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# CIVILIAN COUNSEL IN GENERAL COURT-MARTIAL CASES UNDER THE UNIFORM CODE OF MILITARY JUSTICE

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This article is written with the view of acquainting civilian lawyers with some of the procedural aspects of the trial and appellate review of general court-martial cases under the Uniform Code of Military Justice,<sup>1</sup> as implemented by the Manual for Courts-Martial, United States, 1951.<sup>2</sup> Although every person in the armed forces is entitled to be represented without cost before a general court-martial<sup>3</sup> and during subsequent appellate proceedings<sup>4</sup> by a legally qualified military counsel, a number of such persons have elected to retain civilian lawyers as their representatives. As the number of persons subject to military law increases during the present period of partial military mobilization, it is reasonable to expect that more civilian lawyers will be retained to defend accused persons at the trial level and to represent them before the boards of review of the armed forces and the United States Court of Military Appeals.

The Uniform Code of Military Justice<sup>5</sup> specifically authorizes an accused person to retain civilian counsel for these purposes and, in addition, provides that he may retain civilian counsel to represent him during the formal pretrial investigation which must be made before charges can be referred to a general court-martial for trial.<sup>6</sup> Moreover, military authorities are specifically enjoined to give accused persons timely advice as to their right to individual counsel so that they may make arrangements for

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1. 64 STAT. 128 (1950), 50 U.S.C. §§ 551-741 (Supp. 1951), hereinafter referred to as the Code and cited as U.C.M.J.

2. Exec. Order No. 10214, 16 FED. REG. 1303-1419 (1951), hereinafter referred to as the Manual for Courts-Martial and cited as MCM. A copy of the Manual for Courts-Martial may be purchased from the Superintendent of Documents, United States Government Printing Office, Washington 25, D.C. A copy will be made available for the use of retained civilian counsel in the preparation and trial of a court-martial case by the appointed defense counsel in the case.

3. U.C.M.J., Art. 38(b).

4. U.C.M.J., Art. 70(c).

5. U.C.M.J., Arts. 38(b) and 70(d).

6. U.C.M.J., Art. 32.

securing available civilian counsel at each of these stages of the proceedings.<sup>7</sup> Of course, it should be recognized that some accused persons must be tried in foreign theaters of operation where civilian counsel will not ordinarily be available. However, the United States Court of Military Appeals and, at the present time, all of the boards of review are located in Washington, D.C., and there is no reason why civilian counsel cannot be retained for proceedings before these agencies.

A few explanatory remarks should be made before proceeding into the discussion of general court-martial procedure.<sup>8</sup> A general court-martial consists of not less than the quorum of five court members,<sup>9</sup> who may be compared to civilian jurors; the law officer,<sup>10</sup> who performs many of the functions of a trial judge; the trial counsel and any assistant trial counsel, who make up the prosecution; and the appointed defense counsel<sup>11</sup> and any assistant defense counsel. The court member who is senior in rank is the president of the court. He speaks for the court in announcing the court's findings and sentence and is responsible for preserving order in open sessions. The officer having authority to appoint, and refer cases to, a general court-martial is referred to as the convening authority.<sup>12</sup> Before he

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7. U.C.M.J., Art. 32(b); MCM, T¶ 34b, 46d, 48j(3) and 100c.

8. General courts-martial have jurisdiction to try any person subject to the Code and may, under the limitations prescribed by the President of the United States, impose any punishment not forbidden by the Code. U.C.M.J., Art. 18. No attempt will be made to cover the procedural aspects of trials by special and summary courts-martial, whose jurisdictions are more limited. U.C.M.J., Arts. 19 and 20.

9. Officers and warrant officers on active duty with the armed forces are eligible to serve as members of a general court-martial, and, if the accused is an enlisted person and so requests, enlisted persons on active duty and not assigned to the accused's unit may sit as court members. U.C.M.J., Art. 25. Ordinarily, the court members will be selected from the command of the officer having authority to convene the general court-martial.

10. The law officer must be an officer who is a member of the bar of a federal court or of the highest court of a state and who is certified as qualified for such duty by The Judge Advocate General of the armed force of which he is a member. U.C.M.J., Art. 26.

11. The appointed defense counsel, as well as the trial counsel, must be a judge advocate of the Army or Air Force, or a law specialist of the Navy or Coast Guard, who is a graduate of an accredited law school or is a member of the bar of a federal court or of the highest court of a state; or he must be a person who is a member of the bar of a federal court or of the highest court of a state. In addition, both the trial counsel and the appointed defense counsel must be certified as competent to perform their duties by The Judge Advocate General of the armed force of which they are members. U.C.M.J., Art. 27.

12. U.C.M.J., Arts. 22, 34, 60, and 61.

may order into execution the sentence of the court, the sentence must first have been approved by him and, in certain cases, affirmed by a board of review and the United States Court of Military Appeals and approved by the Secretary of the Department<sup>13</sup> concerned or the President of the United States.<sup>14</sup>

#### PRETRIAL MATTERS

*Pretrial Investigation of Charges.* Before charges can be referred to a general court-martial for trial, they must be thoroughly and impartially investigated to determine the truth of the matters set forth therein.<sup>15</sup> Ordinarily this investigation will be conducted and the investigating officer's formal written report and advisory recommendation will be made before the charges are forwarded to the officer having authority to direct trial by general court-martial.

The investigating officer is required to examine all available witnesses, including those requested by the accused, who are necessary for a thorough and impartial investigation of the charges. As previously indicated, the accused is entitled to counsel during the pretrial investigation, and he may cross-examine the available witnesses who testify against him. There is, however, no provision for compensating witnesses who give evidence at the investigation, nor is there a provision for compelling the attendance of witnesses not subject to military jurisdiction. The accused, if he desires, may make an unsworn statement or may testify under oath at the investigation.

The substance of the testimony of each witness, including the accused, will be reduced to writing by the investigating officer and ordinarily will be signed and sworn to by the witness. These statements are attached to and become a part of the investigating officer's formal report. The report is thus an important factor, for it is considered in determining whether the charges are justified and, if so, whether they should be referred for trial to a general court-martial. If charges are forwarded with a recommendation that they be referred to a general

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13. Depending upon the armed force of which the accused is a member, "Department" as used herein refers to the Army, Navy, Air Force, or the Treasury Department (when the Coast Guard is not operating as a part of the Navy).

14. U.C.M.J., Art. 71.

15. U.C.M.J., Art 32; MCM, ¶ 34.

court-martial, the accused will be furnished with a copy of the substance of the testimony taken at the pretrial investigation.

