in RCM 1105(c) expire before the convening authority's action?"

Get the Record out the Door

The last bean that USALSA counts is the time from "action to dispatch." A well-run office should be able to dispatch a record within twenty-four hours of CG action. The blue covers should be pre-positioned with computations already made, and only the date of CG action to be added. Clerks should know how to post the relevant papers, get the SJA's signature, and package the records. An advantage, especially in OCONUS jurisdictions, which are at the mercy of APOs, is to get legal clerks appointed as mail control officers, enabling them to deliver materials directly to the APO.[161]

Listen to Your Warrant Officer

Warrant officers (legal administrators) ultimately sign for the convening authority in promulgating the result of trial. The prom order is the actual record of conviction, and one of the most important documents in the court-martial process. The warrant officer should scrutinize these carefully. Although the chief should become familiar with the resources provided for drafting prom orders—so that he or she can check the clerks' work—deferring to, or at least seeking guidance from, the other "chief" on details of wording makes sense.[162] Warrant officers often do—and should—adopt a near proprietary interest in documents that they sign. Although helpful, their inclination to scrutinize should not be exploited by criminal law clerks or tempt them to perform slipshod work with the expectation that the warrant officer will clean up after them. This advice applies to referrals as well, but posttrial matters are especially complex and subject to arcane rules that have no relationship to one's skills as a lawyer; let the warrant educate you.

Do Not Bargain for Time

Processing time retains high visibility in the JAG Corps, but it should not be a factor in assessing the acceptability of offers to plead guilty or clemency. A defense counsel's pledge to "eat the time," should have no bearing on a proper sentence limitation or whether an accused should return to society sooner than a judge or panel recommended. Defense offers to swallow processing time in exchange for posttrial clemency must be unambiguously rejected, but as a matter of course, counsel should not be in the position of having to trade for statistics.[163]

The frustration with processing time stems in part from the inability to quantify the unquantifiable: the quality of justice. Nothing guarantees that those ranking first in the standings are dispensing the best justice. Processing time can be an indicator of efficiency, and efficiency is a criterion for assessing the quality of justice. "Justice delayed" can be less meaningful for all parties. The ACMR recently chose to "caution supervisory judge advocates against over-emphasizing the importance of court-martial processing time to their staff judge advocates."[164] Trial participants should not over emphasize it. Chiefs of justice are best positioned to ensure that it is placed in its proper context: that counsel are spurred to move cases expeditiously, but that important or unavoidable delays are memorialized and explained adequately to supervisors and other interested parties. Again, the government's objective is to seek justice. Sometimes doing the right thing also means doing things that slow cases down and, thus, increase processing time. The chief cannot let the processing time tail wag the justice-seeking dog, nor can he set a managerial or leadership tone that winks at doing so.

Counsel Commanders, Guard Against Command Influence

As any collector of military justice truisms knows, "command influence is the mortal enemy of military justice." Most commanders, especially senior commanders, appreciate the obvious points about command influence: they may not dictate or influence a particular result, and may not intimidate or influence witnesses or "work the system" so that a particular offender or class of offenders is treated in a certain manner.

Do Not Commit Command Influence

A chief of justice must understand that counsel may be unwitting agents of command influence and that intermediate or junior commanders may be especially susceptible to command influence, both as actors and as the objects of it. Trial counsel owe commanders their candid advice, including recommendations as to disposition of offenses. They also are good buffers between junior and senior commanders, because they can discuss possible disposition more openly without the immediate suspicion of command influence. However, counsel must be careful about the extent to which they pursue a particular disposition of a case, especially when pushing for a harsher disposition than a junior commander is inclined to pursue. In these circumstances the counsel themselves, espe-

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[161] See *AR 25-51* for details on appointment of soldiers as Official Mail Managers. It can be accomplished in overseas jurisdictions with a memorandum from the SJA. Some areas may require the soldiers to complete training before certification.

[162] Ultimately, drafting of the prom order is something of an art, because no absolute right or wrong to the condensation of specifications is required. The wording should be terse, but sufficiently specific to put others on notice about the nature of the offense and to protect against double jeopardy.

[163] In United States v. Giroux, 37 M.J. 553 (A.C.M.R. 1993), the defense made a "conditional offer for delay" in which it offered to accept responsibility for increasing amounts of processing time in exchange for increasing amounts of clemency for the accused. Although the government intended to reject the conditional aspect of the delay (and effectively did so by granting less clemency than the defense-expressed contingency), its mere approval of one of the delay periods, without express rejection of the defense condition, created an ambiguity that the ACMR clarified in the accused's favor despite its "strong recommendation" that SJAs "not entertain agreements of this nature in the future." *Id.* at 556.

