# The Defense Function:
# The Role of the U.S. Army Trial Defense Service

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## Introduction

Military defense counsel have a unique role. Unlike their civilian counterparts, they are subject not only to the ethical rules applicable to all attorneys,[1] but also to military law and regulations.[2] They are ultimately supervised by the very same agency responsible for the prosecution of military crimes.[3] In addition, they represent clients around the world and are routinely deployed to remote locations such as Bosnia or Kosovo.

In 1980 the Army created the U.S. Army Trial Defense Service (TDS) to deal with some of these unique challenges.[4] The TDS is an independent "stove-pipe" organization made up completely of defense counsel.[5] It has a separate technical chain of supervision to ensure that a defense counsel stationed at a particular installation will not be evaluated or disciplined by the local commander responsible for prosecution of military crimes.[6] The TDS also ensures that counsel receive adequate training and support so they can properly represent their clients.[7]

This article discusses the unique issues facing TDS counsel. It describes TDS management, including reporting requirements and training. It explains the procedures for counseling clients pending nonjudicial punishment, administrative separation, and similar adverse actions. Finally, it discusses representation of soldiers at courts-martial. Although this article focuses on the Army TDS, much of the discussion is also applicable to military defense attorneys in other services.[8]

## Mission and History of the U.S. Army Trial Defense Service

The mission of the TDS is to provide free defense lawyers to soldiers whenever a military defense counsel is required or authorized.[9] It provides defense counsel to soldiers pending court-martial, nonjudicial punishment, administrative separation, and similar adverse action. It also provides defense counsel to soldiers suspected of an offense who have requested counsel.[10]

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1. All judge advocates are required to be admitted to, and to remain members in good standing of, the bar of the highest court of a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a Federal Court. U.S. DEP'T OF ARMY, REG. 27-1, LEGAL SERVICES: JUDGE ADVOCATE LEGAL SERVICES, para. 13.2(h) (3 Feb. 1995). This is a statutory requirement for any judge advocate detailed as a trial or defense counsel for a general court-martial. UCMJ art. 27(b)(1) (2000) As such, they are subject to the ethical rules of their respective state bars. U.S. DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, para. 8.5(f) (1 May 1992) [hereinafter AR 27-26] (stating that Army lawyers are subject to both the rules contained in *AR 27-26* as well as the rules promulgated by their licensing authority or authorities). *Army Regulation 27-26* contains rules governing the ethical conduct of Army lawyers, military and civilian, and non-government lawyers appearing before Army tribunals under the *Manual for Courts-Martial*. *Id*. para. 1.

2. AR 27-26, *supra* note 1, para. 13.2(h). Army Trial Defense Service counsel are also required to meet Army standards of weight and personal appearance and to comply with local personnel policies, including local duty hours, weapons qualification, physical and military training and Army Physical Fitness Test standards. U.S. ARMY TRIAL DEFENSE SERVICE STANDARD OPERATING PROCEDURES, paras. 2-7, 2-8 (1 Mar. 2001) [hereinafter TDS SOP]; U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, paras. 2-7, 2-8 (24 June 1996) [hereinafter AR 27-10].

3. The Army is ultimately responsible both for the supervision and evaluation of all Army defense counsel and the prosecution of courts-martial. *See generally* AR 27-10, *supra* note 2 chs. 5, 6.

4. Memorandum, The Judge Advocate General, United States Army, DAJA-ZA, to Chief of Staff, Army, subject: Evaluation of U.S. Army Trial Defense Service - Decision Memorandum (20 May 1980) (copy on file with Headquarters, U.S. Army Trial Defense Service) [hereinafter Decision Memorandum].

5. *See infra* notes 11-17 and accompanying text.

6. *See infra* notes 19-30 and accompanying text.

7. *See infra* notes 15-16 and accompanying text.

8. The views expressed in this article are solely those of the author and are not official positions of the TDS or the Army.

9. AR 27-10, *supra* note 2, para. 6-1, states that the mission of TDS is "to provide specified defense counsel services for Army personnel, whenever required by law or regulation and authorized by TJAG or TJAG's designee."

The TDS evolved into its current form as a separate defense organization from 1974 to 1980.[11] In 1974, The Judge Advocate General encouraged local staff judge advocates to designate "senior defense counsel" to advise and assist other defense counsel within their commands.[12] In 1975, the Army began to require defense counsel to be rated by these senior defense counsel.[13] In 1978, a test program was initiated in the Training and Doctrine Command (TRADOC) designed to make defense counsel more independent by placing all defense counsel under a separate rating chain.[14] This test program was expanded several times during the next two years.[15] During this time, concerns persisted about the ability of defense counsel to exercise independent judgment.[16] Finally, on 7 November 1980, the U.S. Army TDS was permanently established.[17] A major goal of this new organization was to eliminate the inherent conflict in having defense counsel and prosecutors supervised by the same individual.[18]

The TDS falls under the U.S. Army Legal Services Agency (USALSA), a field-operating agency of The Judge Advocate General.[19] The TDS currently has 134 assigned defense counsel working in fifty-four offices throughout the world.[20] Each trial defense counsel is supervised by a senior defense counsel, who is in turn supervised by one of eight regional defense counsel. The Chief of the TDS supervises these regional defense counsel.[21] The USALSA provides limited funds for the TDS counsel.[22] For example, USALSA funds TDS counsel travel for training and attendance at Article 32 and court-martial hearings.[23] All other funding, including money to travel to investigate cases, counsel soldiers concerning non-judicial punishment or adverse administrative actions, and represent soldiers at administrative hearings, is funded by the local command through the local staff judge advocate's office.[24] The TDS is responsible for its own training[25] and determines which counsel to assign or "detail" to individual soldiers needing defense services.[26]

To help show soldiers that the TDS attorneys are independent, these officers are not required to wear the shoulder patch or insignia of the local organization or command.[27] Instead, TDS counsel wear a special shoulder patch consisting of a blue star on a white background with a red border.[28] Originally

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10. TDS SOP, *supra* note 2, para. 1-5.

11. For a discussion of the history and development of TDS, see Lieutenant Colonel John R. Howell, *TDS: The Establishment of the U.S. Army Trial Defense Service*, 100 MIL. L. REV. 4 (1983) and *Fact Sheet, U.S. Army Trial Defense Service*, ARMY LAW., Jan. 1981, at 27 [hereinafter *Fact Sheet*].

12. Letter, Office of the Judge Advocate General, United States Army, DAJA-MJ 1973/12018, to Staff Judge Advocates, subject: Providing Adequate Defense Services - The Defense Counsel (24 Aug. 1973), *excerpt reprinted in* ARMY LAW., Feb. 1974, at 12 (titled *Inter-Corps Relationships for JAG Defense Counsel*).

13. Letter, Office of the Judge Advocate General, United States Army, DAJA-ZA, to All Staff Judge Advocates, subject: Field Defense Services (7 Sept. 1976) (App. B, Letter from Major General Wilton B. Persons, Jr., to all Staff Judge Advocates on training and evaluation of defense counsel (23 July 1975)), *reprinted in* ARMY LAW., Oct. 1976, at 1, 6.

14. *See The U.S. Army Trial Defense Service Begins One-Year Test*, ARMY LAW., June 1978, at 3, *reprinted in* ARMY LAW., Oct. 2000, at 1 (reprinting text of letter from Major General Wilton B. Persons, Jr. to all Staff Judge Advocates involved in the TRADOC test of TDS).

15. *See* Howell, *supra* note 11, at 28-45.

16. *See* U.S. Army Trial Defense Service, *Exercise of Independent Professional Judgment by Defense Counsel*, ARMY LAW., Sept. 1979, at 39.

17. Decision Memorandum, *supra* note 3; s*ee also* Howell, *supra* note 11, at 45; *Fact Sheet*, *supra*, note 11, at 27.

18. *Fact Sheet*, *supra*, note 11, at 27. *See also* Howell, *supra* note 11, at 30-32.

19. AR 27-10, *supra* note 2, para. 6-3.

20. U.S. Army Trial Defense Service Homepage, *at* www.jagcnet.army.mil/USATDS (Locations) [hereinafter TDS Web site].

21. AR 27-10, *supra* note 2, para. 6-3.

22. *Id.* para. 6-5a.

23. *Id.*

24. *Id.* paras. 6-4, 6-5b.

25. *Id.* para. 6-6.

26. *Id.* para. 6-9.

27. *Id.* para. 6-8b.

28. To view the patch, see TDS Web site, *supra* note 20 (Mission).

designed in 1941 for use by War Department Overhead personnel, the patch is currently worn by soldiers assigned to support the Department of the Army Staff.[29] The crest has its origins in the Coat of Arms of the United States and contains the colors of the United States, red, white, and blue.[30]

## Management

Because the TDS is such a large organization, it has a comprehensive management scheme. Most management guidance is contained in the TDS Standard Operating Procedures (SOP).[31] This SOP provides a wealth of information; each TDS attorney should have ready access to a copy.

### *Assigning TDS Counsel Cases*

Local commanders and prosecutors refer most clients to the TDS upon the initiation of nonjudicial punishment proceedings,[32] the preferral of court-martial charges,[33] or the taking of other adverse action against soldiers.[34] Military law enforcement agencies also refer clients to the TDS when soldiers suspected of an offense invoke their rights to counsel. Some soldiers refer themselves to the TDS when they desire suspect counseling.[35] The senior defense counsel ordinarily decides which TDS attorney will represent each client.[36]

Soldiers pending adverse action can obtain a civilian attorney, either in lieu of or in addition to their TDS attorney. However, since civilian defense attorneys are not provided at government expense, the soldier must arrange for any compensation for civilian defense counsel.[37] Some clients hire civilian counsel because they believe such attorneys are more experienced than TDS lawyers.[38] This is not the case. The TDS counsel are well-trained and experienced and civilian attorneys may be unfamiliar with military criminal law. Some clients hire civilian counsel because they believe TDS counsel will be inhibited in their representation by the military rank structure.[39] To reduce this incorrect perception, the TDS gives its attorneys broad latitude in representing soldiers.

Soldiers pending court-martial can ask to be represented by a specific military lawyer; such an attorney is called an Individual Military Counsel (IMC).[40] Such requests are generally granted if the attorney is reasonably available.[41] Certain attorneys, such as prosecutors and staff judge advocates, may not serve as IMC because this would conflict with their principal duties.[42] In addition, attorneys stationed in distant locations generally may not serve as IMC because they are not reasonably available.[43] Exceptions to these limitations can be granted if the soldier has already formed an attorney-client relationship with the requested lawyer.[44]

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29. *Id.*

30. *Id.*

31. TDS SOP, *supra* note 2.

32. *See* AR 27-10, *supra* note 2, para. 3-18c.

33. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 502(d)(6), 506(a) (2000) [hereinafter MCM].

34. *See* TDS SOP, *supra* note 2, para. 1-5.

35. *See id.*

36. *Id.* para. 3-7.

37. MCM, *supra* note 33, R.C.M. 506(a).

38. Law Firm of Shaw, Bransford,Veilluex & Roth, *Legally Speaking* (Jan. 6, 2000), *at* http://www.militaryreport.com/page56.htm.

39. *Id.*

40. MCM, *supra*, note 33, R.C.M. 506(b); AR 27-10, *supra* note 2, para. 6-10.

41. MCM, *supra*, note 33, R.C.M. 506(b); AR 27-10, *supra* note 2, para. 6-10.

42. The following attorneys are not considered reasonably available to serve as IMC: (1) general officers, (2) military judges, (3) trial counsel, (4) appellate counsel, (5) principal legal advisors to general court-martial commands, (6) principal assistants to such advisors, (7) instructors and students at service schools, (8) students at colleges and universities, and (9) the staff of the Judge Advocate General. MCM, *supra* note 33, R.C.M. 506(b)(1).

43. The following attorneys are not considered reasonably available to serve as IMC: (1) attorneys in Headquarters, TDS; (2) TDS counsel outside the region where the trial or investigation is being held, unless they are within 100 miles of the trial or investigation; and (3) counsel in Panama, Hawaii, and Alaska, for trials and investigations held outside these areas. AR 27-10, *supra* note 2, para. 6-10.

44. *Id.* para. 5-7e.

*Duties of TDS Counsel*

The TDS SOP breaks down TDS attorneys' duties into three priorities. Priority I duties are those that TDS attorneys generally must perform. They include representing soldiers at general and special courts-martial and pretrial investigations under Article 32,[45] and advising pretrial confinees.[46] Priority II duties are those primarily performed by TDS attorneys, unless TDS does not have sufficient resources. Priority II duties include counseling soldiers pending formal nonjudicial punishment under Article 15,[47] counseling soldiers suspected of an offense,[48] representing soldiers at lineups, counseling soldiers regarding summary courts-martial, and representing soldiers recommended for administrative separation.[49] Priority II duties also include representing inmates at sentence vacation hearings and disciplinary and adjustment boards, and counseling soldiers on administrative actions based on alleged violations of the Uniform Code of Military Justice (UCMJ)[50] or related to UCMJ proceedings.[51] If the TDS does not have the resources to perform priority II duties, attorneys working for the local staff judge advocate must perform them.[52] Priority III duties are those legal services not listed above which are usually performed by attorneys in the local staff judge advocate's office, but which TDS attorneys perform pursuant to an agreement with the staff judge advocate.[53]

*Local SOPs and Agreements*

Each TDS office should have a local SOP. This SOP should cover issues such as nonjudicial punishment and administrative separation counseling schedules, office hours, professional development, leave and pass policies, and physical and soldier training. In addition, each TDS office should have a memorandum of understanding with the local staff judge advocate dealing with Priority III duties.[54] The memorandum of understanding should have an "escape clause" which permits defense counsel to decline to perform agreed duties if they do not have adequate resources.

*Obtaining Resources*

Each TDS office needs sufficient resources to perform the defense mission. The local commander of installations selected as duty stations for TDS are responsible for providing administrative support, to include office space, furniture, computers, telephones, fax machines, office supplies, and research materials.[55] In addition, the local command is responsible for providing enlisted or civilian clerical support to the TDS.[56] In most cases, each TDS branch or field office is provided with a legal specialist or noncommissioned officer (NCO). The TDS lawyers should let the local staff judge advocate know if they need additional personnel or equipment. Late spring and early summer is the best time to request new furniture or computer equipment, since this is when staff judge advocates request end of fiscal-year funds.