*Attendance of Witnesses.* When the officer competent to convene a general court-martial refers a case to such a court for trial, the accused will be served with a copy of the formal charge sheet,<sup>16</sup> which includes a list of the prospective witnesses prepared by the person preferring charges. Counsel for the accused is entitled to know in advance of trial which of these witnesses and the names of all other witnesses the prosecution will call and may request that the prosecution disclose this information. All prospective prosecution witnesses may be interviewed before trial by the accused's counsel.

The prosecution will arrange for the attendance of its own witnesses as well as all material witnesses requested by the defense,<sup>17</sup> including civilian witnesses who are within any part of the United States, or its territories and possessions, and thus subject to subpoena at government expense.<sup>18</sup> In the event that counsel for the accused desires the services of an expert civilian witness, a written application addressed to the convening authority should be prepared and delivered to the prosecution, requesting permission to employ the expert and stating the necessity therefor and the probable cost.<sup>19</sup> If the request is reasonable, authorization to employ the expert will ordinarily be given. In the absence of such previous authorization, no fees, other than ordinary witness fees, may be paid by the government for the services of an expert witness.

*Documents in Control of Military Authorities.* Counsel for the accused generally may examine any material contained in the prosecution file on the case, including all documents which the prosecution intends to introduce into evidence. In addition, counsel for the accused may request that the prosecution take necessary action to produce any documents material to the case which are in the custody or control of military authorities wherever situated.<sup>20</sup>

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16. U.C.M.J., Art. 35.

17. MCM, ¶¶ 44f(2) and 115.

18. U.C.M.J., Art. 46.

19. If the employment of an expert witness becomes necessary after the trial has begun, the prosecution, in advance of the employment, will, on the order or permission of the court, request the convening authority to authorize such employment and to fix the limit of the compensation to be paid the expert. MCM, ¶ 116.

20. MCM, ¶ 115c.

*Depositions.* A duly authenticated deposition, taken upon reasonable notice to the other party, may be read in evidence in any non-capital case if it appears that the witness resides or is beyond the state, territory, or district in which the court is ordered to sit; or that the witness, by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, non-amenability to process, or other reasonable cause, is unable to appear and testify at the place of trial or hearing; or that the present whereabouts of the witness are unknown.<sup>21</sup> In a capital case the defense may introduce deposition testimony,<sup>22</sup> but the prosecution may not unless the accused expressly consents thereto in open court.<sup>23</sup>

If, in advance of trial, counsel for the accused desires that a written deposition of a particular witness be taken, he should procure deposition forms from the prosecution and enter thereon the interrogatories to be propounded to the absent witness. He should then submit to the prosecution the written interrogatories so that any objections may be noted thereon and cross-interrogatories prepared. Counsel for the accused will then be permitted to read the cross-interrogatories and note thereon any objections he might have. It is important that all objections be noted at this time, since an objection may be considered as waived if it is such that it could have been obviated before the actual taking of the deposition.<sup>24</sup> With the approval of the convening authority,<sup>25</sup> the trial counsel will then ordinarily send the interrogatories to the commanding officer of the military station nearest the witness with the direction that a competent person be detailed to take the deposition. A similar procedure is followed when a written deposition is initiated by the prosecution.

Depositions on oral examination are also authorized.<sup>26</sup> Whenever practicable the taking of an oral deposition is conducted by counsel for the prosecution and the accused. However, if

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21. U.C.M.J., Art. 49(d).

22. U.C.M.J., Art. 49(e).

23. MCM, ¶ 145a.

24. *Ibid.*

25. Additional interrogatories may be propounded on behalf of the convening authority when necessary to elucidate the whole testimony to be given by the absent witness. If a written deposition is initiated during trial, the papers will be submitted for approval to the law officer, who may also suggest additional interrogatories. Such additional interrogatories must, of course, be propounded by the parties or submitted to them for approval. MCM, ¶ 117b.

26. MCM, ¶ 117g.

the witness is not easily accessible, counsel may prepare memoranda setting forth the reason for the deposition and the points desired to be covered on oral examination. With the approval of the convening authority,<sup>27</sup> the prosecution will forward these papers to the commanding officer of the military installation nearest the witness. This commanding officer will, in addition to designating a person authorized to administer oaths, detail officers to represent both sides in propounding oral questions designed to elicit the desired information. If he desires, civilian counsel for the accused may travel to the residence of the witness and represent the accused personally, or he may retain local civilian counsel for that purpose; the expenses of such representation must be borne by the accused. All questions and answers will be reduced to writing and returned to counsel for use at the trial.

*Advising Accused of His Rights.* The Uniform Code of Military Justice provides that an enlisted accused may request that the membership of the court include enlisted persons.<sup>28</sup> If the accused desires to exercise this right, the request should be made in writing over the accused's signature and presented to the prosecution in advance of trial so that enlisted members may be appointed to the court. Such a request will not be considered if presented after the court has been sworn for the trial of the accused.<sup>29</sup>

The accused, if an enlisted person, should always be advised of this right by his counsel. If it is exercised, the accused ordinarily cannot be tried unless at least one-third of the members of the court are enlisted persons.<sup>30</sup> In the absence of a request for enlisted membership, the court will be composed entirely of officers or warrant officers.

The accused should also be advised before trial of the meaning and effect of a plea of guilty, when appropriate; his right to testify or remain silent; his right, after any findings of guilty are announced, to introduce evidence in extenuation and

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27. If an oral deposition is initiated during trial, the papers will be submitted to the law officer for approval. *Ibid.*

28. U.C.M.J., Art. 25(c).

29. MCM, ¶ 61g.

30. If, because of physical conditions or military exigencies, a sufficient number of eligible enlisted persons cannot be appointed to the court, the convening authority may direct that the trial proceed without enlisted court members. U.C.M.J., Art. 25(c).

mitigation of a possible sentence; and his right to assert any proper defense or objection, such as the statute of limitations, in an appropriate case.<sup>31</sup>

*Postponement of Trial and Continuances.* In time of peace no person, without his consent, can be tried by a general court-martial within five days after the charges are served upon him.<sup>32</sup> Ordinarily, this requirement is respected in time of war as well. In every case, however, the accused's counsel must be given ample opportunity to make adequate preparations for trial. Whenever reasonable cause is shown, including the need for additional time to prepare the defense, the trial will be postponed or a continuance will be granted.<sup>33</sup> A request for a postponement of the date of trial should be made to the president of the court, but it usually will be presented through counsel for the prosecution. After the proceedings have begun, an application for a continuance will be acted upon by the law officer.