[164] *Id.* at 556.

cially when perceived to be agents of higher authority, may foster command influence.[165]

Perceptions Are Critical

For lawyers to counsel against certain conduct because of the "appearance of impropriety," sometimes is too easy. The very subjectivity of this analysis makes it hard to swallow, especially when the person swallowing is a military commander accustomed to action and precision. It is acutely true, however, in the arena of command influence. That a commander meant nothing more than deterrence, sternness, and safety in preaching to a unit formation about the evils of drug use or drunk driving does not mean that his or her subordinates did not perceive that they must be unduly harsh in treating this misconduct or that fellow soldiers and supervisors perceived that they should not testify for soldiers accused of these offenses. If a soldier reasonably perceives that a commander is directing a certain disposition of an offense or has created an atmosphere in which soldiers cannot fully defend themselves, then command influence may well be afoot regardless of the best intentions of the command.

Reign in Commanders

Chiefs may have to intervene on behalf of trial counsel in this area. A young prosecutor may not be able to arrest the attention of a battalion or brigade commander when an issue of unlawful command influence arises, and the counsel may not be certain whether the conduct constitutes command influence. Sensitivity to command influence issues develop over time, making this an area in which the chief's experience makes him especially suited to an aggressive, intercessory role. Commanders frequently retort that "the lawyers" are hampering commanders' capacity to mentor and develop their subordinates in the important area of military justice. Although untrue, commanders will not be satisfied with the lawyerly answer that the line between mentoring and command influence is "blurry" and case-specific.

Give Commanders Specific Answers

Tell commanders that they should not discuss disposition of particular cases before subordinate commanders make their recommendations. Tell them that they may not redirect these recommendations when they disagree with them. They may, instead, act contrary to the subordinates' nonbinding recommendations and, in extreme or repeated cases of poor judgment—such as, a string of light Article 15 punishments or inappropriate exercise of Article 15 authority—the senior commander may withhold or curtail the subordinate's UCMJ authority, itself a corrective measure.[166] While a case is pending, a commander must be scrupulous not to comment on its merits. Although commanders have the right to their opinions, they do not have the right to express them openly before trial. The reason is that those who hear their comments may reasonably perceive that they should not support or testify on behalf of the accused. Sanctions for violating this rule can be extreme. An alert counsel should be a party to a thorough trial level exploration of possible command influence to avoid having to reconstruct the problem later and avert a more drastic solution on appeal.[167]

Tell Them What They *Can* Do

Commanders want to have an impact in the justice area. Most of them put great stock in the UCMJ as undergirding military discipline, and they do not believe that the Army's emphasis on leadership and mentoring should exclude discussions relating to justice. If a commander can advise a subordinate on the best way to take a hill or to aim mortar fire, then the commander can and should be permitted to counsel on the appropriate levels of punishment, choices of punishment, and other issues relating to disposition of cases.

When coaching commanders on the tightrope between mentoring and unlawful influence the emphasis should be on "unlawful" influence. Commanders may and should develop (and therefore "influence") their subordinates. They should do so, however, in a measured manner, perhaps monitored by a JAG. After a case is disposed of, for commanders to share their thinking with their subordinates is appropriate and desirable. Commanders should explain why, for example, they supported a general court-martial in one instance while in another a field grade Article 15. Commanders should point to specifics about a case that help subordinates build their own philosophical and analytical constructs—why, for example, one soldier's record merited a largely suspended punishment under Article 15 while another was given a "chapter 29" (Article 15 plus chapter 14) for similar conduct; why the good record of another soldier was irrelevant in light of that soldier's felonious conduct. The process of explaining philosophy is critical to the development of junior officers and is not unlawful command influence, because it is not designed to coerce junior commanders or affect disposition of a particular case. It enlightens a junior officer about a senior officer's perspective. Because there always can be an arguable subtext to such mentoring—that is, that "you will do in the future as I did in these cases"—it is best accomplished in a semiformal or structured setting, ideally in the context of an officer pro-

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[165] *See, e.g.*, United States v. Hamilton, 36 M.J. 723 (A.C.M.R. 1992) (indication that chief of justice, deputy SJA, and SJA indicated to reluctant special court authority that case would be "sucked up" to GCM level if he pursued more modest disposition resolved in favor of government, but clearly indicated that JAGs could be agents of command influence). *See also* United States v. Hawthorne, 22 C.M.R. 83 (C.M.A. 1956).

[166] AR 27-10, *supra* note 12, para. 3-7c.