Good research materials are critical to the TDS mission. One of the best resources available is the TDS Web site.[57] All TDS counsel have access to this site. It contains a wealth of information including a discussion forum and a document library. The discussion forum contains messages from TDS counsel around the world, to include questions and answers on topics ranging from new case law to defense experts. The document library contains the TDS newsletter, called *The Defender*, and sample documents covering a myriad of topics such as Article 15 counseling and court-martial discovery

45. UCMJ art. 32 (2000).

46. TDS SOP, *supra* note 2, para.1-5a.

47. UCMJ art. 15 (2000).

48. This includes counseling soldiers who's exercising their right to counsel pursuant to Article 31 of the UCMJ or the Fifth Amendment to the Constitution or when the exercise of military jurisdiction is possible. *See* UCMJ art. 31 (2000); U.S. CONST. amend. V; TDS SOP, *supra* note 2, para. 1-5.

49. TDS SOP, *supra* note 2, para. 1-5b.

50. UCMJ arts. 1-146 (2000).

51. TDS SOP, *supra* note 2, para. 1-5b.

52. *Id.*

53. *Id.* para. 1-5c.

54. AR 27-10, *supra* note 2, para. 6-8a.

55. *Id.* para. 6-4g.

56. *Id.* para. 6-4h.

57. TDS Web site, *supra* note 20

requests. The Judge Advocate General's School's Web site[58] also contains valuable information, including many of the course outlines prepared by the school, and *The Advocacy Trainer*, an advocacy training tool for supervisors.[59]

A number of books are available to assist defense counsel in their research. All TDS counsel should have access to the *West's Military Justice Reporter*, which contains all reported cases from military criminal courts, and the *West's Military Justice Digest*, which provides a digest of these cases. Another valuable resource that many counsel bring into the courtroom is the *Military Rules of Evidence Manual*.[60] This book contains a reprint of the Military Rules of Evidence (MRE), editorial comments, the drafter's analysis to the rules, and annotated cases relating to each rule. A broader treatment of military law is found in *Military Criminal Justice, Practice and Procedure*.[61] This book provides a comprehensive analysis of the military criminal justice system, including its historical origins, military offenses, nonjudicial punishment, jurisdiction, pretrial restraint, preferral and referral of charges, Article 32 investigations, plea bargains, discovery, motions and trial procedures, sentencing, and review of courts-martial. A more comprehensive review of military criminal justice is contained in the three-volume set *Court-Martial Procedure*.[62] *Military Evidentiary Foundations*[63] provides an excellent analysis of the process for admitting evidence, along with sample foundational questions. *Military Criminal Procedure Forms*[64] contains sample forms, including pretrial checklists, nonjudicial punishment appeals, pretrial agreements, discovery requests, requests for sanity boards, motions, requests for instructions, and post-trial documents. *Trial Techniques*[65] provides a wealth of information on trial advocacy. Although not written specifically for military or criminal practitioners, it is a superb source of advocacy tips. The *Diagnostic and Statistical Manual of Mental Disorders, 4th Edition (DSM IV)*,[66] provides a description of mental illness and psychiatric terms, which is particularly valuable when the mental status of the accused is in issue.

*Ethics*

The TDS attorneys are subject to the same ethical standards applicable to all military attorneys.[67] Because of their unique position as military defense attorneys, there are several ethical pitfalls that TDS counsel should be aware of. Defense attorneys must consult with supervisors whenever an ethical problem arises.[68]

The TDS counsel must maintain the confidentiality of the information they obtain during the course of representing clients. This ethical rule is broader than the attorney-client privilege contained in the MRE; it extends not only to information gained directly from the client, but also to any other information related to the representation, including information obtained from other people.[69] As an exception to this rule, defense attorneys are required to reveal information relating to clients' commission of future crimes that will result in imminent death, substantial bodily harm, or significant impairment of national security or military readiness.[70] Determining what constitutes significant impairment of national security or military readiness can be difficult. Defense counsel must disclose a client's plans to reveal the classified location of a weapons site if this would likely lead to theft of the weapons; defense counsel are not required to disclose the location of a client who is absent without leave.[71] The TDS legal NCOs and specialists must also maintain client confidences.[72] The TDS attorneys must ensure that legal NCOs and specialists know the rules and come to them for advice.

58. *Available at* http://www.jagcnet.army.mil/TJAGSA [hereinafter TJAGSA Web site].

59. Faculty, The Judge Advocate General's School, *The Advocacy Trainer, A Manual for Supervisors*, ARMY LAW., Dec. 1999, at 50.

60. STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL (4th ed. 1997).

61. DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE, PRACTICE AND PROCEDURE (5th ed. 1999).

62. FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE (2d ed. 1999).

63. DAVID A. SCHLUETER ET AL., MILITARY EVIDENTIARY FOUNDATIONS (1994).

64. DAVID A. SCHLUETER ET AL., MILITARY CRIMINAL PROCEDURE FORMS (1997).

65. THOMAS A. MAUET, TRIAL TECHNIQUES (5th ed. 2000).

66. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1991).

67. AR 27-26, *supra* note 1, paras. 1, 7, Glossary.

68. *See id.* R. 5.2 and cmt.

69. *Compare id.* R. 1.6(a) ("A lawyer shall not reveal information relating to the representation . . . ."), *with* MCM, *supra* note 33, MIL. R. EVID. 502 ("A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications . . . .").

70. AR 27-26, *supra* note 1, R. 1.6(b). *Cf.* MCM, *supra* note 33, MIL. R. EVID. 502(d)(1) (lawyer client privilege does not apply if the communication "clearly contemplated the commission of a fraud or crime . . . .").

Client perjury raises an ethical dilemma for defense counsel. If a client admits guilt and the defense counsel's own investigation establishes the admissions are true, but the client insists on testifying falsely at trial, the counsel must take several actions.[73] First, counsel should advise the client against taking the stand to testify falsely.[74] If the client still insists on testifying falsely, the counsel should seek to withdraw.[75] If this is not permitted (which is often the case) or the situation arises during trial, the counsel must not aid in the perjury or use the perjured testimony. This means that the counsel must not ask the client questions to elicit the perjury; the client will have to testify in a narrative fashion. It also means counsel may not mention the perjury during argument.[76] If the client gives perjured testimony, the defense counsel must disclose this to the military judge.[77]

The TDS attorneys should not become involved in handling client funds.[78] If a client wants to hire a defense expert, the client should pay the expert directly. The TDS attorneys who are required to handle client funds must get approval from their senior defense counsel and make a full accounting of the funds. The funds must never be commingled with the attorney's own funds.[79]

Occasionally, clients will want to turn over illegal drugs or evidence of a crime to a defense attorney. The attorney must avoid taking possession of evidence, if at all possible. If a client offers evidence to a defense counsel, the counsel should refuse to take the evidence, and must not advise the client to destroy or conceal it.[80] Defense attorneys who come into possession of contraband evidence (for example, a client leaves illegal drugs in the office) must turn the evidence over to law enforcement authorities.[81]

One of the most difficult parts of a TDS counsel's job is dealing with the media. The TDS counsel are not permitted to make public statements without first discussing the matter with their regional defense counsel and Office of the Chief, TDS.[82] The Army *Rules of Professional Conduct for Lawyers* prohibit Army attorneys from making extrajudical statements for dissemination to the media if they know or reasonably should know that it will have a substantial likelihood of materially prejudicing a proceeding.[83] The rules explain that prejudice is likely to occur if the statements (made by either prosecutors or defense attorneys) relate to the character of suspects or witnesses, possible guilty pleas, contents of confessions or refusal to make statements by an accused, examination or test results, inadmissible evidence, or opinions of guilt or innocence.[84] Army attorneys may comment on the general nature of a claim or defense, the scope of the investigation, or the scheduling of steps in litigation, and request assistance in obtaining evidence.[85] Defense attorneys should have a specific purpose for discussions with the media, such as asking for help finding exculpatory evidence. Defense counsel who talk to the media should realize they may focus attention on the client and make it more likely that charges will be preferred or referred and less likely that a pretrial agreement will be approved. Media attention might also prejudice potential members or character witnesses against the client.[86]

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71. AR 27-26, *supra* note 1, R. 1.6, cmt.

72. *Id.* R. 5.3(b) ("A lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer . . . .").

73. *Id.* R. 3.3.

74. *Id.* R. 3.3 cmt.

75. *Id.* While seeking to withdraw, the defense counsel should not unnecessarily reveal any attorney-client confidences. Counsel should explain that irreconcilable differences with the client have developed rather than volunteering information about the client's intent to give perjured testimony. *Id.* R. 1.6.

76. *Id.* R. 3.3 cmt.

77. *Id.*

78. TDS SOP, *supra* note 2, paras. 1-11, 1-12.

79. AR 27-26, *supra* note 1, R. 1.15.

80. Defense counsel may not accept evidence offered by clients and may not counsel clients to destroy or hide evidence. *Id.* R. 3.4(a) and cmt.

81. *Id.*

82. TDS SOP, *supra* note 2, para. 1-9.

83. AR 27-26, *supra* note 1, R. 3.6(a).

84. *Id.* R. 3.6(b).

85. *Id.* R. 3.6(c).

Cases involving multiple suspects raise conflict of interest problems for TDS counsel. When counsel learn of such cases, they should immediately notify their senior defense counsel so each suspect or accused soldier can be provided a conflict-free TDS counsel. Counsel should attempt to ascertain the total number of suspects and the probable disposition of each case so the senior defense counsel can make intelligent choices when detailing counsel. Senior defense counsel should avoid detailing themselves to multiple accused cases to avoid conflicts of interest with the trial defense counsel who work for them.[87]

*Providing Advice to Reservists*

Reserve component defense attorneys usually provide legal advice to reserve soldiers pending disciplinary or other adverse action. For example, reserve component attorneys will generally advise reserve soldiers pending nonjudicial punishment and summary courts-martial. However, when a reserve component defense counsel is not reasonably available, active duty TDS counsel can counsel reserve soldiers as an exception to policy.[88] In addition, when an active duty commander initiates disciplinary action against a reserve soldier, active duty TDS counsel should provide the necessary defense services. Since only active duty commanders can refer charges against reserve soldiers to general or special courts-martial, active duty TDS counsel ordinarily provide representation at these hearings.[89]

If a reserve soldier seeks advice from an active duty TDS attorney, the attorney should contact his supervisor to determine if representation is authorized. The TDS attorney should ascertain the soldier's duty status, since the supervisor will want to know whether the soldier is on active duty or subject to the Uniform Code of Military Justice before deciding whether to permit representation. The soldier's orders will indicate if he is on Active Duty for Training (usually a period of greater than two weeks), Annual Training (usually a two-week period), Inactive Duty Training (usually a weekend drill), or some other status. The orders will also indicate if the soldier is on federal duty status under Title 10 of the United States Code. United States Army Reserve personnel are always on federal duty status when performing reserve duty. Army National Guard personnel are on federal duty status only if properly called to federal service in the Army National Guard of the United States (ARNGUS) or some other federal status.[90] Otherwise, National Guard personnel are on state duty status under Title 32 of the United States Code and are not subject to the Uniform Code of Military Justice[91] (although they may be subject to a state Uniform Code of Military Justice).[92]

When active duty TDS counsel provide advice to a reserve soldier, they should familiarize themselves with the special rules applicable to the reserve components. There are separate regulations for the administrative separation of reserve officers[93] and enlisted personnel;[94] the separation authority and processing of these actions differ from active duty separations.

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86. *See* Major Jack B. Patrick, *The Case of the Famous Client: Effects of the Media on Ethics, Influence, and Fair Trials*, ARMY LAW., May 1988, at 24.

87. When a senior defense counsel represents a client in a multiple accused case and a trial defense counsel who works for him or her also represents a client in the case, a conflict of interest may arise. The trial defense counsel, who is rated by the senior defense counsel, may be materially limited in his or her representation because of his or her interest in a favorable rating. In such cases, one of the following alternatives must be chosen: (1) the senior defense counsel may undertake representation of a client if the trial defense counsel determines, based on the specifics of the case, that his or her own interests will not adversely affect representation of the client and the client consents in writing to the potential conflict; or (2) the senior defense counsel will decline to represent any client involved in the case. TDS SOP, *supra* note 2, para 3-3e.

88. *Id.* para. 6-4. Reserve component commanders should contact their Reserve component staff judge advocate or legal advisor for assistance in obtaining defense services. *Id.* para. 6-4b.

89. *Id.* para. 6-4d; AR 27-10, *supra* note 2, para. 21-8a. For other disciplinary actions, reserve component defense counsel will provide the representation if the commander who will decide the case is a reserve component commander. When the decision maker is the commander of an active duty unit or the governing regulation is an active component regulation, active duty TDS counsel should provide the defense services. When the case involves both active and reserve component features, both reserve and active duty defense personnel should collaborate on the case. TDS SOP, *supra* note 2, para. 6-1.

90. For a further discussion of the different statuses of members of the National Guard, see Lieutenant Colonel Steven B. Rich, *The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of "In Federal Service,"* ARMY LAW., June 1994, at 35-40. *See also* U.S. DEP'T OF ARMY, PAM. 27-21, LEGAL SERVICES: ADMINISTRATIVE AND CIVIL LAW HANDBOOK, para. 6-4 (15 Mar. 1992).

91. UCMJ art. 2(a)(3).

92. Many states have their own equivalents of the Uniform Code of Military Justice that apply to National Guard soldiers in a state duty status. *See, e.g.*, MINN. STAT. § 192A (1999); CAL. MIL. & VET. CODE § 560 (Deering 1999); N.M. STAT. ANN. § 20-12-2 (2000). The punishments authorized under these codes are often limited. *See, e.g.*, N.M. STAT. ANN. § 20-12-6 (stating that punishment at a court-martial shall not exceed that prescribed for a misdemeanor).

93. Separation of reserve component officers is covered by U.S. DEP'T OF ARMY, REG. 135-175, ARMY NATIONAL GUARD AND ARMY RESERVE: SEPARATION OF OFFICER PERSONNEL (1 May 1971). Separation of active duty officers is covered by U.S. DEP'T OF ARMY, REG. 635-100, PERSONNEL SEPARATIONS: OFFICER PERSONNEL (1 May 1979).

94. Separation of reserve component enlisted personnel is covered by U.S. DEP'T OF ARMY, REG. 135-178, ARMY NATIONAL GUARD AND ARMY RESERVE: SEPARATION OF ENLISTED PERSONNEL (1 Sept. 1994). Separation of active duty enlisted personnel is covered by U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS: ENLISTED PERSONNEL (1 Nov. 2000) [hereinafter AR 635-200].