#### TRIAL MATTERS

*Challenges.* After the court has assembled and has been formally convened by the administration of the oaths, challenges<sup>34</sup> may be made by both sides. Members of the court may be challenged for cause or peremptorily; however, the law officer may not be challenged except for cause. Challenges for cause may be made on the ground that the law officer or member is not eligible under the Code to serve in the case,<sup>35</sup> that he has not been appointed to the court, or, in the case of a rehearing or new trial, that he was a member of the court which first heard the case. For convenience these grounds are frequently referred to as "jurisdictional" grounds. In addition, a challenge for cause may be based upon any fact indicating that the person challenged should not sit as law officer or court member in the interest of having the trial and subsequent proceedings free from sub-

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31. MCM, ¶ 48f.

32. U.C.M.J., Art. 35.

33. MCM, ¶ 58.

34. U.C.M.J., Art. 41; MCM, ¶ 62.

35. Such grounds include the following: that the challenged law officer or member is not qualified under the Code for such duty, that he is the accuser as to any offense charged, that he will be a witness for the prosecution, that he was the investigating officer as to any offense charged, that he has acted as counsel for the prosecution or the accused as to any offense charged, or that he is an enlisted member assigned to the same unit as the accused. U.C.M.J., Arts. 25 and 26; MCM, ¶ 62f.



stantial doubt as to legality, fairness, and impartiality. The prosecution and each accused person may make one peremptory challenge. Ordinarily, the prosecution will make any challenges for cause and will exercise or waive its right to make one peremptory challenge before the defense exercises these rights.

Before challenges are made, the prosecution will disclose every ground for challenge known to exist and will request that the law officer and members of the court do likewise. Both the prosecution and the defense, without challenging any member, may then question the court as a whole, or the individual members thereof, about the existence or non-existence of facts which may disclose a proper ground for challenge. If, as a result of any disclosure, it appears that the law officer or any member is subject to challenge on a jurisdictional ground and the fact is not disputed, he will be excused forthwith.

As each challenge for cause is made, it will be disposed of by the court before it considers any additional ones. If the challenge is made on a jurisdictional ground and if the challenged person admits the fact upon which the challenge is based, or if in any case it is manifest that the challenge will be unanimously sustained, the person challenged will be excused forthwith unless some objection is raised. When a challenge for cause cannot be disposed of by this summary method, each side will be permitted to introduce evidence, examine the challenged person either informally or under oath, and make an argument. The burden of establishing the grounds for a challenge rests upon the challenging party. Ordinarily, the person against whom a challenge is made will take no part in the hearing upon the challenge except when called upon to testify; however, the law officer rules on all interlocutory questions arising during the hearing, even when the challenge is directed against him. When the hearing on a challenge for cause has been completed, the court will deliberate and vote in closed session on whether to sustain the challenge. The law officer and the challenged member, if any, will be excluded from the closed session. A majority vote is controlling; a tie vote will disqualify the person challenged.<sup>36</sup> The president of the court will announce in open court whether the challenge is sustained. If the challenge is sustained, the person challenged will be excused.

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36. U.C.M.J., Art. 52(c).

If, at any stage of the process of challenging, the court is reduced below the quorum of five members, or the number of enlisted members is reduced below one-third of the members actually sitting (provided a request for enlisted members has been made), or the law officer is successfully challenged, the court will be adjourned pending the appointment of additional personnel.

All challenges should be made before arraignment, but the court may, in its discretion, entertain a challenge for cause at any stage of the proceedings. The fact that a challenge for cause was not sustained will not preclude the court's entertaining it again if good cause is shown.

*Motions Raising Defenses and Objections.* After all challenges have been acted upon, the accused will be arraigned on the charges. Any defense or objection which is capable of determination without trial of the issue raised by a plea of not guilty ordinarily should be asserted by a motion to the court before the pleas of the accused are entered. This procedure is substantially the same as that provided for by Rule 12, Federal Rules of Criminal Procedure. A motion to dismiss<sup>37</sup> properly relates to any defense or objection raised in bar of trial, including such defenses and objections as lack of jurisdiction, failure of the charges to allege an offense, running of the statute of limitations,<sup>38</sup> former jeopardy,<sup>39</sup> pardon, constructive condonation of desertion, former punishment, promised immunity, and lack of mental responsibility of the accused at the time of the alleged offense. Any such defense or objection, except lack of jurisdiction or failure of the charges to allege an offense, will be regarded as waived unless asserted before the conclusion of the hearing of the case. A motion to grant appropriate relief<sup>40</sup> is one made to cure a defect of

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37. MCM, ¶ 68.

38. The statute of limitations is tolled when the sworn charges are received by an officer exercising summary court-martial jurisdiction. U.C.M.J., Art. 43.

39. No proceeding in which an accused has been found guilty by a court-martial is considered a trial in the double jeopardy sense until the finding of guilty has become final upon review of the case having been fully completed. U.C.M.J., Arts. 44(b) and 76. However, a proceeding which, subsequent to the introduction of evidence but prior to a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused is a trial in the double jeopardy sense. U.C.M.J., Art. 44(c).

40. MCM, ¶ 69.

form or substance which impedes the accused's properly preparing for trial or conducting his defense. Objections which may be raised by such a motion include defects in the preferring of charges, defects in the form of the charges which do not amount to a failure of the charges to allege an offense, irregularities in the reference of the case for trial, a substantial defect in the pretrial investigation or other pretrial proceedings, prejudicial joinder in a joint trial, and misjoinder in a common trial. Unless such objections are raised before pleas are entered, they will be regarded as waived; however, the court for good cause shown may entertain a motion for appropriate relief at any subsequent stage of the hearing of the case.

A motion raising a defense or objection may be made orally or in writing and should clearly state the defense or objection which is being asserted. Ordinarily each side will be permitted to introduce evidence pertinent to the motion and make an argument, and the law officer's ruling on the motion will be made before the accused's pleas are entered. However, if the motion raises an issue of fact which may properly be considered by the court in reaching its findings of guilt or innocence, the law officer may defer his ruling on the motion and direct that the evidence pertinent thereto be withheld until evidence on the general issue has been introduced.

In the event that a motion to dismiss a particular charge is sustained, the accused will not be required to plead to the charge and may not be tried by the court for the offense. However, if the ruling sustaining a motion to dismiss does not amount to a finding of not guilty, the convening authority may direct that the court reconsider its ruling.<sup>41</sup> If the convening authority and the court differ on a question of law, as distinguished from an issue of fact, the court must accede to the view of the convening authority in reconsidering its ruling.<sup>42</sup>

When a motion for appropriate relief has been sustained, necessary action will be taken to obviate the objection so that the trial may proceed. For example, if the accused's name has been incorrectly spelled in the charges, or if the offense charged is laid under the wrong article of the Code, and it clearly appears that the accused has not been misled thereby, the court may pro-

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41. U.C.M.J., Art. 62.