[167] The most common sanctions are precluding the government from offering sentencing evidence or from cross-examining defense sentencing witnesses. *See, e.g.*, United States v. Clemons, ACMR 910182 (A.C.M.R. 16 Sept. 1992) (unpub.) (battalion commander's "counselling" of subordinates regarding trial testimony improperly chilled the witnesses; no relief on appeal because of substantial efforts at trial to counter the effects, including wide defense latitude in calling and examining witnesses, and permitting accused to say what he believed other witnesses would have said).

fessional development class attended by a trial counsel, who can answer questions and foster discussion. Use the JAG School's "10 Commandments of Command Influence" as a teaching tool.[168]

Finally, appeal to commanders' self-interest, not in only retaining their jobs and staying out of trouble, but in ensuring maximum troop loyalty so that they are maximally effective. Disciplined soldiers are better soldiers. Soldiers who believe that their commanders enforce discipline evenly are more likely to be trusting and effective. Colonel Wiener addressed this sentiment in 1978:

> [J]ustice and discipline in the military are indivisible, because, as everyone with troop experience has known since the beginning, a unit subjected to injustice is bound to be undisciplined. Hard, even harsh treatment in difficult situations is understandable when fairly administered, and is therefore acceptable. But unjust treatment is certain to destroy morale and hence military effectiveness. In short . . . justice and discipline are one and inseparable in the military community.[169]

Conclusion: Keystones of the System

No single actor is indispensable to the military justice system. The combination of roles of the key participants ensures its fairness and effectiveness. No one is better equipped to make a difference on more levels, however, than the chief of justice, hence the position as keystone of the system. The chief must be an efficient bureaucrat, insightful analyst, and honest advisor. The chief must supply candid, accurate appraisals of cases to the SJA and command, must coach and lead counsel, and must communicate clearly and honestly with the defense community. The chief must set a tenor of integrity while aggressively protecting the community and crime victims. The chief may fill all of these roles well, regardless of the experience he carries into the job. Sufficient resources exist to enable the chief to master the technical aspects of the job. With a confident willingness to draw on all experience, not only that received at counsel table in courts-martial, the chief can effectively meet the only real job requirement: to do justice.

Appendix A

Sample Format: Prosecution Memo

MEMORANDUM THRU

CHIEF OF JUSTICE
DEPUTY STAFF JUDGE ADVOCATE
FOR STAFF JUDGE ADVOCATE

SUBJECT: Prosecution Brief, *UNITED STATES v. Soldier Name*, Unit

1. Summary of Charges and Evidence:

This section should include a capsulized account of the offense, written almost in newspaper format. Its focus is presenting a short version of the facts, before separating them for the purposes of charges, specifications, and evidentiary analysis.

2. Specific Offenses and Evidentiary Considerations:

CHG ART SPEC GIST OF THE OFFENSE MAXIMUM PUNISHMENT

a. Elements and Form of Proof:

(1) List each element separately, followed by the evidence that the counsel anticipates will be used to prove it.

b. Potential Defenses: Forces counsel to critically assess the case. Rarely should a "none" be entered here.

c. Mitigating Evidence: Compassionate or other factors that may mitigate punishment. Again, forces counsel to delve into the circumstances of this particular crime, as well as to check out the background of the soldier and victims.

d. Other Evidentiary Considerations: Difficult or novel evidentiary issues—such as privileges or hearsay hurdles—as well as problems unique to the case or jurisdiction—such as witness unavailability or press interest.

3. Unresolved Aspects of Criminal Investigation or Legal Preparation: Gives those reading the memo a sense of coun-

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[168] The "10 Commandments of Command Influence," created by the Criminal Law Division, TJAGSA, capsulizes the greatest concerns of command influence and contained in outlines generated by TJAGSA. The 10 Commandments Command Influence are as follows:

1. The Commander May Not Order a Subordinate to Dispose of a Case in a Certain Way.
2. The Commander Must Not Have an Inflexible Policy on Disposition or Punishment.
3. The Commander, If Accuser, May Not Refer the Case.
4. The Commander May Neither Select Nor Remove Court Members in Order to Obtain a Particular Result in a Particular Trial.
5. No Outside Pressures May Be Placed on the Judge or Court Members to Arrive at a Particular Decision.
6. Witnesses May Not Be Intimidated or Discouraged From Testifying.
7. The Court Decides Punishment. An Accused May Not Be Punished Before Trial.
8. No Person May Invade the Independent Discretion of the Military Judge.
9. Commanders May Not Have an Inflexible Policy Toward Clemency.
10. If a Mistake is Made, Raise the Issue Immediately.

[169] Wiener, *supra* note 85, at 18-19.

sel's progress, sense of work remaining to be done, or steps skipped or assumed.