Special rules also apply to nonjudicial punishment of reservists.[95]

*Reporting Requirements*

The TDS has a number of reporting requirements. Senior defense counsel must submit monthly statistical reports containing the number of clients counseled, courts-martial completed, and hours worked by their defense counsel.[96] Regional defense counsel and TDS Headquarters use these reports to manage manpower. Senior defense counsel and regional defense counsel also submit quarterly narrative reports discussing significant activities within their offices, such as the arrival of new defense counsel, significant cases tried, and any problems they are having obtaining administrative support.[97]

When the result in a case is particularly favorable to the defense, the TDS counsel involved should submit a Significant Results Report describing the factors that led to the result. Such reports are intended to cover a broad range of favorable results that demonstrate outstanding performance by defense counsel. This includes acquittals, lenient sentences, pretrial dismissals, or other favorable results at a court-martial. This also includes favorable results at an administrative separation board or similar hearing.[98]

Any significant incident must be reported immediately to TDS Headquarters. This includes misconduct by TDS attorneys, misconduct by senior officers (lieutenant colonel and above), potential capital cases, and incidents that may receive media coverage. These events should be reported to TDS Headquarters through the senior defense counsel and regional defense counsel. [99]

*Training*

Training TDS counsel is critical. Most training is conducted on-the-job. New defense counsel usually serve as "second-chair" or assistant defense counsel to a more experienced defense counsel for their first few trials before representing soldiers at courts-martial alone. In many regions, this "second-chair" training continues throughout a TDS counsel's career; even experienced counsel are assigned to second chair other counsel during complex or serious contested cases.

Senior defense counsel that supervise other trial defense counsel should conduct local training sessions. This training should be conducted at least monthly, if possible. This training often includes advocacy drills and updates on the law. Except in Korea, each regional defense counsel also conducts region-wide training biannually. These training sessions are generally week-long conferences. Often, two or more regions combine to conduct this training.

In addition to local training, there are a number of formal training opportunities for defense counsel. The Army Judge Advocate General's School in Charlottesville, Virginia, offers a number of courses for military justice practitioners. New defense counsel attend the Criminal Law Advocacy Course, currently held twice a year in the spring and fall. This two-week course includes intensive advocacy training and classroom instruction on evidence and trial topics. Senior defense counsel should attend the Military Justice Managers' Course, currently offered in the summer. This provides instruction on the management issues faced by senior defense counsel. Senior defense counsel in the Continental United States generally attend the Criminal Law New Developments course, currently offered in the fall, which provides an update on military justice case-law during the last year.[100] At least one TDS counsel from each area should attend a capital litigation course. These courses are offered by a number of agencies[101] and are a must for counsel assigned to represent a soldier in a capital case.[102] Many other government and civilian training opportunities

95. MCM, *supra* note 33, pt. V, para. 5e, provides that when nonjudicial punishment amounting to deprivation of liberty is imposed on reserve component personnel during a period of inactive duty training, punishment may only be served during the normal period of inactive duty training or subsequent periods of active duty. Unserved punishments may be carried over to subsequent periods of duty. *Id.* Commanders may not reduce Active Guard Reserve (AGR) soldiers in the grade of Staff Sergeant or higher through nonjudicial punishment. U.S. DEP'T OF ARMY, REG. 140-158, ENLISTED PERSONNEL CLASSIFICATION, PROMOTION, AND REDUCTION, para. 7-9a (1 July 1990).

96. TDS SOP, *supra* note 2, paras. 4-1 to 4-4.

97. *Id.* para. 4-5.

98. *Id.* para. 4-6.

99. TDS SOP, *supra* note 2, para. 1-8; U.S. ARMY TRIAL DEFENSE SERVICE REGIONAL DEFENSE COUNSEL HANDBOOK, para. 6-e (1 May 1997).

100. Information on registering for these courses can be found on the TJAGSA Web site, *supra* note 58, or in the CLE News, Course Schedule section of the *The Army Lawyer*.

101. The Naval Justice School offers such a course in the summer. Information on the course can be obtained from the Naval Justice School at 360 Elliot Street, Newport, Rhode Island 02841-1523, or through the school's Web site, http://www.njs.jag.navy.mil. The National Legal Aid and Defender Association also offers such courses; information can be obtained from their Web site at http://www.nlada.org.

exist. The Department of Justice offers a number of criminal law and advocacy courses at the National Advocacy Center in Columbia, South Carolina. Counsel must apply for attendance at these; the National Advocacy Center Web site contains information on the courses available and the application process.[103] The National Institute of Trial Advocacy offers a number of courses on advocacy and critiquing.[104] Many other federal, state, and local agencies and bar associations also offer excellent training on criminal law topics. Counsel should aggressively seek out these training opportunities.

### Client Counseling

Client counseling is the largest part of the TDS mission. The TDS legal NCOs and specialists play a critical role in this area. They set up appointments, screen clients, provide initial information, and ensure that counseling is conducted efficiently and effectively. The TDS legal NCOs and specialists must ensure clients complete a client card or similar document recording their name, rank, and unit, as well as the name of the attorney providing advice. These cards must be properly filed so TDS attorneys can identify the soldiers they have advised and avoid conflicts of interest if a co-accused later seeks counseling for the same matter.[105] The TDS legal NCOs and specialists also keep a log of the number of soldiers counseled by each attorney so this information can be included in the senior defense counsel's monthly statistical report.[106]

#### *Nonjudicial Punishment Counseling*

All soldiers pending formal Article 15[107] proceedings are entitled to consult with an attorney before punishment can be imposed.[108] Most soldiers rely on the TDS to provide this counseling.[109]

Every TDS office should have established procedures for providing Article 15 counseling. Smaller offices usually see Article 15 clients by appointment. Larger TDS offices may establish regular times each week when Article 15 counseling is provided on a walk-in basis. Some offices use a combination of appointments and regularly scheduled walk-in sessions to provide Article 15 counseling. Regardless of how Article 15 clients are seen, no soldier should have to wait more than five duty days to be counseled.[110]

When Article 15 clients report to the TDS office, the TDS legal NCO or specialist should ensure they have their DA Form 2627, Record of Proceedings Under Article 15,[111] and supporting paperwork. Either a TDS attorney or a legal NCO or specialist should counsel the clients concerning their procedural rights. This can be done individually, if only one or two clients are present, or in a group. The TDS has developed a videotape that provides all of the necessary information. Showing clients this videotape ensures that they are fully briefed on all of the procedural aspects of nonjudicial punishment. The TDS legal NCO or specialist should augment the videotape with information unique to the local command. It is important that clients understand their rights to "turn down" the Article 15 and demand trial by court-martial, to request an open or closed hearing, to request a spokesperson, to present evidence in extenuation and mitigation, and to appeal.[112] Clients should also understand the maximum punishment possible[113] and the filing options for the Article 15 record.[114]

During the briefing, clients should be given an Article 15 fact sheet, which provides a written explanation of procedural

102. *See* United States v. Murphy, 50 M.J. 4 (1998) (finding two defense counsel in capital case ineffective because, among other things,neither had attended capital litigation training).

103. Information can be found at http://www.usdoj.gov/usao/eousa/ole. If the Department of Justice approves the application, it will fund meals, lodging, and travel to and from the course.

104. Information on these courses can be found at the National Institute for Trial Advocacy Web site at http://www.nita.org.

105. *See* AR 27-26, *supra* note 1, R. 1.7, R. 1.9.

106. *See supra* notes 96-99 and accompanying text.

107. UCMJ art. 15 (2000).

108. AR 27-10, *supra* note 2, para. 3-18c.

109. TDS SOP, *supra* note 2, para. 1-5b(5).

110. This time period is based on the author's experience as a defense counsel and is not official TDS policy. Soldiers pending formal nonjudicial punishment have a reasonable time period to seek counsel, normally forty-eight hours. This time may be extended for good cause. AR 27-10, *supra* note 2, para. 3-18f(1). Unavailability of TDS counsel should constitute good cause to extend the forty-eight hour time period.

111. *Id.* fig. 3-2.

112. *Id.* para. 3-18.

113. For a breakdown of the authorized punishments see *id.* para. 3-19.

rights. These fact sheets provide soldiers with an excellent reminder of their rights after they leave the office.[115]

Either a TDS attorney or the TDS legal NCO or specialist should review the Article 15 form and supporting evidence of each client to ensure there are no legal problems. For example, if the evidence appears to be weak, this should be discussed with the client.[116]

Once the soldier has been briefed and the paperwork reviewed, the soldier should be given the opportunity to talk individually with a TDS attorney. During this counseling, the attorney needs to fully discuss the facts of the case to determine if the soldier should "turn-down" the Article 15 and demand trial by court-martial, or exercise any other rights. The attorney should explain that the burden of proof at the Article 15 hearing is proof beyond a reasonable doubt[117] and provide specific advice on the use of a spokesperson, witnesses, and documentary evidence at the Article 15 hearing.[118] The attorney may assist the client in preparing a statement for the commander's consideration during the hearing. Also, the defense attorney should encourage the soldier to appeal if the commander finds the soldier guilty. The soldier should be told that the TDS counsel can assist in preparing written matters in support of the appeal.

It may be necessary to counsel Article 15 clients in remote locations telephonically or by video-teleconference. Such counseling is not as effective as face-to-face counseling and should be conducted only when necessary. If such counseling is necessary, the TDS attorney must receive a complete copy of the Article 15 paperwork before counseling the soldier. The soldier should be shown the TDS Article 15 videotape and provided with an Article 15 fact-sheet. Such telephonic or video-teleconference counseling should address the same topics discussed with a client in face-to-face counseling.

Soldiers do not have the right to have a TDS attorney serve as their spokesperson at an Article 15 hearing.[119] However, a TDS attorney may attend the hearing if the commander imposing the Article 15 and the senior defense counsel agree.[120] A TDS attorney should be present if the commander imposing the Article 15 insists. A TDS attorney may also ask to attend the hearing if the soldier was initially pending trial by court-martial but was given the opportunity to have the matter resolved under Article 15 instead. Senior defense counsel should be cautious about permitting TDS attorneys to represent soldiers at these hearings, as other soldiers may complain when TDS attorneys do not represent them at their hearings.

Soldiers pending summarized Article 15 proceedings do not have the right to consult with a defense attorney.[121] This is because summarized Article 15s are filed locally[122] and the punishments are limited.[123] The senior defense counsel can permit such soldiers to receive counseling as an exception to policy.[124] The soldier's commander is not, however, required to delay the proceedings until the soldier consults with an attorney.[125]

*Administrative Separation Counseling and Representation*

Representing soldiers pending administrative separation is another important mission of the TDS. It is critical to provide these soldiers the best advice possible, since the administrative separation rules are complex and the consequences for the soldier are significant.

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114. For soldiers in the grade of E4 and below, the record of Article 15 punishment will be filed in the local nonjudicial punishment file and destroyed after two years or when the soldier is reassigned. For other soldiers the imposing commander decides whether the record will be filed in the re stricted or performance fiche of the Official Military Personnel File. *Id.* para. 3-17.

115. A sample fact sheet is contained on the TDS Web site, *supra* note 20.

116. The TDS legal NCO or specialist plays a critical role in providing Article 15 counseling. TDS attorneys must ensure that they are properly supervised and do not engage in the unauthorized practice of law. AR 27-26, *supra* note 1, R. 5.3, R.5.5. However, legal NCOs and specialists are typically extremely familiar with Article 15 procedures and particularly talented at spotting and pointing out evidentiary weaknesses to their supervising attorneys.

117. AR 27-10, *supra* note 2, para. 3-181.

118. *Id.* para. 3-18.

119. *Id.* para. 3-18h.

120. TDS SOP, *supra* note 2, para. 1-5d(2).

121. AR 27-10, *supra* note 2, para. 3-16b.

122. *Id.* para. 3-16f.

123. The punishments at a summarized Article 15 are limited to fourteen days extra duty, fourteen days restriction, and an admoniton or reprimand. *Id.* para. 3-16a.

124. TDS SOP, *supra* note 2, para 1-5d(2)(a).

125. AR 27-10, *supra* note 2, para. 3-16b.

There are three types of services TDS provides soldiers facing administrative separation. First, TDS attorneys provide initial advice to soldiers pending administrative separation. Second, if the soldier is entitled to an administrative separation board, TDS attorneys can represent the soldier at the board.[126] Finally, TDS attorneys provide advice on appeals to administrative separations and assist soldiers trying to upgrade their discharges.[127]

*Initial Separation Counseling*

The TDS counsel who provide initial separation counseling are known as "counsel for consultation."[128] Because there are so many different types of separations, most TDS offices provide this counseling on an individual basis. Soldiers can either be seen by appointment or on a walk-in basis (often at the same time walk-in Article 15 clients are seen). Soldiers should not have to wait more than five duty-days to be counseled.[129]

During the initial client screening, the TDS legal NCO or specialist should ensure that the soldier possesses a complete separation packet. After this, a TDS attorney or legal NCO or specialist should provide the soldier with an initial briefing on procedural rights. Most of these rights are listed in the notification memorandum signed by the soldier's commander, which is in the separation packet.[130]

Once the soldier understands the procedural rights, a TDS attorney must personally counsel the soldier and complete an election of rights.[131] The attorney should carefully review the separation packet. Soldiers with six or more years of active and reserve service and soldiers facing discharge under other than honorable conditions have a right to a board hearing.[132] The attorney should not rely on the commander's notification letter to determine if a soldier has a right to a board; these letters sometimes incorrectly state that soldiers do not have a right to a board when, in fact, they do.

If the soldier has a right to a board, the TDS attorney should explain the possibility of a conditional waiver. This is a waiver of the right to a board contingent upon approval of a more favorable discharge.[133] For example, a soldier facing the possibility of a discharge under other than honorable conditions, may want to waive the board contingent upon the approval of a more favorable general discharge.[134]

If the soldier is being separated for unsatisfactory performance or a pattern of misconduct, the attorney should look through the packet to see if the soldier was properly counseled before the separation was initiated. The separation packet must contain a written counseling statement explaining that the soldier can be separated if his or her poor performance or misconduct continues and what type of discharge may result.[135] If the required counseling is missing, the soldier can point out this deficiency to the separation authority or board. The attorney should also look to see if the soldier received a rehabilitative transfer to another unit before the separation was started.[136] If the soldier did not receive such a transfer, this requirement may be waived.[137] However, the soldier may argue that waiver is inappropriate because the soldier could have benefited from a "second chance" in another unit.

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126. TDS SOP, *supra* note 2, para. 1-5b(8).

127. *Id.* para. 1-5d(1)(b).