42. MCM, ¶ 67f.

ceed immediately with the trial upon directing that the charges be appropriately amended. If, however, the charges are so defective that they do not fairly apprise the accused of the offense charged, the court may direct that they be stricken or that the case be continued for such time as will enable the defense to prepare for the trial of properly amended charges. A continuance will also be granted whenever it appears necessary to cure a defect in the pretrial investigation which has prevented the accused from properly preparing for trial or has injuriously affected his substantial rights. In the event that two or more accused persons are to be tried together—either at a common trial for offenses provable by the same evidence or under joint charges—and a motion to sever has been granted, the court may proceed to try only one of the accused. If the charges are joint, the court, before proceeding with the trial, should direct that the charges be amended to allege either that the accused to be tried committed the offense by himself or that he did so in conjunction with the other accused person or persons.

*Pleas.* After the accused has been arraigned and the motions, if any, have been disposed of, the accused will be asked to plead to each offense charged. Permissible pleas include a plea of guilty, not guilty, and not guilty but guilty of a lesser included offense.<sup>43</sup> However, a plea of guilty to an offense for which the death penalty may be adjudged may not be received by the court.<sup>44</sup> If the accused elects to stand mute, a plea of not guilty will be entered by the court.

When a plea of guilty has been made to any offense charged or to any lesser included offense, the law officer must explain to the accused the meaning and effect of such a plea. He will then ask the accused to state whether he understands its meaning and effect and, if so, whether he desires to persist in the plea of guilty. The answers to these questions must be given in open court by the accused personally and not through his counsel.

In court-martial procedure, the term "charges" is generally applied to the formal written accusation or accusations. Each accusation consists of two parts: (1) the technical charge stating the article of the Code which has been violated and (2) the specification alleging the particular facts and circumstances constitut-

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43. MCM, § 70.

44. U.C.M.J., Art. 45(b).

ing an offense denounced by the article. If, for example, the accused has been charged with the larceny of a watch, the wrongful appropriation of a motor vehicle, and desertion, the charges might be worded as follows:

**Charge I:** Violation of the Uniform Code of Military Justice, Article 85.

*Specification:* In that Private John Doe, U. S. Army, Company A, 2d Infantry, did, on or about 6 June 1951, without proper authority and with intent to remain away therefrom permanently, absent himself from his organization, to wit: Company A, 2d Infantry, and did remain so absent in desertion until he was apprehended on or about 19 January 1952.

**Charge II:** Violation of the Uniform Code of Military Justice, Article 121.

*Specification 1:* In that Private John Doe, U. S. Army, Company A, 2d Infantry, did, at Saint Louis, Missouri, on or about 6 June 1951, wrongfully appropriate a motor vehicle, to wit: a Packard sedan, the property of Richard Roe.

*Specification 2:* In that Private John Doe, U. S. Army, Company A, 2d Infantry, did, at Saint Louis, Missouri, on or about 6 June 1951, steal a watch, of a value of about \$40.00, the property of Richard Roe.

Unless the accused elects to stand mute, a plea must be made to each charge and to each specification thereunder. Continuing the example set forth above, if the accused desires to plead not guilty to the larceny and wrongful appropriation, and not guilty to desertion but guilty of the lesser included offense of absence without leave, his pleas should be made through his counsel as follows:

To the Specification of Charge I: Guilty, except the words 'and with intent to remain away therefrom permanently' and 'in desertion.'

To Charge I: Not guilty, but guilty of a violation of Article 86.

To Specification 1 of Charge II: Not guilty.

To Specification 2 of Charge II: Not guilty.

To Charge II: Not guilty.

If the accused had desired to plead not guilty (or guilty) to all of the offenses, his pleas could have been made as follows:

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

It may be noted that although a plea of guilty will warrant a conviction without further proof, it does not preclude the taking of evidence and the showing of aggravating, mitigating, and extenuating circumstances. If, at any stage of the proceedings, it appears to the court that a plea of guilty was made improvidently, the court of its own motion will direct that the plea be changed to not guilty and the trial will proceed on that basis.<sup>45</sup>

*Opening Statements.* After the pleas have been entered, the prosecution may read parts of the Manual for Courts-Martial and any authoritative precedents that are pertinent to the definition and proof of any offense charged or to the defense thereto. The prosecution may then make a brief opening statement of the issues to be tried and what it expects to prove by available and admissible evidence.<sup>46</sup> The defense may likewise present legal authorities and make an opening statement at this time.<sup>47</sup> However, it is customary in military practice for the defense to make its opening statement after the prosecution has rested. With the court's permission, either side may make other like statements at other stages of the proceedings.

*Interlocutory Questions Other Than Challenges.* All interlocutory questions, other than challenges, arising during the course of the proceedings are ruled upon by the law officer.<sup>48</sup> Any member of the court, however, may object to the ruling of the law officer on a motion for a finding of not guilty or on any question relating to the accused's sanity and thereby cause the question to be referred to the court members for decision made in closed session upon majority vote.<sup>49</sup> With these exceptions, the rulings of the law officer are considered final and constitute the rulings of the court.

Before making his ruling, the law officer may direct that an inquiry be made into the facts and law pertinent to the interlocutory question and may request that the party raising the question furnish evidence or legal authorities in support of his contention. Questions of fact arising during such an inquiry are determined by a preponderance of the evidence. Whenever it appears that an offer of proof, or preliminary evidence, or argument with re-

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45. U.C.M.J., Art. 45(a); MCM, ¶ 70.

46. MCM, ¶ 44g(2).

47. MCM, ¶ 48h.

48. U.C.M.J., Art. 51(b); MCM, ¶ 57.

49. U.C.M.J., Art. 52(c).

spect to the admissibility of proffered evidence may contain matter prejudicial to the rights of the accused or the Government, and that the question cannot be satisfactorily disposed of at a side-bar conference between the law officer, counsel, and the accused, the law officer may, upon his own motion or upon motion of counsel, recess the court so that the offer of proof, preliminary evidence, or argument may be presented at a hearing outside the presence of the members of the court. Ordinarily the proceedings of such hearings are not recorded if only arguments or offers of proof<sup>50</sup> have been presented. However, the law officer may direct that the proceedings or parts thereof be recorded, transcribed, and appended to the record of trial for the information of the reviewing authorities. Proffered evidence which has been ruled admissible upon such a hearing may then be offered in open court, together with any admissible preliminary evidence affecting the weight of such proffered evidence.

*Rules of Evidence.* The Manual for Courts-Martial contains a discussion of many of the rules of evidence which are applicable in court-martial trials.<sup>51</sup> In general, the rules conform to those recognized in the trial of criminal cases in the United States district courts and, when not inconsistent therewith, to the rules recognized at common law. There are differences, however, and some of these are noted below.