4. Disposition and Sentencing Considerations:

a. Level of Trial:

b. Probable Sentence:

c. Minimum Acceptable PTA Terms: Counsel must come on line with a recommendation. Chief, deputy, and SJA then comment here.

d. Alternate Disposition: Whether chapter 10, partial plea, unusual disposition such as general officer letter of reprimand or Article 15 should be considered.

e. Pretrial Restraint: Note any, as well as any possible issues regarding illegal pretrial punishment, pulling of pass privileges, or restriction tantamount to confinement.

f. Sentencing Considerations:

(1) Personnel Records: No adverse records.

(2) Prior conviction: None.

(3) Aggravation: Counsel must begin to articulate specific facts about this case that are aggravating.

(4) Extenuation: Excuses, considerations, that defense might argue.

(5) Duty Performance: What does command, NCO chain say about this soldier?

(6) Soldier Profile: BASD, MOS, GT, family, dependents; anything else from the soldier's record that describes the total person.

3 Encls:
1. Draft of Charges
2. Allied Documents
3. Milestones

NAME
CPT, JA
Trial Counsel

Milestones

1. Preferral of Charges (date)
2. Notification to Accused (date)
3. Transmittal of Charges to SCMCA (date)
4. Review of Charges by SCMCA (date)
5. Transmittal of Charges to SPCMCA (date)
6. Appointment of Article 32 IO (date)
7. Article 32 Hearing (date)
8. IO's report to SPCMCA (date)
9. Transmittal of Charges to GCMCA (date)
10. Pretrial Advice to GCMCA by SJA (date)
11. Referral of Charges (date)
12. Service of Charges on Accused (date)
13. Docket Case (date)
14. Trial (date)

Appendix B
Trial Counsel Training Plan (METL)

Captain _____

I. Preparation.

A. Read:

1. UCMJ.

2. MCM, not counting appendices.

3. Criminal law notes and articles in last twelve issues of *The Army Lawyer.*

4. Last twelve issues of the *TCAP Memo.*

5. Most recent year's USLW review of the Supreme Court's criminal cases.

6. All Advocacy Supplements from TCAP Memo. Copy and start own file of them.

7. Five sample 3ID prosecution briefs drawn from the exemplar file in Wuerzburg.

8. Three sample case files provided by chief, criminal law.

9. A pretrial preparation checklist.

10. *AR 27-10*, chapters 1, 3, and 5; 3ID Supplement to *AR 27-10.*

11. *USAREUR Regs. 600-1, 190-1.*

12. *AR 635-200*, chapters 1-3, 10, 13, 14, and 15.

13. *AR 27-26* (Professional Responsibility).

B. Skim:

1. Digests for Court-Martial Reports (red books).

2. Digests for MJs.

3. Saltzburg, *et al.*, *Military Rules of Evidence.*

4. Imwinkelried, *Evidentiary Foundations.*

5. Mauet, *Fundamentals of Trial Techniques.*

6. *DA Pam 27-22* (Military Criminal Law Evidence).

7. A sample trial notebook.

8. *DA Pam 27-9* (Military Judges Benchbook)

9. Portions of *ARs 27-10, 635-200* not listed in the "read" section.

10. Materials from most recent Criminal Law New Developments Course.

11. Materials from most recent Military Judges Course.

12. Recent dockets, pretrial and posttrial case status reports.

13. Criminal law files in your office, guided by criminal law NCOIC.

II. Milestones.

Each of the following events will be preceded by discussion, coaching, and assistance from the senior trial counsel (STC) or chief of criminal law, and followed by a debriefing, discussion, and critique from the STC or chief of criminal law. The STC or chief will determine that the training goals of one milestone are met before certifying the counsel for the next step. Some steps—such as, D and E, H and I—could be accomplished in the same case, depending on the assessment of the supervisor and the needs of the office. Ideally, however, the greater number of cases it takes to complete the steps, the more experience the counsel will absorb, and the better the counsel will be able to concentrate on mastering each component of the trial process.