128. AR 635-200, *supra* note 94, para. 2-2a. Soldiers pending separation also have the right to consult with civilian counsel retained at no expense to the government. *Id.*

129. This time period is based on the author's experience as a defense counsel and is not official TDS policy. Soldiers have a reasonable period of time (no less than three days) to consult with counsel. *Id.* para. 2-2a. This time period can be extended for good cause. *Id.* para. 2-2g. The unavailability of TDS counsel should constitute good cause to extend the time period.

130. This is the memorandum used by the commander to notify soldiers that they are pending administrative separation. *See id.* figs 2-2, 2-4.

131. This is the endorsement soldiers pending separation send back to the commander to acknowledge receipt of the notification memorandum and to indicate what rights the soldiers will exercise. *See id.* fig. 2-4.

132. *Id.* para. 2-2d.

133. *Id.* para. 2-5b, fig. 2-3.

134. Soldiers pending administrative separation may receive one of three types of discharges: (1) an honorable discharge, which is the best discharge possible; (2) a general discharge, which is a separation under-honorable-conditions and is issued to soldiers whose record, while satisfactory, is not sufficiently meritorious to warrant an honorable discharge; and (3) a discharge under other than honorable conditions, which is generally issued for misconduct and usually results in denial of veteran's benefits. Soldiers issued the latter type of discharge generally have a right to an administrative separation board. *Id.* para. 3-7.

135. The counseling must be performed prior to initiation of separation action. *Id.* para. 1-18b. Such counseling is also required before a soldier can be separated for parenthood, personality disorder, entry level performance and conduct and minor disciplinary infractions. *Id.* para. 1-18a.

136. *Id.* para. 1-18c. The rehabilitative transfer must generally be between at least battalion sized units and permit the soldier at least two months of duty in each unit. *Id.* para. 1-18c(2).

When soldiers do not have the right to a board, the TDS attorney should explain their right to submit matters to the separation authority.[138] These matters may convince the separation authority not to discharge the soldier or to issue the soldier a more favorable discharge. The TDS attorney can help the soldier prepare these matters.

During the counseling the soldier should be given a separation fact sheet. These help soldiers prepare their cases.[139]

*Separation Boards*

Soldiers are entitled to representation by a military defense counsel at administrative separation boards.[140] These attorneys are called "counsel for representation."[141]

Administrative separation boards are excellent advocacy opportunities for TDS counsel. The MRE do not apply at these hearings.[142] As a result, TDS counsel can be creative in presenting evidence and making arguments to the board.

To prepare for the board TDS counsel should interview everyone mentioned in the separation packet, the client's chain of command, fellow soldiers, friends, and family. Counsel should ask the recorder to secure the attendance of favorable witnesses.[143] Distant witnesses can testify by telephone or video-teleconference.[144]

Counsel should also develop a packet of documentary evidence to present at the board. Hearsay is admissible, including written statements from supervisors and other soldiers, awards, certificates, memoranda of appreciation, and letters from family and friends.[145] Counsel should make enough copies so each board member can be given a packet of defense evidence.

Trial Defense Service counsel should be careful to ensure that the recorder does not introduce impermissible evidence. Army regulations prohibit the introduction of certain evidence, such as lawyer-client conversations, involuntary confessions, evidence obtained from bad faith unlawful searches, and polygraph results (unless both parties agree).[146] Trial Defense Service counsel should know these rules and use them aggressively.

Trial Defense Service counsel should also educate the board members on the law.[147] Since the members are not attorneys, they may not know the requirements for separation. Counsel should explain the rules favorable to the soldier, such as the requirements to counsel soldiers and provide them rehabilitative transfers.[148] Defense counsel can also provide copies of favorable regulatory provisions to the board members.

*Appealing Separations and Upgrading Discharges*

The TDS attorneys should ensure that clients pending separation are aware of their appellate rights, should they be discharged. If an administrative separation board recommends

137. The separation authority can (and often does) waive this requirement. *Id.* para. 1-18d.

138. *Id.* para. 2-2b.

139. Individual fact sheets relating to each ground for separation can be found on the TDS Web site, *supra* note 20.

140. AR 635-200, *supra* note 94, para. 2-4e. Soldiers may also retain civilian counsel at no expense to the government to represent them at an administrative separation board. *Id.*

141. *Id.*

142. *Id.* para. 2-11a; U.S. DEP'T OF ARMY, REG. 15-6, BOARDS, COMMISSIONS, AND COMMITTEES, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS, para. 3-6a (11 May 1988) [hereinafter AR 15-6].

143. Respondents at administrative separation boards may request the attendance of witnesses. The authority which convened the board may authorize the expenditure of funds for such witnesses if: (a) their testimony is not cumulative, (b) personal appearance is essential, (c) written or recorded testimony will not accomplish the same objective, (d) the need for live testimony is substantial, material, and necessary, and (e) the significance of personal appearance, balanced against the difficulties of obtaining the witness, favors production. AR 635-200, *supra* note 94, paras. 2-10b(3), 2-10b(4).

144. While not specifically provided for in the applicable regulations, telephonic testimony is consistent with the other types of testimony permitted at administrative separation boards. *See, e.g. id.* paras. 2-10b(2) (stating that depositions and affidavits of unavailable witnesses may be presented), 2-10b(4)(c) (stating that recorded testimony permitted).

145. AR 15-6, *supra* note 142, para. 3-7c(5).

146. *Id.* para 3-6c.

147. Lieutenant Colonel Kevin Lovejoy, *The Art of Trial Advocacy, To Advocate and Educate: The Twin Peaks of Litigating Administrative Separation Boards*, ARMY LAW., Mar. 1999, at 35.

148. AR 635-200, *supra* note 94, para. 1-18.

discharge, the soldier can still submit matters to the separation authority raising legal objections.[149] Once soldiers are discharged, they can request additional review and obtain reinstatement to active duty or an upgrade of the discharge.

Discharged soldiers can apply to the Army Discharge Review Board[150] to upgrade their discharges. Upgrades are not automatic; clients must submit convincing evidence that the discharge was improper or inequitable.[151] For example, clients who declined nonjudicial punishment and had their cases handled by administrative separation, rather than court-martial, may be able to prove this unfairly denied them the opportunity to contest their guilt. New evidence, such as statements of witnesses who were not available at the board or the results of proceedings against co-accuseds, may also help the client obtain relief.

Applications to the board are made on DD Form 293, Application for Review of Discharge or Separation from the Armed Forces of the United States. Although the Army Discharge Review Board has a fifteen-year statute of limitations,[152] soldiers should not delay in submitting a request to the board. Personal appearance before the board is authorized;[153] generally soldiers who appear before the board in person are more successful than those who do not. Soldiers can generally expect a decision on their application within four months. In 1997, the Army Discharge Review Board granted relief on approximately ten percent of the applications submitted to it.[154]

Discharged soldiers can also seek relief from the Army Board for Correction of Military Records (ABCMR). This board has broad powers to change any military record to correct an error or remove an injustice.[155] It can reinstate soldiers to active duty[156] or upgrade discharges.[157] Soldiers can appeal to this board even though they have already unsuccessfully applied to the Army Discharge Review Board for relief. However, the board will only grant relief if the soldier can demonstrate that the separation was in error or unjust.[158]

Applications to the (ABCMR) are made on DD Form 149, Application for Correction of Military Records.[159] The board has a three-year statute of limitations; however, this can be waived if the soldier presents good reasons for failing to meet the three-year limitation.[160] As with the Discharge Review Board, soldiers can request a hearing before the ABCMR.[161] The board processes most applications for relief in ten months. In 1999 the ABCMR granted relief in approximately fifteen percent of the cases it considered.[162]

### *Suspect Counseling*

Counseling soldiers suspected of offenses is another important duty of TDS counsel.[163] Soldiers who request an attorney when questioned by military law enforcement agents are routinely referred to TDS. Soldiers suspected of an offense may also seek TDS advice without any referral from the command or law enforcement authorities. [164] These soldiers should be

149. *See id.* para. 2-6a.

150. *See* U.S. DEP'T OF ARMY, REG. 15-180 ARMY DISCHARGE REVIEW BOARD (1 MAY 1980) [hereinafter AR 15-180]; 10 U.S.C. § 1553 (2000).

151. U.S. DEP'T OF DEFENSE, DIRECTIVE 1332.28, DISCHARGE REVIEW BOARD PROCEDURES AND STANDARDS, encl. 4, (11 Aug. 1982) *reproduced in* AR 15-180, *supra* note 150, app. A.

152. 10 U.S.C. § 1553a.

153. *Id.* § 1553c.

154. Captain Bronte I. Montgomery, *Note from the Field, Army Discharge Review Board Streamlines and Reduces Processing Times*, ARMY LAW., Nov. 1997, at 47.

155. 10 U.S.C. § 1552(a)(1).

156. *Id.* § 1552(d).

157. *Id.* § 1552(a)(1).

158. U.S. DEP'T OF ARMY, REG. 15-185, ARMY BOARD FOR CORRECTION OF MILITARY RECORDS (29 Feb. 2000) [hereinafter AR 15-185].

159. The full title of the form is Application for Correction of Military Records Under the Provisions of Title 10, U.S. Code, Sec. 1552. *See* AR 15-185, *supra* note 158, para. 2-3b.

160. The board may excuse the failure to file within three years if it is in the interests of justice. 10 U.S.C. § 1552(b); AR 15-185, *supra* note 158, para. 7.

161. AR 15-185, *supra* note 158, para. 4.

162. Karl F. Schneider, Director, Army Review Board Agency, Address at the Office of the Staff Judge Advocate, 1st Infantry Division, Wuerzburg, Germany (Jan. 27, 2000).

163. TDS SOP, *supra*, note 2, para. 1-5b(1), (3).

seen immediately; they should not be required to make an appointment. They should also be screened carefully to identify possible conflicts of interest.[165]

It is rarely wise for a suspect to make a statement until the TDS counsel has the opportunity to review all the evidence against the suspect. Generally, TDS counsel should accompany a suspect who decides to speak to commanders or law enforcement authorities. Also, counsel should stress the importance of not talking to anyone, including law enforcement agents, supervisors, family, and friends.

If the soldier seeking advice is scheduled to be transferred to a distant installation, it may be best to have a TDS counsel at the new duty station provide the advice by telephone. For example, if a suspect seeks advice from a TDS attorney in Germany and will be transferred to Texas the next day, it may be best to have a TDS attorney stationed in Texas provide the suspect counseling. This procedure generally avoids unnecessary expense and inconvenience. However, if telephonic counseling with a Texas counsel is impossible or impracticable, the attorney in Germany should provide the counseling. A suspect should not be denied access to a TDS attorney solely because the representation may become inconvenient or expensive.

Suspects should be provided a fact sheet explaining their right to remain silent. These fact sheets serve as valuable reminders to soldiers after they leave the TDS office.[166].

TDS attorneys should tell law enforcement agents and commanders that they represent the suspect and demand to be present during any questioning about the suspected offenses. The notification should be in writing, if possible.[167]

*Lineups*

Soldiers have a right to counsel at lineups, show-ups, and similar identification procedures if they occur after preferral of charges or the imposition of pretrial confinement.[168] The TDS provides these counsel.[169]

The TDS counsel representing soldiers at such identifications should ensure that clients make no statements. Counsel should also bring a notepad and, if possible, a camera, to record precisely how the identification is conducted. Unduly suggestive lineups may be successfully challenged at trial.[170]

*Summary Courts-Martial*

Trial Defense Service counsel routinely counsel soldiers regarding summary courts-martial.[171] Counsel should meet individually with such clients to carefully discuss their procedural rights, including the right to "turn-down" the summary court-martial and demand trial by a higher level of court-martial.[172] Counsel should also discuss the soldier's rights to demand production of evidence and witnesses. A soldier's right to production of evidence and witnesses is essentially the same at a summary court-martial as it is at a special and a general court-martial.[173] Counsel may want to help the soldier prepare questions for particular witnesses, or prepare an evidentiary statement or argument for consideration by the

164. Trial Defense Service attorneys are authorized to counsel soldiers suspected of offenses as required under Article 31 of the UCMJ or the Fifth Amendment or when the exercise of military jurisdiction is possible. TDS SOP, *supra* note 2, para. 1-5.

165. AR 27-26, *supra* note 1, R. 1.7, R. 1.9. Suspects should be given the opportunity to discuss their cases fully with a TDS attorney as soon as possible. Since this involves forming an attorney-client relationship, TDS attorneys must ensure they have not counseled other soldiers concerning the same misconduct. *Id.*

166. A sample fact sheet can be found at the TDS Web site, *supra* note 20.

167. If a suspect has an appointed counsel, that counsel must be present before the suspect may be interrogated by law enforcement agents after preferral of charges, unless the accused initiates the communication and waives the right to counsel. MCM, *supra* note 34, MIL. R. EVID. 305(e). *United States v. McComber*, 1 M.J. 380 (C.M.A. 1976), created a requirement for the government to notify counsel and give him a reasonable opportunity to be present at any interrogation, once the government is aware that the accused is represented by counsel. This requirement was codified in a former version of Military Rule of Evidence 305(e), but was eliminated in a 1994 amendment to the rules. *See* MCM, *supra* note 33, app. 22-16 (Analysis of the Military Rule of Evidence). However, arguably the notice to counsel rule is still effective since *McComber* has never been overruled. *See* Major Mark David "Max" Maxwell, *McOmber's Obituary: Do Not Write It Quite Yet,* ARMY LAW., Sept. 1999, at 17. *But see* MCM, *supra* note 33, app. 22-16; Major Robert S. Hrvoj, *The Viability of United States v. McOmber: Are Notice to Counsel Requirements Dead or Alive?*, ARMY LAW., Sept. 1999, at 1.

168. MCM, *supra* note 33, MIL. R. EVID. 321(b)(2).

169. TDS SOP, *supra* note 2, para. 1-5b(2).

170. MCM, *supra* note 33, MIL. R. EVID. 321(b)(1), states that: "A lineup and other identification process is 'unlawful' if the identification is unreliable. An identification is unreliable if the lineup or other identification process, under the circumstances, is so suggestive as to create a substantial likelihood of misidentification."