Article 31 of the Uniform Code of Military Justice provides in part as follows:

(b) No person subject to this code shall interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) . . . .

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement shall be received in evidence against him in a trial by court-martial.

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50. Whenever the court refuses to hear or receive certain testimony offered by the defense, counsel may make a concise statement of the substance of such evidence and request that it be attached to the record for appellate purposes. If an offered document is refused, it too may be attached to the record. MCM, ¶¶ 54d and 154c.

51. MCM, c. XXVII.

In court-martial practice, therefore, a pretrial confession, obtained by a person subject to the Code through interrogation or upon request from the accused after charges have been preferred or at a time when the accused was suspected of the offense, may not be introduced in evidence unless the prosecution shows affirmatively that the confession was voluntary and was made after the accused's rights under Article 31 had been explained to him, even though he may have been aware of those rights at the time.<sup>52</sup> When the confession has been obtained by one not subject to the Code (a civilian law enforcement officer, for example), either through interrogation or upon request from an accused person or a person suspected of the offense, it is essential only that the prosecution show affirmatively that the confession was made voluntarily and that the accused was aware of his rights under Article 31 at the time.<sup>52</sup>

Two modes of proving the character of a person are specifically authorized in court-martial trials.<sup>53</sup> The military recognizes the time-honored practice of proving the person's reputation in his community through the testimony of one who is also a member of the community and who is acquainted with the person's reputation. In the military service, "community" includes an organization, post, camp, ship, or station. In addition, the opinion of a witness about a person's character may be received in evidence if it is first shown that the witness has an acquaintance or relationship with the person in question which qualifies him to form a reliable opinion in this respect. As an exception to the hearsay rule, the defense may introduce affidavits or other written statements about the character of the accused.<sup>54</sup>

Evidence obtained through or as the result of an unlawful search of the accused's property conducted or instigated by persons acting under authority of the United States is not admissible against the accused.<sup>55</sup> However, courts-martial have no authority to order a return to the accused of illegally seized property or to impound such property for the purpose of suppressing its use as evidence. The objection to its use as evidence can only be made

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52. A similar foundation must be made for introducing an incriminatory admission of the accused when there is an indication that it may not have been made voluntarily. MCM, ¶ 140a.

53. MCM, ¶ 138f(1).

54. MCM, ¶ 146b.

55. MCM, ¶ 152.



when the prosecution attempts to introduce it at the trial. It should be noted here that among the searches which are recognized as lawful by courts-martial is the following:

A search of property which is owned or controlled by the United States and is under the control of an armed force, or of property which is located within a military installation or in a foreign country or in occupied territory and is owned, used, or occupied by persons subject to military law or to the law of war, which search has been authorized by a commanding officer (including an officer in charge) having jurisdiction over the place where the property is situated or, if the property is in a foreign country or in occupied territory, over personnel subject to military law or to the law of war in the place where the property is situated.<sup>56</sup>

In addition, this provision continues with a specific authorization for the commanding officer to delegate the general authority to order searches and a statement that a search made by military personnel in the areas outlined, if made in accordance with military custom, may be legal.

Courts-martial recognize the general rule that ignorance of the law does not excuse a criminal act, although an honest and reasonable mistake of law may be shown in an appropriate case for the purpose of indicating the absence of a specific intent when such an intent is an essential element of the offense charged.<sup>57</sup> Included within the term "law" are the regulations and directives of the Department of the Army, Navy, or Air Force, or the Headquarters of the Marine Corps or Coast Guard, or the headquarters of a territorial, theater, or similar area command. Thus the fact that the accused was ignorant of such a regulation or directive could not ordinarily be asserted as a defense against charges alleging the violation of such a regulation or directive. However, before a person can properly be held responsible for the violation of any regulation or directive of a command inferior to those mentioned above, it must appear that he knew of the regulation or directive either actually or constructively.

The court-martial, in its discretion, may relax the rules of evidence in certain instances. On interlocutory questions relating to the propriety of proceeding with the trial, or to the availability of witnesses, the court may receive pertinent affidavits, certifi-

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56. MCM, ¶ 152, at p. 288.

57. MCM, ¶ 154a(4).

cates of military and civil officers, and other writings of similar apparent authenticity and reliability, unless it appears that the receipt of such matter might injuriously affect the substantial rights of the accused or the interests of the Government.<sup>58</sup> The hearsay rule may be relaxed to permit the defense to introduce affidavits or other written statements about the character of the accused at any stage of the proceedings.<sup>59</sup> Similar writings may be offered by the defense, after any findings of guilty, in mitigation or extenuation of a possible sentence.<sup>60</sup> However, an affidavit of the accused on such matters may not be offered, although the accused may make an unsworn statement in mitigation or extenuation.

*Motions for a Finding of Not Guilty.* The defense may move for a finding of not guilty after the prosecution has rested or after the defense has presented its evidence or at both of these stages.<sup>61</sup> As previously indicated, the law officer's ruling on such a motion is made subject to the objection of any member of the court. If there is substantial evidence which reasonably tends to establish every essential element of an offense charged or included in any specification to which the motion is directed, the motion will not be granted. The fact that such a motion, made after the prosecution had rested, was erroneously denied and that a conviction ultimately resulted will not necessitate a reversal upon appellate review if there is sufficient evidence in the record, whether adduced by the prosecution or the defense, to warrant a conviction.

*Closing Arguments.* After both sides have rested, the law officer should inform counsel of the instructions he intends to give to the court so that counsel may base their arguments thereon. The prosecution has the right to make the opening argument and, if any argument is made on behalf of the defense, the closing argument.<sup>62</sup> The closing argument of the prosecution is generally limited to matters argued by the defense. If, however, the law officer deems it appropriate to permit the prosecution to include new matter in the closing argument, the defense will be afforded an opportunity to reply thereto, but this will not pre-

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58. MCM, ¶ 137.

59. MCM, ¶ 146b.

60. MCM, ¶ 75c.

61. MCM, ¶ 71a.

62. MCM, ¶ 72.

clude the prosecution from presenting a final argument. The prosecution has the privilege of waiving either the opening or the closing argument, or both, and the defense may likewise waive argument.

Arguments may be presented orally or in writing. When an argument is presented in writing, it is ordinarily read to the court by the party submitting it and is thereafter attached to the record as an exhibit. Counsel are allowed a reasonable latitude in making their arguments and should not be interrupted by the law officer or opposing counsel unless their arguments become improper. Neither side may state in argument any matter of fact which is not fairly supported by the evidence, nor may the prosecution comment directly or indirectly upon the failure of the accused to testify on the general issue of guilt or innocence.