A. Prepare and recite the boilerplate in a guilty plea.

Case: U.S. v.
Date: Co-counsel:

B. Draft and supervise the preferral of charges.

Case: U.S. v.
Date:

C. Represent the government at an Article 32 investigation.

Case: U.S. v.
Date: Co-counsel:

D. Prepare, mark, and introduce prosecution evidence in a guilty plea.

Case: U.S. v.
Date: Co-counsel:

E. Prepare, rehearse and examine a government sentencing witness in a guilty plea.

Case: U.S. v.
Date: Co-counsel:

F. Write a stipulation of fact for a guilty plea.

Case: U.S. v.
Date: Co-counsel:

G. Cross-examine a defense witness in a guilty plea.

Case: U.S. v.
Date: Co-counsel:

H. Write, practice, and deliver a sentencing argument.

Case: U.S. v.
Date: Co-counsel:

I. Write a prosecution brief.

Case: U.S. v.
Date: Co-counsel:

J. Prepare and conduct voir dire.

Case: U.S. v.
Date: Co-counsel:

K. Prepare and examine a merits witness in a contested case.

Case: U.S. v.
Date: Co-counsel:

L. Introduce a piece of evidence through a witness in a contested case.

Case: U.S. v.
Date: Co-counsel:

M. Cross-examine a defense witness in a contested case.

Case: U.S. v.
Date: Co-counsel:

N. Write, rehearse, and deliver a closing argument in a contested case.

Case: U.S. v.
Date: Co-counsel:

O. Deliver a closing and rebuttal argument in the same contested case.

Case: U.S. v.
Date: Co-counsel:

P. Write, rehearse, and deliver an opening statement.

Case: U.S. v.
Date: Co-counsel:

Q. Prepare jury instructions for panel case.

Case: U.S. v.
Date: Co-counsel:

R. Prepare a trial notebook for a guilty plea.

Case: U.S. v.
Date: Co-counsel:

S. Act as lead counsel in a guilty plea in which assistant TC is either a more experienced prosecutor or a senior trial

counsel. Receive debriefing and critique from a senior trial counsel or the chief, criminal law.

Case: U.S. v. .
Date: Co-counsel:

T. Prepare a trial notebook for a contested case.

Case: U.S. v. .
Date: Co-counsel:

U. Act as lead counsel in a contest in which assisted by a senior trial counsel or the chief, criminal law. Receive debriefing/critique from chief, criminal law.

Case: U.S. v. .
Date: Co-counsel:

V. Contribute one document to the 3ID Trial Counsel Resource Book.

Item:
Date:

USALSA Report

United States Army Legal Services Agency

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency (USALSA), produces *The Environmental Law Division Bulletin* (*Bulletin*), designed to inform Army environmental law practitioners of current developments in the environmental law arena. The *Bulletin* appears on the Legal Automated Army-Wide Bulletin Board System, Environmental Law Conference, while hard copies will be distributed on a limited basis. The content of the latest issue (volume 1, number 11) is reproduced below:

Resource Conservation and Recovery Act (RCRA)

Fines

On receipt of a Notice of Violation (NOV) from the Environmental Protection Agency (EPA), state, or local authorities, the installation environmental law specialist (ELS) must ensure that all administrative rights are preserved. This includes answering the complaint, raising defenses, and requesting a hearing in a timely manner. Be aware of differences between EPA, state, and local procedures. If penalty computation worksheets or inspection reports are not provided with the NOV, a Motion to Compel their discovery should be filed with the Answer. This approach is necessary as a result of the experience with several EPA Regions not providing this vital and basic information in a timely manner. The installation ELS should coordinate with the ELD, through the MACOM ELS, in all cases where a fine is assessed. Captain Cook.

Clean Air Act (CAA)

Title V Permit Assistance Guide

The United States Army Environmental Hygiene Agency (USAEHA) has prepared a guide to assist installations in meeting the requirements of the new CAA Title V Operating Permit Program, entitled; *Title V Permit Assistance Guide for Army Installations*. The guide is well written and an excellent source of information for attorneys and technical personnel. For a copy of the guide, contact USAEHA, Air Pollution Engineering Division, ATTN: Lisa Polyak, Aberdeen Proving Ground, Maryland 21010-5422, DSN 584-2509/3954 or commercial (410) 671-2509/3954.

Installation CAA Compliance Status

Most Army installations will have to submit an application for a Title V operating permit no later than November 1995.[1] The responsible official—who in most cases will be the installation commander—must certify compliance with all applicable CAA requirements in the application and annually thereafter. At a minimum, states must require that responsible officials certify that "based on information and belief formed after reasonable inquiry, the statements and information in the document [application form or annual compliance certification] are true, accurate, and complete."[2] A false or negligent certification is subject to civil and criminal penalties. Consequently, as part of the Title V planning process, installations must carefully evaluate their current compliance status and either remedy any noncompliance prior to filing an application or fully report the noncompliance in the application and include a compliance plan and schedule. Army installations

[1] *See* Environmental Law Division Notes, *Army Guidance on the General Conformity Rule*, ARMY LAW., Sept. 1994, at 33.

[2] 40 C.F.R. § 70.5 (1994).