171. TDS SOP, *supra* note 2, para. 1-5b(4).

172. MCM, *supra* note 33, R.C.M. 1303.

173. *Id.* R.C.M. 1301(f).

summary court officer. The soldier should be provided with a summary court-martial fact sheet before leaving the office. These fact sheets will help the soldier prepare his or her case.[174]

Usually, a soldier does not have a right to representation by a TDS attorney at a summary court-martial. However, the regional defense counsel may waive this limitation in appropriate circumstances.[175] For example, if the soldier was pending a higher level of court-martial and the convening authority withdrew the charges and re-referred them to a summary court, it may be appropriate for the TDS attorney working on the case to represent the soldier at the summary court hearing. A soldier also has a right to have a civilian attorney represent him at a summary court-martial.[176]

*Counseling Inmates*

Trial Defense Service attorneys located near confinement facilities may represent inmates during sentence vacation hearings.[177] A "vacation" is the reimposition of a suspended court-martial sentence. A suspended sentence is one that is not imposed or "executed," as long as the accused abides by the terms of the suspension, which generally means the accused must not commit any future misconduct.[178] If the accused violates the terms of the suspension, the suspension may be "vacated" and the original sentence imposed. Before this can be done, the accused is entitled to a hearing. The accused has the right to attend the hearing, present evidence, and be represented by counsel.[179]

Counsel representing soldiers at such hearings should brief them on their procedural rights and fully discuss their cases. Counsel should interview all of the necessary witnesses and be prepared to call witnesses and present evidence at the hearing. The rules for production of witnesses and presentation of evidence are the same as those at an Article 32 investigation; the MRE do not apply.[180] Therefore, counsel can be creative in presenting evidence at these hearings.

The TDS attorneys may also counsel inmates pending disciplinary and adjustment boards.[181] These boards can recommend imposition of administrative disciplinary measures, such as forfeiture of "good conduct time," and disciplinary segregation.[182] The loss of "good conduct time" is important to inmates, since this can substantially reduce their time in confinement.[183] In some circumstances, inmates have the right to consult with an attorney before the board. Inmates do not have the right to have an attorney represent them at the board.[184]

Since the rules at these boards are unique, counsel should familiarize themselves with the board procedures.[185] Counsel should explain the inmate's right to present evidence in defense, mitigation, and extenuation, and the right to cross-examine accusers.[186] Counsel may want to help the inmate prepare questions for witnesses or a statement for presentation to the board.

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174. A sample fact-sheet can be found on the TDS Web site, *supra* note 20.

175. TDS SOP, *supra* note 2, para. 1-5d(2)(c).

176. The accused has the right to be represented by civilian counsel provided at his or her own expense if such representation will not unduly delay the proceedings and military exigencies do not preclude it. MCM, *supra* note 33, R.C.M. 1301(e).

177. TDS SOP, *supra* note 2, para. 1-5b(9).

178. MCM, *supra* note 33, R.C.M. 1108.

179. *Id.* R.C.M. 1109(d)(1), (e); UCMJ art. 72a (1996).

180. MCM, *supra* note 33, R.C.M. 1109(d)(1)(C), (e)(3).

181. TDS SOP, *supra* note 2, para. 1-5b(10).

182. U.S. DEP'T OF ARMY, REG. 190-47, MILITARY POLICE, THE ARMY CORRECTIONS SYSTEM (15 Aug. 1996) [hereinafter AR 190-47]. These boards can also impose minor disciplinary measures. *Id.*

183. Inmates accrue five days of good conduct credit per month for sentences that are less than a year. Inmates accrue six days of good conduct credit per month for sentences not less than one year but less than three years. They accrue seven days per month for sentences not less than three years but less than five years. They accrue eight days per month for sentences not less than five years but less than ten years. They accrue ten days per month for sentences of 10 years or more, excluding life. U.S. DEP'T OF ARMY, REG. 633-30, APPREHENSION AND CONFINEMENT, MILITARY SENTENCES TO CONFINEMENT, para. 13 (6 Nov. 1964).

184. Inmates only have the right to consult with an attorney if the board is composed of three members. Such boards are authorized to impose "major" disciplinary measures, such as forfeiture of good conduct time. One-member boards are only authorized to impose "minor" disciplinary measures. AR 190-47, *supra* note 182, paras. 12.11, .13.

185. *Id.* ch. 12 (describing these procedures).

186. *Id.* para. 12.13.

*Other Adverse Administrative Action*

Trial Defense Service attorneys provide counseling on a variety of administrative actions not mentioned above that are based on alleged violations of the UCMJ or are related to UCMJ proceedings.[187] This counseling is considered a "priority II" duty, which means that it is generally conducted by TDS.[188] For example, if a soldier commits a crime and her commander issues her a reprimand, rather than pursuing nonjudicial punishment or court-martial, TDS would generally offer the soldier counseling as a priority II duty.

Trial Defense Service attorneys may also provide counseling on administrative actions unrelated to UCMJ violations, based on an agreement with the local staff judge advocate.[189] This counseling is a "priority III" duty, which means that it would ordinarily be performed by attorneys working for the local staff judge advocate, absent an agreement with TDS.[190] For example, if a soldier displays a poor attitude and is given a written reprimand, TDS would offer the soldier counseling as a priority III duty only if this was consistent with an agreement with the staff judge advocate; otherwise the soldier would be referred to the local legal assistance office. Trial Defense Service counsel should not conduct this priority III counseling if it interferes with priority I and priority II duties. Counsel should separate priority II duties from priority III duties for purposes of the monthly statistical report.[191]

Trial Defense Service attorneys can provide advice on administrative reprimands,[192] adverse efficiency reports,[193] reports of survey,[194] inspector general investigations,[195] line of duty investigations,[196] bars to reenlistment,[197] security clearance revocations,[198] physical and medical evaluation boards,[199] flags (suspensions of favorable personnel actions),[200] and flying evaluation boards.[201] Counsel should refer to the applicable regulations to ensure their advice is accurate. Fact sheets on many common administrative actions are available on the TDS Internet site.

**Court-Martial Representation**

Representing clients at courts-martial is the most important part of the TDS mission.[202] A court-martial is the most severe disciplinary option available to commanders. The rules are complex and the potential punishments are great.[203] Soldiers facing court-martial need well-trained defense attorneys. Soldiers rely on the TDS to provide such counsel.

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187. TDS SOP, *supra* note 2, para. 1-5b; U.S. DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM, para. 3-6(g)(2) (10 Sept. 1995) [hereinafter AR 27-3].

188. *See supra* notes 47-52 and accompanying text.

189. TDS SOP, *supra* note 2, para. 1-5c; AR 27-3, *supra* note 187, para. 3-6(g)(3).

190. *See supra* note 53 and accompanying text.

191. *See supra* notes 96-99 and accompanying text.

192. *See* U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION (19 Dec. 1986).

193. *See* U.S. DEP'T OF ARMY, REG. 623-105, PERSONNEL EVALUATION: OFFICER EVALUATION REPORTING SYSTEM (1 Oct. 1997); U.S. DEP'T OF ARMY, REG. 623-205, PERSONNEL EVALUATION: NONCOMMISSIONED OFFICER EVALUATION REPORTING SYSTEM (31 Mar. 1992).

194. *See* U.S. DEP'T OF ARMY, REG. 735-5, POLICIES AND PROCEDURES FOR PROPERTY ACCOUNTABILITY (28 Feb. 1994).

195. *See* U.S. DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES (15 Mar. 1994).

196. *See* U.S. DEP'T OF ARMY, REG. 600-8-1, PERSONNEL AFFAIRS: ARMY CASUALTY AND MEMORIAL AFFAIRS AND LINE OF DUTY INVESTIGATIONS (18 Sept. 1986).

197. *See* U.S. DEP'T OF ARMY, REG. 601-280, PERSONNEL PROCUREMENT: ARMY RETENTION PROGRAM (29 Sept. 1995).

198. *See* U.S. DEP'T OF ARMY, REG. 380-67, SECURITY: PERSONNEL SECURITY PROGRAM (9 Sept. 1988).

199. *See* U.S. DEP'T OF ARMY, REG. 635-40, PERSONNEL SEPARATIONS: PHYSICAL EVALUATION FOR RETENTION, RETIREMENT, AND SEPARATION (15 Sept. 1990) (covering physical evaluation boards); U.S. DEP'T OF ARMY, REG. 40-3, MEDICAL SERVICES: MEDICAL DENTAL, AND VETERINARY CARE (15 Feb. 1985) (covering medical evaluation boards).

200. *See* U.S. DEP'T OF ARMY, REG. 600-8-2, PERSONNEL AFFAIRS: SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAGS) (30 Nov. 1987).

201. *See* U.S. DEP'T OF ARMY, REG. 600-105, AVIATION SERVICE OF RATED ARMY OFFICERS (15 Dec. 1994). *See generally* Captain Michael P. Ryan, *Note from the Field, Flying Evaluation Boards: A Primer for Judge Advocates*, ARMY LAW., Aug. 1998, at 43.

202. TDS SOP, *supra* note 2, para. 1-5a.

203. For a chart of maximum punishments see MCM, *supra* note 33, app. 12.

*Pretrial Confinement Strategies*

For many soldiers, the court-martial process begins with pretrial confinement. All soldiers placed in pretrial confinement must be counseled on their rights[204] and provided with a military attorney upon request.[205] The TDS counsel typically give this counseling and assist soldiers once they have been confined.[206]

When providing a soldier initial pretrial confinement advice, counsel should explain the nature of the offenses for which the soldier is being confined, the right to remain silent, the right to civilian and military counsel, and the procedures by which the pretrial confinement will be reviewed.[207] Counsel can provide this advice without forming an attorney-client relationship. However, the TDS attorney who provides the initial counseling will probably be detailed to represent the soldier during subsequent pretrial confinement hearings and the court-martial. Before providing the counseling, TDS attorneys should ensure that they do not have any conflicts of interest with other soldiers involved in the case.[208] Counsel should stress the right to remain silent and explain that fellow inmates can also be called to testify concerning statements made to them in confinement. The only safe statements are those made to the defense attorney.[209]

There are a number of reviews of pretrial confinement. The first is the forty-eight hour probable cause determination. Within forty-eight hours of confinement, a neutral and detached officer (usually a military magistrate) must review the case to determine if probable cause exists to continue pretrial confinement.[210] The TDS counsel representing the soldier should, if appropriate, submit matters to this official indicating why probable cause does not exist.

The soldier's commander conducts the second review. Within seventy-two hours after a soldier is ordered into pretrial confinement, the soldier's commander must decide whether confinement will continue. The commander must order release unless he or she finds probable cause that (1) the prisoner committed an offense triable by court-martial, (2) confinement is necessary because it is foreseeable that the prisoner will not appear at trial or pretrial hearings or the prisoner will engage in serious misconduct, and (3) lesser forms of restraint are inadequate.[211] The commander must prepare a memorandum documenting his decision.[212] The commander's review is often conducted at the same time the soldier is confined. Therefore, the TDS counsel may not have much success appealing to the commander for release from confinement.

A military magistrate conducts the third review, which must occur within seven days of confinement.[213] This is a TDS counsel's best chance of "springing" the client. Both counsel and the client have a right to appear before the magistrate and submit matters for consideration. The MRE do not apply to this hearing, so counsel can introduce hearsay to support the defense case.[214] The magistrate must conclude by a preponderance of the evidence that the soldier committed the offense and that confinement is the only means of restraint appropriate under the circumstances.[215]

To be successful at the hearing, the TDS counsel should attack the basis for the confinement, contained in the commander's memorandum. If the memorandum asserts that the client is a "flight risk," counsel may be able to rebut this with evidence that the client has family in the area or cooperated fully with authorities at every opportunity. If the memorandum asserts that the client will engage in "serious criminal misconduct," counsel may rebut this with evidence that the client is a good soldier who has not engaged in misconduct in the past. Counsel may also be able to show that the commander did not attempt lesser forms of restraint.[216]

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204. *Id.* R.C.M. 305(e).

205. *Id.* R.C.M. 305(f).

206. TDS SOP, *supra* note 2, para. 1-5a(4).

207. MCM, *supra* note 33, R.C.M. 305(e).

208. *See* AR 27-26, *supra* note 1, R. 1.7.

209. MCM, *supra* note 33, MIL. R. EVID. 801(d)(2).

210. *Id.* R.C.M. 305(i)(1); United States v. Rexroat, 38 M.J. 292 (C.M.A. 1993). This review may be combined with the third review, discussed below.

211. MCM, *supra* note 33, R.C.M. 305(h)(2).

212. *Id.* R.C.M. 305(h)(2)(C).

213. *Id.* R.C.M. 305(i)(2).

214. *Id.* R.C.M. 305(i)(2)(A)(ii).

215. *Id.* R.C.M. 305(i)(2)(A)(iii).

The magistrate must prepare a written memorandum memorializing his or her decision.[217] The client may request reconsideration of a decision to continue confinement based upon significant new information.[218] Once the case has been referred to trial, the military judge assigned to the case can also review the pretrial confinement decision.[219] In appropriate cases, TDS counsel should take full advantage of these opportunities to appeal.

If the client remains in confinement, counsel should consider raising a speedy trial motion. Although there is no set time-frame for the government to proceed to trial when the accused is in confinement (other than the 120-day time limit applicable to all courts-martial),[220] the government is required to process the case with "due diligence."[221]

Counsel should also remember to request appropriate sentence credit for pretrial confinement. There are four basic types of sentence credit: (1) day-for-day credit for actual pretrial confinement;[222] day for day credit for restriction tantamount to confinement;[223] (3) additional day-for-day credit for violation of the pretrial confinement rules;[224] and (4) additional credit for pretrial punishment.[225]

*Pretrial Agreement Negotiation*

Pretrial agreements can be a great benefit to the defense. Pretrial agreements require the convening authority to take action favorable to the accused, generally in the form of a sentence limitation.[226] The disadvantage is that the accused gives up the right to contest the charges.[227]

Either a defense counsel or prosecutor can initiate pretrial agreement negotiations.[228] Most pretrial agreements consist of a promise by the accused to plead guilty to some or all of the charges. A less common form of pretrial agreement consists of a promise to enter into a confessional stipulation to certain charges.[229] In either case, the military judge will conduct a "providency inquiry" to ensure that the accused's plea or confessional stipulation is entered into voluntarily, that the accused understands its effect, that there is a factual basis for the plea or stipulation, and that the accused understands and agrees to the terms of the pretrial agreement.[230] The accused can include a number of other promises in a pretrial agreement, including a promise to enter into a stipulation of fact (included in nearly every pretrial agreement), a promise to testify against a co-accused, a promise to provide restitution to a victim, a promise not to engage in future misconduct, and a promise to waive procedural requirements, such as an Article 32 investigation, the right to trial by members, or the right to the production of witnesses.[231]

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216. *See* Captain Stephen J. Pfleger & Major Denise K. Vowell, *Pretrial Confinement: A Defense Perspective*, ARMY LAW., Apr. 1990, at 36.