*Instructions to the Court.* After closing arguments have been completed and before the court retires in closed session to make its findings, the law officer must instruct the court as to the elements of each offense charged and the rules relating to the presumption of innocence, reasonable doubt, and burden of proof.<sup>63</sup> These instructions are mandatory and a failure to give them in all cases, including those in which the accused has pleaded guilty, constitutes error as a matter of law.<sup>64</sup>

The law officer may also give such additional instructions as he deems necessary or proper in the case. In many instances the law officer may deem it sufficient merely to invite the court's attention to pertinent parts of the Manual for Courts-Martial, which is available to the court at every stage in the proceedings, including the closed session at which findings are reached. In giving additional instructions, the law officer may make an orderly statement of the issues of fact present in the case, summarize and comment upon the evidence that tends to support or deny those issues, and discuss the law applicable thereto. His comments and remarks,

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63. U.C.M.J., Art. 51(c); MCM, ¶ 73. Article 51(c) of the Code has recently been interpreted as requiring the law officer to instruct the court as to the elements of each offense charged, including the lesser offenses, unless the evidence excludes any reasonable inference that a lesser crime was committed. *United States v. Clark*, No. 190, United States Court of Military Appeals, Feb. 29, 1952.

64. *United States v. Clay*, No. 49, United States Court of Military Appeals, Nov. 27, 1951. However, a failure to give such instructions when the accused has pleaded guilty and persists in such plea will not constitute reversible error. *United States v. Lucas*, No. 7, United States Court of Military Appeals, Nov. 8, 1951.

however, must be accurate, fair, and dispassionate. In no case may the law officer comment on the guilt or innocence of the accused.

Counsel may submit proposed instructions for the law officer's consideration either at the request of the law officer or on their own initiative.<sup>65</sup> Such proposals must be submitted in writing to the law officer, and copies thereof should be furnished to the opposing counsel. All proposed instructions are marked for identification and attached to the record of trial as appellate exhibits. If the law officer permits counsel to present arguments upon proposed instructions, the court will be recessed so that arguments may be made outside the presence of the court. Ordinarily this will be accomplished after both sides have rested and before closing arguments in the case are made so that counsel may be informed of the instructions that will be given to the court.

*Findings.* After the court has received the instructions of the law officer, it will close to deliberate and vote on its findings.<sup>66</sup> No person may be convicted of spying except upon the concurrence of all the members of the court-martial present at the time the vote is taken.<sup>67</sup> Two-thirds of such members must concur to warrant a conviction for any other offense.<sup>68</sup>

After closing to make its findings, the court may reopen to request additional instructions from the law officer whenever it is in doubt as to the applicability of the law or the effect of certain evidence.<sup>69</sup> Such instructions are given in open court by the law officer in the presence of the accused and counsel.

When the court has finally voted on its findings, it will open and make the formal announcement of its findings. Before doing so, however, the court may request the law officer and the reporter to appear before it in closed session to put the findings in proper form.<sup>70</sup> This procedure is particularly encouraged when the court has found the accused guilty of a lesser included offense or has made exceptions and substitutions in any specification of which it has found the accused guilty.

The court may reconsider any finding before it is announced

65. MCM, ¶ 73c(2).

66. MCM, ¶ 74.

67. U.C.M.J., Art. 52(a) (1).

68. U.C.M.J., Art. 52(a) (2).

69. MCM, ¶ 74e.

70. U.C.M.J., Art. 39.

in open court. A finding of not guilty once formally announced may not be reconsidered. However, a finding of guilty may be reconsidered by the court on its own motion at any time before it has first announced the sentence in the case.<sup>71</sup>

*Sentence.* After the court has formally announced any finding of guilty, the prosecution will read from the charge sheet the data as to the age, pay, and service of the accused and the duration and nature of any restraint imposed before trial.<sup>72</sup> The prosecution will next introduce any evidence of previous convictions of the accused by courts-martial for offenses committed during his current enlistment or appointment and during the three years next preceding the commission of any offense of which the accused stands convicted.<sup>73</sup> Ordinarily this is accomplished by introducing into evidence an authenticated extract copy of the accused's official record of service.

If a finding of guilty is based upon a plea of guilty, and available and admissible evidence as to any aggravating circumstances was not introduced before the findings, the prosecution may then introduce such evidence. In any case in which there is a finding of guilty, the defense may introduce matter which tends to explain the commission of the offense or offenses or which might move the court to lessen the punishment to be imposed.<sup>74</sup> As to matters in extenuation and mitigation, the accused may testify under oath or may make an unsworn statement. The latter may be made by the accused personally or through his counsel.

After affording each side an opportunity to make an argument with respect to matters in aggravation, extenuation, and mitigation, the court will again retire in closed session to deliberate and vote on the sentence to be adjudged. Before the court closes for this purpose, the law officer properly may advise the court as to the maximum sentence which may be adjudged for each of the offenses of which the accused has been found guilty. All members of the court present at the time the vote is taken must concur if the death penalty is imposed. If the accused is sentenced to life imprisonment or to confinement in excess of ten years, three-

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71. MCM, ¶ 74d(3).

72. MCM, ¶ 75.

73. Proof of two or more previous court-martial convictions will in some cases authorize a more severe sentence than would otherwise be permitted. MCM, ¶ 127 c, Table of Maximum Punishments, Section B.

74. MCM, ¶ 75c.

fourths of such members must concur. All other sentences are determined by the concurrence of two-thirds of the members present when the vote is taken.<sup>75</sup> When the sentence has been formally announced in open court, the trial is complete.

#### POST TRIAL MATTERS

*Recommendation for Clemency.* After the trial has been concluded, the defense may prepare a written recommendation for clemency in which members of the court may join.<sup>76</sup> The recommendation should state specifically the amount and character of the clemency recommended and the reasons for the recommendation. It should not, however, be cumulative of matters presented to the court before the sentence was announced, nor should it be based upon a doubt as to the accused's guilt. As a practical matter, therefore, it is limited to a recommendation that an adjudged sentence be suspended or that a mandatory sentence be reduced. The recommendation may be submitted to the prosecution with the request that it be attached to the record of trial for the consideration of reviewing authorities.

*Appellate Brief.* In the event of a conviction, counsel for the accused may prepare a brief on any matters, including objections to the content of the record, which he feels should be considered on review of the record.<sup>77</sup> The brief will be attached to the record so that it will receive the consideration of the reviewing authorities.

In this connection it may be added that, after the record of the proceedings is transcribed, it is authenticated by the president and law officer of the court. The record is then forwarded to the convening authority. When undue delay will not result, counsel for the accused may be permitted to examine the record before it is sent to the convening authority. In every case, however, the accused will be given a copy of the record of trial as soon as it is authenticated, and this copy may be made available to his counsel.<sup>78</sup>

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75. U.C.M.J., Art. 52(b).

76. MCM, ¶¶ 48j(1) and 77a.

77. U.C.M.J., Art. 38(c); MCM, ¶ 48j(2).

78. This copy of the record of trial is the only one which may be furnished to the accused at government expense. U.C.M.J., Art. 54(c). If the accused retains civilian counsel for proceedings before a board of review or the United States Court of Military Appeals, he should deliver this copy of the record to such counsel to prevent inconvenience, delay, and unnecessary expense.

*Appellate Rights.* Whenever the accused has been convicted of any offense, his counsel should advise him as to his appellate rights as soon after the trial as is practicable. The accused should be advised that, if the case is referred to a board of review, he is entitled in the proceedings before the board to be represented without cost by appointed appellate defense counsel or, at his own expense, by civilian counsel. He should also be advised of any right he may have to appeal to the United States Court of Military Appeals and of his right to representation before this agency. Ordinarily there will be a form available to the accused's counsel which, when completed and signed by the accused, will indicate that he has been advised of these rights. It will also indicate whether he desires to be represented before a board of review and, if so, whether he desires appointed appellate defense counsel or whether he has retained or intends to retain civilian counsel. If civilian counsel has been retained, the name and address of such counsel should be stated. In the event appellate counsel is desired, this completed form or a similar statement signed by the accused or his representative must be forwarded to the convening authority or dispatched to The Judge Advocate General of the accused's armed force within ten days from the date of sentence.<sup>79</sup> If the accused has indicated therein his intention to retain civilian counsel, a notice of retainer, stating the name and address of such counsel, must be received in the office of the appropriate Judge Advocate General within ten days after receipt of the notice of intention.<sup>80</sup> Failure to comply timely with these requirements may be regarded as a waiver of the right to representation before a board of review.

It is thus important that the accused be advised of these rights and that he make known his desires with respect to appellate counsel, even though the convening authority will not ordinarily have taken his action on the findings of guilty and the sentence at the time, and the accused cannot therefore be definitely advised that the case will or will not be referred to a board of review. The convening authority may take action only on findings of guilty and the sentence.<sup>81</sup> He may approve them in whole or in part and remit or suspend all or any part of an approved sentence,

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79. MCM, ¶ 48j(3); Uniform Rules of Procedure for Proceedings In and Before Boards of Review, Rule V, D, 16 FED. REG. 4433-4435 (1951).

80. *Ibid.*

81. MCM, ¶¶ 87 and 88.

except that he may not suspend a sentence to death. If he disapproves the findings and sentence, he may, unless there is a lack of sufficient evidence in the record to support the finding of guilty, also order a rehearing. Unless a rehearing has been ordered, the record, together with his action on the findings of guilty and the sentence, will be forwarded to the office of the appropriate Judge Advocate General.

#### PRACTICE BEFORE BOARDS OF REVIEW

The Judge Advocate General of each armed force has, in his office in Washington, D. C., one or more boards of review composed of not less than three officers or civilians who are qualified lawyers. Article 66 of the Code provides that the record of trial of every general court-martial case in which the sentence, as approved by the convening authority, affects a general or flag officer or extends to death, dismissal of an officer, cadet, or midshipman, dishonorable or bad conduct discharge, or confinement for one year or more must be referred to such a board of review to determine whether the approved findings of guilty and the sentence, or any part thereof, are correct in law and fact and whether, on the basis of the entire record, they should be affirmed. A finding or sentence will not be held incorrect on the ground of an error of law unless the error materially prejudiced the substantial rights of the accused.<sup>82</sup> In considering the record, the board has authority to weigh the evidence, judge the credibility of witnesses, and determine controverted issues of fact.

Every other record of trial by general court-martial in which there has been a finding of guilty and a sentence must be examined in the office of the appropriate Judge Advocate General under Article 69 of the Code. Such cases will be reviewed by a board of review only if the findings or sentence, or any parts thereof, are found unsupported in law or if The Judge Advocate General so directs.<sup>83</sup> If the record is found to be legally sufficient and The Judge Advocate General does not direct that it be reviewed by a board of review, the case is final and conclusive.<sup>84</sup>

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82. U.C.M.J., Art. 59(a).

83. If the record is initially examined under Art. 69 and then reviewed by a board of review, the decision of the board is final and conclusive unless the Judge Advocate General certifies the case to the United States Court of Military Appeals. The accused may not petition the court to review such a case. U.C.M.J., Art. 69.

84. U.C.M.J., Art. 76.



When the accused has retained civilian counsel to represent him before a board of review,<sup>85</sup> such counsel must file a notice of appearance within ten days after the date that the notice of retainer is received in the office of The Judge Advocate General.<sup>86</sup> When the record of trial is received in the office of The Judge Advocate General, counsel will be so notified. Within ten days after the receipt of such notice, counsel for the accused must file an assignment of errors, setting forth each error asserted and intended to be urged.<sup>87</sup> The assignment of errors may be included in, or filed in lieu of, a brief for the accused.<sup>88</sup> Government counsel may file a reply to the assignment of errors and a brief within ten days after the assignment of errors or any brief has been filed on behalf of the accused.<sup>89</sup> Each side will be furnished with copies of such papers.

The case will then be set for oral argument before a board of review, and counsel will be given at least ten days notice of the time and place of oral argument.<sup>90</sup> The defense will have the right to make opening and closing arguments. Ordinarily each side will be allowed thirty minutes for argument, although the board in its discretion may extend the time limit.<sup>91</sup> Matters outside the record may not ordinarily be presented to or argued before a board of review, unless such matters pertain to a question of jurisdiction or tend to show that an inquiry into the accused's mental condition is warranted, or unless they are matters of which judicial notice may be taken.<sup>92</sup>

The board of review may affirm the findings of guilty and the sentence in whole or in part, or it may set aside the findings of guilty and the sentence as being incorrect in law and fact.<sup>93</sup> If a setting aside is not based on lack of sufficient evidence in the

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85. To practice before a board of review, civilian counsel must be a member in good standing of the bar of a federal court or of a court of record of any state and may be required to file a certificate setting forth such qualifications. Uniform Rules of Procedure for Proceedings In and Before Boards of Review, Rule V, A, 16 FED. REG. 4433-4435 (1951).

86. *Id.*, Rule V, H.

87. *Id.*, Rule VII.

88. *Id.*, Rule VIII, A.