217. MCM, *supra* note 33, R.C.M. 305(i)(2)(D).

218. *Id.* R.C.M. 305(i)(2)(E).

219. *Id.* R.C.M. 305(j).

220. *Id.* R.C.M. 707a requires the accused to be brought to trial within 120 days of preferral of charges or imposition of restraint, whichever is earlier. Delays approved by the convening authority or military judge are excluded when determining when this time period has run.

221. United States v. Kossman, 38 M.J. 258 (C.M.A. 1993).

222. United States v. Allen, 17 M.J. 126 (C.M.A. 1984).

223. United States v. Mason, 19 M.J. 274 (C.M.A. 1985).

224. MCM, *supra* note 33, R.C.M. 305k.

225. United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983); UCMJ art. 13 (2000). *See generally* Major Michael G. Seidel, *Giving Service Members the Credit They Deserve: A Review of Sentencing Credit and Its Application*, ARMY LAW. Aug. 1999, at 1.

226. MCM, *supra* note 33, R.C.M. 705(c)(1).

227. *Id.* R.C.M. 705(b)(1).

228. *Id.*

229. *Id.*

230. The military judge is always required to conduct this type of inquiry when the accused pleads guilty. *Id.* R.C.M. 910(c)-(f); United States v. Care, 40 C.M.R. 247 (C.M.A. 1969). A similar inquiry is required for stipulations that practically amount to a confession. MCM, *supra* note 33, R.C.M. 811(c), discussion. Such an inquiry is not required where the stipulation does not amount to a confession because the accused contests guilt by presenting evidence. For example, a stipulation that drugs were found in the accused's vehicle would normally amount to a confession if no other evidence were presented. However, it would not amount to a confession if the defense presents evidence that the accused was not aware of the presence of the drugs. *Id.*

Most pretrial agreements contain a limit on the sentence the convening authority can approve after trial. The convening authority can also promise to refer the charges to a lower level of court-martial, to refer a capital case as noncapital, to withdraw certain charges or specifications, or have the government present no evidence on certain charges or specifications.[232]

Before negotiating a pretrial agreement, defense counsel should determine what the client really wants. If confinement is the main concern, counsel should attempt to obtain a favorable sentence limitation. If providing support for the client's family is important, counsel should work on a favorable limitation on forfeitures. If the accused does not desire trial by members, counsel can offer to waive this right in return for other favorable terms.

Agreeing on a stipulation of fact can be the most difficult part of a pretrial agreement negotiation. The prosecutor often tries to include as much aggravation as possible, including uncharged misconduct. The defense counsel wants to minimize the amount of damaging evidence in the stipulation. If there is a disagreement on the stipulation of fact, the military judge usually will not resolve it. The judge will typically rule that there is no pretrial agreement if the parties cannot agree on the required stipulation.[233] Therefore, the contents of the stipulation should be agreed to well before trial.[234]

*Discovery*

Discovery is an important tool for TDS counsel. The judge or members will decide the case based on the facts presented in court. Discovery is how counsel finds the relevant facts to present at trial.

The prosecutor is required to disclose a great deal of information to the defense without a discovery request. The prosecutor must disclose exculpatory evidence as soon as practicable.[235] The prosecutor must provide the defense all of the papers and evidence that accompanied the charges as soon as practicable after service of charges.[236] Before the beginning of trial on the merits, the prosecution must notify the defense of witnesses they intend to call,[237] and prior convictions of the accused that they may offer on the merits.[238] Prior to arraignment, the prosecutor must give the defense "Section III" notice.[239] This notice must include grants of immunity or leniency to a prosecution witness,[240] the accused's written or oral statements,[241] evidence seized from the accused that the prosecution intends to offer at trial,[242] and evidence of a prior identification of the accused that the prosecution intends to introduce at trial.[243]

The defense can obtain additional evidence from the prosecutor by filing a timely discovery request. Upon a defense request, the prosecutor must permit the defense to inspect evidence and reports that are material to the defense or that the prosecution intends to use at trial.[244]

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231. *Id.* R.C.M. 705(c)(2). Certain pretrial agreement terms are specifically prohibited. A term will not be enforced if the accused did not voluntarily agree to it or if it deprives the accused of a fundamental right, such as the right to counsel, the right to due process, the right to challenge jurisdiction, the right to a speedy trial, the right to complete sentencing proceedings, or the complete and effective exercise of post-trial and appellate rights. *Id.* R.C.M. 705(c)(1).

232. *Id.* R.C.M. 705(b)(2).

233. If the stipulation of fact contains objectionable evidence, such as uncharged misconduct, the defense may be able to successfully object to this evidence at trial. However, if the stipulation of fact contains an agreement that its contents are admissible against the accused, the defense objection will not be successful. *See* United States v. Glazier, 26 M.J. 268 (C.M.A. 1988).

234. *See generally* Captain R. Peter Masterton, *Pretrial Agreement Negotiations: A Defense Perspective*, ARMY LAW., Apr. 1990, at 28.

235. MCM, *supra* note 33, R.C.M. 701(a)(6); Brady v. Maryland, 373 U.S. 83 (1963). Prosecutors must exercise due diligence in searching their files and readily available police files for exculpatory evidence. United States v. Simmons, 38 M.J. 386 (C.M.A. 1993).

236. MCM, *supra* note 33, R.C.M. 701(a)(1).

237. *Id.* R.C.M. 701(a)(3).

238. *Id.* R.C.M. 701(a)(4).

239. "Section III" refers to the third section of the MRE. *Id.* MIL. R. EVID. 301-21.

240. *Id.* MIL. R. EVID. 301(c)(2).

241. *Id.* MIL. R. EVID. 304(d)(1). The requirement only extends to statements relevant to the case that are known to the trial counsel and within the control of the armed forces. *Id.*

242. *Id.* MIL. R. EVID. 311(d)(1).

243. *Id.* MIL. R. EVID. 321(c)(1).

244. *Id.* R.C.M. 701(a)(2).

Trial Defense Service counsel should make discovery requests early and in writing. They should specify the documents sought, explain why the request is reasonable, and explain why the documents are relevant and necessary.[245]

One danger of submitting a discovery request is "reverse discovery." Once the defense submits a discovery request the prosecutor can ask the defense to produce similar materials. If the defense asks to inspect the government's evidence or reports, the government can ask to inspect the defense's evidence or reports.[246] However, before the prosecutor can take advantage of reverse discovery, he or she must fully comply with the defense discovery request.[247]

The defense also has certain discovery obligations. These include the duty to notify the government of defense witnesses, to provide signed statements made by the witnesses,[248] and to notify the government of a defense of alibi, innocent ingestion, or lack of mental responsibility.[249]

The material obtained from the prosecution during discovery should serve as the beginning, not the end, of the defense counsel's own investigation. The TDS counsel should interview all of the government witnesses to see if they have favorable information not mentioned in their pretrial statements. Counsel should ask the accused to identify further witnesses to interview. Counsel should also interview the accused's chain of command and other soldiers in the accused's unit, to determine what character and sentencing witnesses to call. The more witnesses defense attorneys interview, the more likely they are to find favorable evidence and fully prepare for potential unfavorable testimony.

Defense counsel should inspect the entire military police or Criminal Investigation Division (CID) file related to the case, if one exists.[250] Counsel should also inspect any physical evidence held by the police. If the police are unwilling to permit a defense counsel to see the entire file, counsel should obtain assistance from the prosecutor or the military judge.

The TDS counsel should always visit the crime scene prior to trial. If possible, counsel should bring a camera along and take photographs of the scene. If measurements or locations are important, counsel should bring a tape measure and note pad to create a diagram. Counsel should also bring a TDS legal specialist or NCO along to serve as a witness, in case the photographs or diagrams are later needed at trial.

The TDS counsel should also consider obtaining defense experts. The defense may obtain expert witnesses at government expense when such witnesses are necessary to the defense case.[251] The defense counsel should do some research to find the best expert possible.[252] The government is not required to hire an expert specifically requested by the defense if it can produce an adequate substitute.[253] Defense attorneys who are dissatisfied with the government's substitute can ask the military judge to order the government to provide the requested expert.[254] The defense has the burden of showing that employment of an expert is necessary and that the government's substitute is inadequate. One way to do this is to show that the requested expert has a different scientific opinion than the government's substitute.[255]

The TDS counsel can also request an expert be appointed as part of the defense team to help them prepare their case. Such experts are covered by the attorney-client privilege; the prosecution is not permitted to talk to these experts unless the

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245. Major Edye Moran, *The Art of Trial Advocacy, The Art of Military Criminal Discovery Practice? Rules and Realities for Trial and Defense Counsel*, ARMY LAW., Feb. 1999, at 37. Sample discovery requests are available on the TDS Web site, *supra* note 20.

246. MCM, *supra* note 33, R.C.M. 701(b)(3)-(4).

247. *Id.* R.C.M. 701(b)(4).

248. *Id.* R.C.M. 701(b)(1).

249. *Id.* R.C.M. 701(b)(2).

250. *See* United States v. Gibson, 51 M.J. 198 (1999) (stating that defense counsel were ineffective because they failed to read final CID report that contained information strongly suggesting the alleged victim was not a credible witness).

251. MCM, *supra* note 33, R.C.M. 703(d); MIL. R. EVID. 706.

252. Names of appropriate experts can be found on the TDS Web site, *supra* note 20. Another source of expert witnesses is the Technical Advisory Service for Attorneys, which can be contacted at (800) 523-2319.

253. MCM, *supra* note 33, R.C.M. 703(d).

254. *Id.* Since employment of an expert can be critical to the preparation of the defense case, counsel should consider requesting an extraordinary writ if the military judge refuses to order the government to provide an expert. Defense counsel should coordinate such requests with their senior defense counsel. *See generally* Major Matthew Winter, *Putting on the Writs: Extraordinary Relief in a Nutshell*, ARMY LAW., May 1988, at 20.

255. United States v. Van Horn, 26 M.J. 434 (C.M.A. 1988).

defense later decides to call them as witnesses.[256] For example, when the accused's mental condition is in issue, defense counsel may request that a psychiatrist be appointed to the defense team to help prepare their psychiatric evidence.[257] When accused soldiers hire experts at their own expense, such experts are also covered by the attorney-client privilege.[258]

*Article 32 Investigations*

An Article 32 investigation is required before charges are referred to a general court-martial.[259] The accused has the right to be present at the hearing and be represented by counsel.[260] The TDS attorneys provide this representation.[261]

The Article 32 investigation is an excellent discovery tool. It provides an opportunity for the defense to discover what the government witnesses have to say and how they respond to direct and cross-examination.

The defense may present evidence in defense, extenuation, or mitigation at the hearing.[262] The investigating officer is required to gather evidence and produce witnesses requested by the defense that are reasonably available.[263] However, presenting defense evidence gives the government the opportunity to discover the defense case. As a result, the defense often presents little or no evidence at the investigation.

Occasionally a defense counsel may want to present evidence at the Article 32 hearing. For example, where the charges against the accused are weak, the defense may be able to "win" the case by presenting evidence at the hearing. Although the investigating officer's recommendation is not binding on the convening authority,[264] a favorable recommendation may convince the convening authority to dismiss the charges or dispose of them under Article 15 or by summary court-martial. Defense counsel should be careful before calling the accused as a witness, since the accused's testimony can be used against him or her later at a court-martial.[265]

The TDS counsel should be prepared for an Article 32 investigation. In particular, defense counsel should be ready to cross-examine critical government witnesses, such as the victim in a rape case. If such witnesses later become unavailable, the government may try to introduce testimony from the investigation at trial.[266] In this case, the defense's only opportunity to effectively cross-examine the witness may be at the Article 32 investigation.

The defense can request that the Article 32 investigation be closed to the public. The TDS counsel should consider making such a request if media attention could prejudice potential jurors or the defense case.[267]

If the investigation is inadequate or the accused has been denied procedural rights, the defense counsel may want to challenge the Article 32 investigation. Counsel can object to the commander who ordered the investigation within five days of receipt of the report.[268] Defense counsel may also raise objections to the Article 32 investigation prior to trial.[269] Unfortunately, the only remedy is generally a delay sufficient to reopen the investigation or to conduct a new one.[270]

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256. *See* United States v. Toledo (C.M.A. 1987).

257. The defense can also request a sanity board under RCM 706 to develop psychological or psychiatric evidence helpful to the defense. Although this examination is not covered by the attorney-client privilege, the prosecutor is only able to obtain very general information relating to the exam. MCM, *supra* note 33, R.C.M. 706.

258. *Id.* MIL. R. EVID. 706(c).

259. UCMJ art. 32 (2000).

260. *Id.* R.C.M. 405.

261. TDS SOP, *supra* note 2, para. 1-5a(3).

262. MCM, *supra* note 33, R.C.M. 405(f)(11).

263. *Id.* R.C.M. 405(f)(9)-(12). Witnesses located within 100 miles of the investigation are generally considered reasonably available. *Id.* R.C.M. 405(g)(1)(A).

264. *See id.* R.C.M. 405(j).

265. *Id.* MIL. R. EVID. 801(d)(2).

266. *See generally* Captain Mark Cremin, *Use of Article 32 Testimony at Trial? A New Peril for Defense Counsel*, ARMY LAW., Jan. 1991, at 35.

267. *Id.* R.C.M. 405(h)(3).

268. *Id.* R.C.M. 405(j)(4).

269. *Id.* R.C.M. 905(b)(1), 906(b)(3).

270. *See id.* R.C.M. 906(b)(3) discussion.

*Motion Practice*

Defense counsel should raise appropriate objections at the beginning of a court-martial. Motions based on defects in the charges or the preferral and referral process, motions to suppress evidence, motions for discovery, motions for severance, and objections related to counsel must all be raised prior to the entry of pleas.[271] Many other defenses and objections can also be raised before trial. [272]

Defense counsel should prepare written briefs in support of motions.[273] This not only assists the military judge, but also helps counsel clarify the issues. Counsel should not delay in preparation of motions and service of briefs until the last minute unless there is a good reason for doing so. Late submission of motions usually only means that the defense will not see the government response until shortly before trial.[274]

When a motion involves evidentiary issues, defense attorneys must request all of the necessary witnesses to support their position.[275] Defense counsel should not rely on the prosecutor to stipulate to the necessary facts during a motion hearing. Witness testimony is often the best way (and sometimes the only way) to develop facts favorable to the defense.

Before the hearing, counsel should find out all of the information they can about the judge, since the judge is the sole decision-maker on motions. Judges are unwilling to make rulings without knowing all the relevant law. Defense counsel should find appropriate case law to cite in support of their positions.[276]

*Trial Preparation*

Defense counsel can only be effective if they are prepared and organized. Most cases are won by careful preparation before trial, not brilliant advocacy during trial.

The best way to organize a case is to start from the end and work backwards. Counsel should determine the theory of the case and then work backwards from there to develop proposed instructions, closing argument, direct examination of defense witnesses, cross examination of government witnesses, opening statement, and, finally, voir dire.[277]

A trial notebook is an essential tool for any trial advocate. It helps counsel organize all of the documents and notes needed during trial, such as witness questions and arguments. It allows counsel to find items quickly when they are needed, rather than fumbling for them during trial. The form of a trial notebook may vary from counsel to counsel. Some prefer three ring binders; others prefer accordion folders or binders with pockets.

A trial notebook should contain, at a minimum, separate sections for each of the following areas: (1) the trial script; (2) relevant documentary evidence, including the offer to plead guilty and all defense exhibits; (3) motions and supporting case law; (4) voir dire questions, panel member questionnaires and a panel schematic; (5) cross-examination questions for government witnesses, the witnesses' prior statements, and witness interview notes (a separate divider should be used for each witness); (6) direct examination questions for defense witnesses, prior statements and interview notes (again, separate dividers should be used for each witness); (7) proposed instructions; (8) closing argument; (9) cross and direct examination of all sentencing witnesses; and (10) sentencing argument.[278]

Defense counsel must have all of the necessary items with them in the courtroom. In addition to the trial notebook, counsel will need a copy of the *Manual for Courts-Martial*[279] and the *Military Judge's Benchbook.*[280] Many defense counsel also bring the *Military Rules of Evidence Manual*[281] with them to court.

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271. *Id.* R.C.M. 905(b).

272. *See id.* R.C.M. 905 (motions generally), 906 (motions for appropriate relief), 907 (motions to dismiss), 909 (capacity of the accused to stand trial).

273. *Id.* R.C.M. 905(h) (written motions permitted).

274. *See* Lieutenant Colonel Thomas C. Lane, *Military Trial Lawyers: Some Observations*, ARMY LAW., Dec. 1986, at 45.

275. Upon request, either party is entitled to a motion hearing to present argument or evidence. MCM, *supra* note 33, R.C.M. 905(h).

276. Major Walter Hudson, *The Art of Trial Advocacy, Advocacy in Front of the Military Judge*, ARMY LAW., Nov. 1999, at 36.

277. Lieutenant Colonel James L. Pohl, *Note from The Field, Trial Plan: From the Rear . . . March!*, ARMY LAW., June 1998, at 21.

278. *See generally* Faculty, The Judge Advocate General's School, *The Art of Trial Advocacy, Trial Notebook*, ARMY LAW., Oct. 1997, at 40.

279. MCM, *supra* note 33.

280. U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHBOOK (30 Sept. 1996) [hereinafter DA PAM 27-9].

281. STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL (4th ed. 1997).

*Voir Dire*

Defense counsel should carefully consider the accused's forum selection before trial. There are three options for enlisted soldiers: trial by military judge alone, trial by an all-officer panel, and trial by a panel consisting of officers and at least one-third enlisted members.[282] Some military attorneys believe that trial by members is more likely to result in an acquittal, but that a military judge is more likely to impose a lenient sentence. Some believe that officer panels adjudge more lenient sentences for military offenses, such as absence without leave and disrespect, than enlisted panels. Unfortunately, these assumptions are difficult to prove statistically.[283]

Counsel should find out as much as possible about the members and military judge who will sit on the case so they can make an intelligent forum selection. Counsel should review prior sentences to find out if the members and military judge are strict disciplinarians or are sensitive about particular offenses.

Voir dire is a defense counsel's first opportunity to speak with the court members; it should not be squandered. Counsel should prepare for voir dire by doing research on the individual members. The member questionnaires should only be the beginning of the inquiry. Counsel should also talk to other defense counsel and soldiers within the members' units to find out if any members have anything in their background, such as law enforcement experience, which might justify a challenge.

Counsel should use their theory of the case to develop voir dire questions. For example, if the theory is that the victim consented to an alleged rape, counsel might ask the members if they would be unable to believe a person could consent to sex and later allege rape. The TDS Web site has a number of effective voir dire questions to serve as a starting point.[284]

Counsel must carefully listen to the answers to voir dire questions and have a procedure for recording them. If a co-counsel is appointed, he or she should record the answers.

Defense counsel can raise a challenge for cause against any member who may not be impartial.[285] Examples of such grounds for challenge include personal interests in the case, hostile attitudes toward the defense, inelastic attitudes on sentencing,[286] relationships with other court members (such as a member who rates another member),[287] relationships with the prosecutor,[288] relationships with witnesses,[289] knowledge of the case or the evidence,[290] or prior experience as a victim of a similar crime to that charged.[291] Such challenges should be liberally granted.[292]

Both the prosecution and the defense can make one peremptory challenge.[293] Such challenges may not be based on race or gender.[294] If the prosecutor peremptorily challenges a female or minority member, the defense counsel should object and require the prosecutor to state a race or gender neutral reason for the challenge. The prosecutor can raise the same objection to defense peremptory challenges, so defense counsel should be prepared with appropriate race and gender neutral grounds for their challenges.[295] When a defense challenge for cause against a particular member is denied, a peremptory challenge must be exercised in order to preserve the issue for appeal. Additionally, if the peremptory challenge is made against the member unsuccessfully challenged for cause, counsel must state that

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282. MCM, *supra* note 33, R.C.M. 903, 503(a).

283. *See* Major John E. Baker & Major William L. Wallis, *Predicting Courts-Martial Results: Choosing the Right Forum*, ARMY LAW., June 1985, at 71.

284. TDS Website, *supra*, note 20.

285. MCM, *supra* note 33, R.C.M. 912(f)(1)(N).

286. *Id.* R.C.M. 912(f) discussion.

287. *Cf.* United States v. White, 36 M.J. 284 (C.M.A 1992) (stating that rater-ratee relationship between members is not *per se* disqualifying).

288. *Cf.* United States v. Hamilton, 41 M.J. 22 (C.M.A. 1994) (stating that member who received legal advice from assistant trial counsel not disqualified).

289. *Cf.* United States v. Ai, 49 M.J. 1 (1998) (stating that member's prior working relationship with witness was not disqualifying).

290. United Stated v. Coffin, 25 M.J. 32 (C.M.A. 1987).

291. United States v. Smart, 21 M.J. 15 (C.M.A. 1985).

292. *White*, 36 M.J. at 284.

293. MCM, *supra* note 33, R.C.M. 912(g)(1).

294. Batson v. Kentucky, 476 U.S. 79 (1986) (basing prosecutor's peremptory challenge on race is an unconstitutional denial of equal protection of law); United States v. Santiago-Davila, 26 M.J. 380 (C.M.A. 1988) (*Batson* applies to military); JEB v. Alabama, 511 U.S. 127 (1994) (*Batson* doctrine includes peremptory challenges based on gender).

295. United States v. Whitham, 47 M.J. 297 (1997).

they would have exercised the peremptory challenge against another member, had the causal challenge been granted.[296]

Many defense counsel automatically challenge the senior member of the panel, assuming that this individual will be the harshest disciplinarian. This is not always the case. A better approach is to rely on pretrial research to identify those members who should be peremptorily challenged.[297]

Finally, counsel should consider the "numbers game." In most cases, it is easier to obtain an acquittal with a panel consisting of five members than it is with a panel consisting of four or three members. In each case, the defense only needs one vote for acquittal; this is only twenty percent of a five-person panel, while it is twenty-five percent of a four-person panel and thirty-three percent of a three-person panel. Similarly, eight person panels are generally better than seven or six person panels, and eleven person panels are better than ten or nine person panels.[298] In appropriate cases, defense counsel may want to exercise a peremptory challenge to obtain a favorable number of members.[299] Any panel divisible by three is bad for the defense on findings.

*Opening Statement*

The opening statement is counsel's first opportunity to give the members or judge a summary of the facts of the case. Defense counsel should use the opening statement as a roadmap to explain where the defense is going. The best way to do this is to use storytelling techniques: counsel should speak in clear active voice to make the opening interesting.[300]

Defense counsel may not argue during the opening.[301] Instead, counsel should stick to the facts and tell the members what they anticipate the evidence will show.

Counsel should practice their opening and ensure that it is clear and easy to understand. Counsel should practice in front of other defense counsel, TDS enlisted personnel, family or friends and ask for critiques. If possible, counsel should use a video-camera to record the practices and review the videotape to see what parts of the opening need clarification.

Defense counsel may want to tell the members what portions of the case the prosecutor neglected to mention during his or her opening statement. For example, a defense counsel may explain what a defense alibi witness will say or describe biases of government witnesses that will be developed on cross-examination. However, counsel should not make promises they cannot keep. Counsel should limit the opening to items they are sure will be introduced at trial.

Some defense counsel choose to defer the opening statement until the beginning of the defense case.[302] This may be effective when it is unclear what evidence the government will present. However, in most cases it is not a good idea to wait until the middle of trial to tell the defense story to the members.

*Cross-Examination of Government Witnesses*

Interviewing government witnesses is the first step in developing an effective cross-examination. Defense counsel should personally interview all of the government witnesses to determine what they will say during trial.[303] Counsel must explore weaknesses in the witnesses' testimony, such as their inability to observe or bias against the accused. Counsel should also determine if the witnesses have any information that is exculpatory or favorable to the defense. If possible, defense counsel should bring a third party to the interview. This person can later testify about any inconsistencies with the witness's subsequent testimony at trial.[304]

The TDS counsel who plan to interview a soldier suspected of an offense may be faced with the dilemma of whether to read the soldier his or her rights under Article 31.[305] Article 31

296. MCM, *supra* note 33, R.C.M. 912(f)(4).

297. Major Michael Hargis, *The Art of Trial Advocacy, Voir Dire: Making Your First Impression Count*, ARMY LAW., Nov. 1998, at 54.

298. These numbers are a result of the requirement for a two-thirds vote by the members for a finding of guilty. MCM, *supra* note 33, R.C.M. 921(c)(2)(B).

299. *Cf.* United States v. Newsome, 26 M.J. 719 (A.C.M.R. 1988), *aff'd*, 29 M.J. 17 (C.M.A. 1989) (stating that gamesmanship not encouraged).

300. Major Martin Sitler, *The Art of Trial Advocacy, The Art of Storytelling*, ARMY LAW., Oct. 1999, at 30.

301. MCM, *supra* note 33, R.C.M. 913(b) discussion.

302. MCM, *supra* note 33, R.C.M. 913(b) (stating that the defense may elect to make its opening statement after the prosecution has rested, but before the presentation of evidence for the defense).

303. Each side is entitled to an equal opportunity to interview witnesses and neither side may unreasonably impede the access of an other to witnesses. *Id.* R.C.M. 701(e).

304. *But see* Major Timothy McDonnell, *The Art of Trial Advocacy, It is Not Just What You Ask, But How You Ask It: The Art of Building Rapport During Witness Interviews*, ARMY LAW., Aug. 1999, at 65.

applies to all persons subject to the UCMJ, including defense counsel, who question another service member who is suspected of an offense, when there is a law enforcement purpose for the questioning. Military case law suggests that defense counsel are not required to read suspects their rights because defense counsel's questions do not have a law enforcement purpose.[306] However, defense counsel must be careful to comply with the ethical rules relating to communications with witnesses.[307]

After the interview, defense counsel should determine what areas they want to develop during cross-examination. For example, counsel may want to establish that the witness was unable to observe accurately because his or her vision was impaired and the lighting was poor. Counsel should consolidate these points into written cross-examination questions.[308]

When developing cross-examination, counsel should avoid the temptation to rehash the direct examination or to ask too many questions. Cross-examination should be a succinct attack in a few areas that will help the defense case.[309] Counsel should also avoid the temptation to ask questions they do not know the answer to; this can be disastrous if the witness gives the "wrong" answer.

One of the most fertile areas of cross-examination is prior inconsistent statements. Counsel should carefully examine prior statements the witness made to the military police, CID, or during the Article 32 investigation to see if they contain inconsistencies. Counsel should also question friends and acquaintances of the witness to determine if the witness made prior inconsistent statements to them. Counsel should incorporate these inconsistencies into the cross-examination questions and, if necessary, be prepared to offer extrinsic evidence of these inconsistencies.[310]

*Direct Examination of Defense Witnesses*

Proper preparation of defense testimony is critical. Defense counsel should carefully interview each defense witness and prepare direct examination questions prior to trial, to ensure that defense testimony is presented effectively.

Before interviewing defense witnesses, TDS counsel should prepare by reviewing the witnesses' prior statements. During interviews, counsel should try to build rapport with their witnesses.[311] Counsel should explain what questions they are likely to ask and what cross examination questions the prosecutor will ask. If possible, counsel should show witnesses the courtroom and conduct mock examinations. If a witness is critical to the case, another counsel can play the role of trial counsel and ask anticipated cross-examination questions. Defense counsel should explain the importance of a good appearance and stress the importance of telling the truth.[312]

To ensure that no important testimony is left out during trial, defense counsel should write out all the direct examination questions they want to ask. Counsel should also consider possible objections to the questions and prepare responses.[313]

Counsel can enhance a witness' testimony by using demonstrative evidence, such as power point slides or overheads.[314] If counsel use visual aids, they must rehearse their witness on the use of the aids.

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305. UCMJ art. 31 (2000).

306. *See* Lieutenant Colonel Harry L. Williams, *To Read or Not to Read . . . The Defense Counsel's Dilemma Provided by Article 31(b), UCMJ*, ARMY LAW., Sept. 1996, at 50.

307. Defense counsel may not communicate with a person represented by another lawyer without that lawyer's authorization. AR 27-26, *supra* note 1, R. 4.2. When dealing with an unrepresented person, a defense counsel may not imply that he or she is disinterested. *Id.* R. 4.3.

308. Major Martin Sitler, *The Art of Trial Advocacy, An Approach to Cross-Examination, "It's a Commando Raid, not the Invasion of Europe,"* ARMY LAW., July 1998, at 80.

309. *See* Lieutenant Colonel Thomas C. Lane, *Military Trial Lawyers: Some Observations*, ARMY LAW., Dec. 1986, at 45.

310. MCM, *supra* note 33, MIL. R. EVID. 613. *See* Major Norman Allen, *The Art of Trial Advocacy, Impeachment by Prior Inconsistent Statement*, ARMY LAW., Feb. 1998, at 35.