89. *Id.*, Rule VIII, C.

90. *Id.*, Rule IX, B.

91. *Id.*, Rule IX, C.

92. *Id.*, Rule IX, F.

93. MCM, ¶ 100a.

record, a rehearing may be ordered.<sup>94</sup> Otherwise the board will order that the charges be dismissed.

If the sentence as affirmed by a board of review does not affect a general or flag officer and does not extend to death, The Judge Advocate General may recommend that the Secretary of the Department concerned mitigate, remit, or suspend the sentence in whole or in part, or he may take such action as may have been authorized by the Secretary of the Department.<sup>95</sup> This action will be taken before the decision of the board of review is transmitted to the accused and his counsel.

#### PRACTICE BEFORE THE UNITED STATES COURT OF MILITARY APPEALS

The United States Court of Military Appeals consists of three judges appointed from civilian life by the President, by and with the advice and consent of the Senate.<sup>96</sup> All cases in which the sentence, as affirmed by a board of review, affects a general or flag officer or extends to death must be referred by The Judge Advocate General to the Court of Military Appeals for review. In addition, The Judge Advocate General may in his discretion certify to the court all other cases reviewed by a board of review, and the accused may petition the court to review all cases reviewed by a board of review under Article 66 of the Code.<sup>97</sup> In addition, The Judge Advocate General may in his discretion to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in *law* by the board of review. Unlike boards of review, the court is not authorized to weigh the evidence, judge the credibility of witnesses, or determine controverted questions of fact. It may only consider and determine questions of law.<sup>98</sup>

To be admitted to practice before the Court of Military Appeals, counsel must be a member of the bar of a federal court or the highest court of a state and must file an application on a form supplied by the clerk. In addition, the applicant must append a certificate from the presiding judge or clerk of the court to which

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94. MCM, ¶ 100b(1). However, if the convening authority finds a rehearing impracticable, he may dismiss the charges. U.C.M.J., Art. 66(e).

95. U.C.M.J., Art. 74(a).

96. U.C.M.J., Art. 67.

97. *Ibid.*

98. *Ibid.*

he has been admitted, stating that the applicant is a member of the bar and that his private and professional character appear to be good.<sup>99</sup> Admissions will be granted upon motion of the court or upon oral motion by a person admitted to practice before the court. Whenever counsel thereafter intends to appear in any proceedings, he must file prior thereto a written notice of appearance.<sup>100</sup>

In proceedings before the Court of Military Appeals, the accused is deemed to be the appellant except when The Judge Advocate General has certified a decision of a board of review in which a finding of guilty was set aside.<sup>101</sup> The rules prescribed by the Court of Military Appeals contain detailed instructions as to the form, and the time of filing, of petitions for grants of review, assignments of errors, and briefs. Only a few of the rules relating to the processing of an appeal by a petition of the accused will be mentioned. When a case is appealed in this manner, the petition must be filed within thirty days after the time the accused is served with a copy of the decision of the board of review.<sup>102</sup> The petition, which should be forwarded through the appropriate Judge Advocate General, is deemed to have been filed upon the date postmarked on the envelope containing the petition or upon the date the petition is deposited in military channels for transmittal.<sup>103</sup> All other pleadings or papers are deemed to be filed when received in the office of the clerk of the court.<sup>104</sup> A brief may accompany the petition at the time it is filed or within 30 days thereafter.<sup>105</sup> Except when ordered by the court, oral argument is not permitted on a petition for grant of review.<sup>106</sup>

If a petition for review is granted, the accused has thirty days in which to file a brief on the issues raised by the parties or specified by the court.<sup>107</sup> Thereafter, unless oral argument is waived, the case is set down for a hearing, counsel being given ten days

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99. Rules of Practice and Procedure In the United States Court of Military Appeals, Rules 10-12, 17 FED. REG. 2046 (1952).

100. The filing of any pleading or other paper relative to a case will constitute an appearance. *Id.*, Rules 14 and 15.

101. *Id.*, Rule 7.

102. *Id.*, Rule 22(a).

103. *Id.*, Rule 22(b), (c).

104. *Id.*, Rule 25.

105. *Id.*, Rules 38 and 40(a).

106. *Id.*, Rule 42.

107. *Id.*, Rule 41a.

written notice of the time and place thereof. Each side is ordinarily allowed forty-five minutes for oral argument. When a case comes before the court upon a petition for a grant of review, the accused has the right to open and close the argument.<sup>108</sup>

A petition for a rehearing or modification may be filed within five days after the receipt of notice of the entry of an order, decision, or opinion of the court.<sup>109</sup> Unless such a petition is filed, mandate will issue ten days after the opinion of the court is filed with the clerk.<sup>110</sup>

If the Court of Military Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If a rehearing is not ordered, the court will direct that the charges be dismissed.<sup>111</sup>

After the court has acted on a case, it may direct The Judge Advocate General to return the record to the board of review for further review in accordance with the decision of the court.<sup>112</sup> Otherwise, unless there is further action by the President or the Secretary of the Department,<sup>113</sup> the convening authority will take any necessary action to give effect to the decision of the court.<sup>114</sup>

### CONCLUSION

The procedural course of a trial by general court-martial is charted by the prosecution, and civilian counsel should therefore experience little difficulty with those formalities which are peculiar to military law. In addition, Appendix 8 of the Manual for Courts-Martial contains a detailed procedural guide which may be easily followed by counsel during the proceedings in open court. It should also be noted that although an accused person has retained civilian counsel he is entitled without cost to the

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108. *Id.*, Rule 44.

109. *Id.*, Rule 46.

110. *Id.*, Rule 55.

111. U.C.M.J., Art. 67 (e). However, if the convening authority finds a rehearing impracticable, he may dismiss the charges. U.C.M.J., Art. 67(f).

112. U.C.M.J., Art. 67(f).

113. If the sentence extends to death or involves a general or flag officer, it must be approved by the President before it can be ordered into execution. U.C.M.J., Art. 71(a). If the sentence extends to the dismissal of an officer (other than a general or flag officer), cadet, or midshipman, it may not be ordered executed until approved by the Secretary of the Department concerned. U.C.M.J., Art. 71(b).

114. U.C.M.J., Art. 67(f).

services of the appointed defense counsel and assistant defense counsel, if any, as his associate counsel, unless they are excused by him. The appointed defense counsel will be legally qualified and ordinarily will have had prior court-martial experience. It is therefore often advisable to retain him as associate counsel.

In closing, it may be said with assurance that the military authorities will extend every courtesy to the civilian lawyer and will render such assistance as they can to enable him to discharge properly his responsibilities to the accused. They, too, have an interest in the accused and are anxious only in seeing that justice is done.