311. Major Timothy McDonnell, *The Art of Trial Advocacy, It is Not Just What You Ask, But How You Ask It: The Art of Building Rapport During Witness Interviews*, ARMY LAW., Aug. 1999, at 65.

312. Lieutenant Colonel Steven Henley, *The Art of Trial Advocacy, Horse-shedding the Evidence? Twenty Do's and Don'ts of Witness Preparation*, ARMY LAW., Feb. 1998, at 38.

313. Major Norman Allen, *The Art of Trial Advocacy, Making and Responding to Objections*, ARMY LAW., July 1999, at 38.

314. Major Edye Moran, *The Art of Trial Advocacy, Prevention of Juror Ennui ?Demonstrative Evidence in the Courtroom*, ARMY LAW., June 1998, at 23.

Well before trial, defense counsel must talk to the accused about his or her right to testify.[315] The accused must personally decide whether he or she will testify. Counsel should discuss the advantages and disadvantages of such testimony and then let the accused make the final call.[316] The accused has an obvious reason to lie and any cross-examination on prior inconsistent statements[317] or misconduct[318] can be a disaster. If the accused decides to testify, the defense counsel must carefully prepare for that testimony. Counsel should rehearse the testimony and subject the client to sample cross-examination.

*Arguments*

The closing argument is the defense's opportunity to tie the case together for the panel or judge. It should be the high point of the defense case during which counsel explains why the evidence does not support a conviction.

Defense counsel should write out the argument well before trial. Most counsel write the argument in outline format, although some prefer to write it out verbatim.[319] Counsel should have a strong introduction that establishes the defense theory of the case. Counsel should then point out the facts and law that support that theory. Counsel should remind the fact-finder of evidence and testimony that is favorable to the defense and educate the members on instructions that the military judge will give. Counsel must finish strong, explaining why the fact-finder should acquit the accused.

The argument should build on the other parts of the trial. For example, counsel might want to remind the members that, during voir dire, they promised not to find the accused guilty unless they were convinced of guilt beyond a reasonable doubt.

Defense counsel must develop their own style when presenting argument. Members and judges are looking for counsel who effectively present a case in an orderly fashion, not flamboyance.[320] Counsel should maintain eye contact with the panel; it helps engage the members and keeps them interested.[321] Counsel should use strong language during argument; action verbs and simple language are more powerful than jargon and "legalese."

Counsel should rehearse the argument before trial. An unrehearsed argument will seldom be effective. Counsel should ask others to critique these rehearsals and, if possible videotape them.

Defense counsel must be alert during prosecutors' arguments to ensure that they do not make improper comments. It is impermissible for the prosecutor to comment on the accused's right to remain silent,[322] refer to personal beliefs,[323] mention facts not in evidence,[324] or make inflammatory statements.[325] Defense counsel must be quick to object to such argument.[326]

*Instructions*

Long before trial, defense attorneys should start thinking of what instructions they would like the judge to give. The *Military Judge's Benchbook*[327] contains most of the appropriate instructions.

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315. Rock v. Arkansas, 483 U.S. 44 (1987); United States v. Murray, 52 M.J. 671 (N.M. Ct. Crim. App. 2000).

316. United States v. Jones, 14 M.J. 702 (N.M.C.M.R. 1982).

317. MCM, *supra* note 33, MIL. R. EVID. 613.

318. *Id.* MIL. R. EVID. 608 (permitting inquiry on cross examination into prior conduct concerning character for untruthfulness); MIL. R. EVID. 609 (permitting impeachment by evidence of conviction of a crime which is not over ten years old and which is punishable by death, a dishonorabl e discharge, or imprisonment in excess of one year, or involves dishonesty or false statement).

319. *See* Major Gregory Coe, *The Art of Trial Advocacy, To Write or Not to Write?: That Should Not Be A Question*, ARMY LAW., Sept. 1998, at 48.

320. *See* Lieutenant Colonel Thomas C. Lane, *Military Trial Lawyers: Some Observations*, ARMY LAW., Dec. 1986, at 45.

321. Faculty, The Judge Advocate General's School, *The Art of Trial Advocacy, Lawyering Through Your Eyes*, ARMY LAW., Nov. 1997, at 45.

322. Griffin v. California, 380 U.S. 609 (1965) (stating that it is improper for prosecutor to comment on accused's failure to testif y); MCM, *supra* note 33, MIL. R. EVID. 301(f)(3) (stating that it is improper for prosecutor to introduce evidence of accused's pretrial refusal to answer questions or invocation of rights).

323. United States v. Young, 470 U.S. 1, 18 (1985).

324. United States v. Cook, 48 M.J. 64 (1998) (stating that the trial counsel erred by commenting on fact that accused yawned during trial; this was a fact not in evidence).

325. *See, e.g.*, United States v. Causey, 37 M.J. 308 (C.M.A. 1995) (stating that the trial counsel improperly argued in urinalysis case that if members accepted accused's innocent ingestion defense, they would "hear it a million times again" in their units).

326. *See* Captain Randy V. Cargill, *Government Appellate Division Note, "Hard Blows" Versus "Foul Ones:" Restrictions on Trial Counsel's Closing Argument*, ARMY LAW., Jan. 1991, at 20.

Counsel should always consider asking for relevant evidentiary instructions contained in the *Benchbook*. The circumstantial evidence instruction is appropriate in most cases.[328] Defense counsel can ask the judge to tailor this instruction by mentioning any justifiable inferences from circumstantial evidence the defense is relying on.[329] The instruction on credibility of witnesses should be requested whenever the defense has assailed the credibility of government witnesses.[330] If eyewitness identification is in issue, the eyewitness identification and interracial identification instruction may be appropriate.[331] If evidence of the accused's good character is introduced, the defense counsel should ask for the defense character instruction.[332] The defense should ask for the accomplice instruction whenever a government witness is culpably involved in the charged offenses.[333] If a government witness testifies under a grant of immunity or promise of leniency, the defense should ask for the immunity instruction.[334] Whenever uncharged misconduct is introduced, the defense should consider asking for the uncharged misconduct instruction.[335] Similarly, whenever two or more similar offenses are charged, the defense should consider asking for the spillover instruction, to ensure the members do not improperly consider one offense as corroborating another.[336]

If the accused decides not to testify, the judge can give an instruction telling the members not to draw any adverse inference from this decision.[337] Many defense counsel waive this instruction because it draws the members' attention to the accused's failure to testify.

If the case involves a novel theory of law, counsel may want to draft an instruction and submit it to the military judge.[338] For example, if the accused is charged with a violation of assimilated state law under Article 134,[339] the defense counsel should research the state law and be prepared to offer an appropriate instruction on the elements. This will help the defense counsel rebut instructions proposed by the prosecutor and may help ensure that the judge's final instruction is favorable to the defense.

### *Sentencing*

Because of the high conviction rates in military courts-martial,[340] sentencing is a frequent part of every defense counsel's practice. Since there are no sentencing guidelines in the military, the military judge and members have broad discretion in determining a sentence. Therefore, it is critical to present an effective sentencing case.

Defense counsel should know the rules the prosecutor must follow in sentencing. The prosecutor is limited to presenting personnel records of the accused, prior convictions, matters in aggravation directly relating to the offenses, and very limited testimony on the accused's previous duty performance and rehabilitative potential.[341] The prosecution witnesses may give a brief description of the accused's duty performance, but may not discuss specific instances of bad duty performance.[342] They may testify that the accused has "little" or "no" rehabilitative

327. DA PAM. 27-9, *supra* note 280.

328. *Id.* para. 7-3.

329. *Id.* para. 7-3, n.2.

330. *Id.* para. 7-7-1.

331. *Id.* para. 7-7-2.

332. *Id.* para. 7-8-1.

333. *Id.* para. 7-10.

334. *Id.* para. 7-19.

335. *Id.* para. 7-13-1.

336. *Id.* para. 7-17.

337. *Id.* para. 7-12.

338. *See* Major Victor Hansen, *The Art of Trial Advocacy, Instructions—An Often Overlooked Advocacy Tool,* ARMY LAW., Oct. 1998, at 62.

339. UCMJ art. 134 (2000).

340. In 1997, the Army-wide conviction rate at general courts-martial was 94.6%. The Army-wide conviction rate at special courts-m artial empowered to adjudge a bad-conduct discharge was 86.8%. Clerk of Court, U.S. Army Legal Services Agency, *Five Year Military Justice Statistics, FY 1993-1997,* ARMY LAW., June 1998, at 26.

341. MCM, *supra* note 33, R.C.M. 1001(b).

342. *Id.* R.C.M. 1001(b).

potential, but may not elaborate further or suggest that the accused not be returned to the unit or military[343]. The prosecutor must follow the rules of evidence; defense counsel should object if the prosecutor fails to follow them.[344]

The rules of evidence are usually relaxed for the defense during sentencing.[345] Defense counsel can offer hearsay statements (for example, from other soldiers, family, and friends), unauthenticated awards, certificates, and similar items. Counsel should be creative in coming up with such evidence. Counsel should send a letter or e-mail to the client's family and ask them to mail or fax letters and statements supporting the client.

Counsel should consider presenting a statement from the accused during sentencing. There are four possibilities: a sworn statement given by the client, an unsworn statement given by the client, an unsworn statement delivered by counsel, or a combination of any of these methods.[346] Because the unsworn statement is not subject to cross-examination, it is less dangerous than a sworn statement. It may be more effective for the statement to come directly from the client, rather than from counsel. The exception is when the client was convicted during a contested case in which he or she testified and denied guilt. Judges and members who have already determined that the accused lied during the findings portion of trial may not want to hear from the accused again during sentencing.

Counsel should not present matters that will open the door to damaging government rebuttal.[347] If the prosecutor has evidence that the accused missed numerous formations, it may not be a good idea to have the defense witnesses testify that the accused was a dependable duty performer. Defense counsel should also be careful not to elicit facts during the unsworn statement that the prosecutor can rebut, since the prosecutor can refute facts contained in the unsworn statement.[348] If the accused testifies that he or she believes that he or she was a good duty performer, this is opinion testimony and will not open the door to rebuttal evidence of bad duty performance. However, if the accused testifies that the commander said that he or she was the best duty performer in the company, the prosecutor may be able to rebut this with contrary testimony from the commander.

Defense counsel should never waive the opportunity to argue during sentencing. Counsel should explain why the accused should not be punished severely by highlighting evidence in extenuation, such as restitution the accused has made to the victims. Counsel should humanize the accused by describing his background, his family, good duty performance, and any other mitigation evidence that was introduced. Counsel may want to argue that a sentence to confinement should not exceed a specific amount. Members and judges are used to specific recommendations like this. The danger is that if the defense counsel recommends a higher sentence than the members or judge were considering, the argument may harm rather than help the accused. If the defense counsel plans to ask for a bad-conduct discharge[349] in lieu of a lengthy jail sentence, counsel must discuss this matter fully with the client before trial.[350]

### *Post-trial Representation*

Before authenticating the record of trial, the military judge has the authority to remedy certain types of errors. The military judge can conduct proceedings in revision and post-trial Article 39(a) sessions to remedy ambiguous or apparently illegal action by the court-martial, to inquire into the terms of the pretrial agreement, to reconsider a trial ruling, or to examine allegations of misconduct by a counsel, member, or witness.[351]

After the record of trial has been authenticated, the defense can submit two types of matters to the convening authority: clemency matters under Rule for Court-Martial 1105,[352] and matters in response to the staff judge advocate's recommendation under Rule for Court-Martial 1106.[353] Defense counsel can, and often do, combine these two submissions into one document asking for clemency. Defense counsel have ten days

343. *Id.* R.C.M. 1001(b)(5).

344. *But see id*. R.C.M. 1001(c)(3) (stating that the rules of evidence may be relaxed with respect to matters in extenuation and mitigation).

345. *Id.*

346. *Id.* R.C.M. 1001(c)(2).

347. *Id.* R.C.M. 1001(d).

348. *Id.* R.C.M. 1001(c)(2)(C).

349. When arguing for a discharge in lieu of confinement, defense counsel are limited to asking for a bad conduct discharge; counsel may not argue for a dishonorable discharge. *See* United States v. Holcomb, 43 C.M.R. 149 (C.M.A. 1971); United States v. Dresen, 40 M.J. 462 (C.M.A. 1994).

350. United States v. McMillan, 42 C.M.R. 601 (A.C.M.R. 1970). The military judge is required to conduct an inquiry when the defense counsel argues for a punitive discharge. United States v. McNally, 16 M.J. 32 (C.M.A. 1983).

351. *Id.* R.C.M. 1102. S*ee generally* Major Randy L. Woolf, *Trial Defense Service Notes, The Post-Trial Authority of the Military Judge*, ARMY LAW., Jan. 1991, at 27.

352. MCM, *supra* note 33, R.C.M. 1105.

from the service of the authenticated record of trial or the staff judge advocate's recommendation, whichever is later, to submit matters. The defense can request a twenty-day extension of this time-period, which is usually approved.[354]

Counsel should be creative in preparing post-trial submissions. One way to do this is to show the convening authority that circumstances have changed since trial. Counsel may be able to attach additional clemency matters that were not available at trial or show that the accused has made additional restitution. Counsel can also introduce evidence that was not admissible at trial, such as the collateral effects of the sentence or the sentences of a co-accused. Counsel should obtain the support of the accused's chain of command, if possible; convening authorities are used to accepting recommendations of subordinates.

If there is a good chance of obtaining clemency, a personal appearance before the convening authority should be requested. Although the convening authority is not required to grant such a request, this is an excellent way to highlight important parts of your clemency request.[355]

**Conclusion**

Trial Defense Service attorneys provide an important service to the Army. By effectively representing soldiers pending adverse action, they give soldiers confidence in the fairness of the military justice system and improve discipline and morale.

To be effective, TDS attorneys must have proper resources and training. The resources primarily come from the local command; TDS attorneys must aggressively seek this support. The training is done internally by TDS. Trial Defense Service attorneys must all strive to make this training effective.

Knowing how to properly represent clients is critical. This article provides a point of departure for new counsel. Experience, guidance from other defense counsel, and regular training are the other tools necessary to become an effective TDS counsel.

353. *Id.* R.C.M. 1106.

354. *Id.* R.C.M. 1105(c)(1), R.C.M. 1106(f)(5).

355. *See* Lieutenant Colonel Kevin Lovejoy, *The Art of Trial Advocacy, The Art of Clemency,* ARMY LAW., Mar. 1998, at 31.