

## USALSA Report

*United States Army Legal Services Agency*

### *Trial Judiciary Note*

#### **A View from the Bench: Defense Requested Experts**

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#### **Introduction**

Experts can provide invaluable assistance to the defense in courts-martial. Forensic experts may help develop a defense or attack the government's scientific evidence. If the accused is mentally ill, experts may assist with an insanity defense or provide mitigation evidence. In cases involving scientific, medical, or mental health issues, the defense should consider hiring an expert.

An accused in a court-martial can obtain an expert at government expense, if such assistance is necessary.<sup>1</sup> The defense counsel representing such an accused should request expert assistance as early as possible. The defense counsel must also decide whether to request an expert consultant or an expert witness.<sup>2</sup> An expert consultant's job is to help the defense counsel research the case, evaluate and develop the evidence, and understand a scientific or medical theory.<sup>3</sup> An expert witness's job, on the other hand, is to testify at trial.<sup>4</sup>

This article discusses the differences between expert consultants and expert witnesses and identifies the procedures for obtaining defense experts and how the government should process these requests.

#### **Expert Consultants**

An expert consultant assists defense counsel prepare for trial.<sup>5</sup> Consultants research the case and advise defense counsel in their areas of expertise. Consultants are covered by the attorney-client privilege,<sup>6</sup> therefore, the defense counsel can discuss trial strategy with consultants without revealing the content of these discussions to the prosecutor.

To obtain an expert consultant at government expense, the defense must show that employment of an expert is necessary for an adequate defense.<sup>7</sup> Specifically, the defense must show the following: (1) why expert assistance is needed, (2) what the expert assistance would accomplish, and (3) why defense counsel, on their own, are unable to gather and present the evidence that the expert consultant would develop.<sup>8</sup> To establish the third point, the defense counsel must show that the expert's assistance will help them understand a scientific or technical field that they would be unable to understand through independent research.

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<sup>1</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 703(d) (2005) [hereinafter MCM]; UCMJ art. 46 (2005).

<sup>2</sup> *United States v. Langston*, 32 M.J. 894 (A.F.C.M.R. 1991) (explaining the difference between an expert consultant and expert witness).

<sup>3</sup> *See infra* notes 5-11 and accompanying text.

<sup>4</sup> *See infra* notes 12-16 and accompanying text.

<sup>5</sup> *Langston*, 32 M.J. at 896.

<sup>6</sup> MCM, *supra* note 1, MIL. R. EVID. 502; *Langston*, 32 M.J. at 896.

<sup>7</sup> *Ake v. Oklahoma*, 470 U.S. 53 (1985); *United States v. Burnette*, 29 M.J. 473 (C.M.A. 1990); UCMJ art. 46 (2005).

<sup>8</sup> *United States v. Ndanyi*, 45 M.J. 315 (1996) (utilizing a three-part test to determine that military judge did not err in denying defense request for assistance of DNA expert).

Although the defense can propose employment of a specific expert consultant, the government is not required to hire the requested individual if it can provide an adequate substitute.<sup>9</sup> An adequate substitute is one with sufficient training or experience to properly advise the defense counsel on the expert theory in question.<sup>10</sup> The threshold to prove that such a substitute is adequate is generally low. It does not matter whether the consultant agrees with the defense theory of the case, as long as he can assist the defense in formulating the theory<sup>11</sup>

### Expert Witnesses

A defense expert witness's sole task is to testify at trial. Since witnesses are not covered by the attorney-client privilege,<sup>12</sup> defense counsel who discuss their theory of the case with an expert witness risk revealing the theory to the government. The standard for obtaining expert witnesses is whether their testimony is relevant and necessary.<sup>13</sup> The defense can meet this burden by showing that an expert's testimony will assist the defense theory of the case.

As with an expert consultant, the defense can propose employment of a specific expert witness. The government, however, is not required to hire the requested witness if it can provide an adequate substitute.<sup>14</sup> There is a relatively high threshold to show that a substitute expert witness is adequate. If the requested expert witness supports a defense theory that is relevant to the case, the adequate substitute must also support this theory. A substitute that has a different scientific view will usually be inadequate.<sup>15</sup> In addition, if the government has obtained an expert to assist in its case, the substitute provided to the defense must have professional qualifications reasonably comparable to those of the government expert.<sup>16</sup>

### Obtaining the Expert

Defense counsel who need an expert should submit an appropriate request to the convening authority.<sup>17</sup> The request should specify what type of expert is needed and why the expert is necessary.<sup>18</sup> Defense counsel should also specify whether they are requesting an expert consultant or witness.

Before requesting an expert consultant, defense counsel should educate themselves on the scientific or medical issues involved. A defense request for an expert consultant will be granted only if defense counsel can show that the consultant will develop evidence that the defense counsel cannot develop on their own.<sup>19</sup>

Defense counsel often first ask for an expert consultant. Since consultants are covered by the attorney-client privilege, they can often more effectively help the defense prepare the case. Consultants can also help defense counsel determine if expert testimony will be needed at trial. In many cases expert consultants later become defense witnesses.<sup>20</sup>

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<sup>9</sup> United States v. Ford, 51 M.J. 445 (1999) (finding that the military judge properly denied a defense request for assistance of explosives expert where adequate substitute was provided).

<sup>10</sup> *Ndanyi*, 45 M.J. at 319.

<sup>11</sup> *Cf.* United States v. Van Horn, 26 M.J. 434 (C.M.A. 1988) (holding that the military judge erred in ruling that the government provided an adequate substitute for the defense requested expert witness; substitute was inadequate because his proffered testimony contradicted that of the defense requested expert).

<sup>12</sup> United States v. Langston, 32 M.J. 894 (A.F. Ct. Crim. App. 1991).

<sup>13</sup> MCM, *supra* note 1, R.C.M. 703(d).

<sup>14</sup> *Id.*

<sup>15</sup> *Van Horn*, 26 M.J. at 434. *Cf.* United States v. Robinson, 43 M.J. 501 (Army Ct. of Crim. App. 1995) (finding that the military judge did not abuse his discretion in denying defense motion to employ clinical psychologist as witness where the government provided a psychiatrist as an adequate substitute and defense did not establish that divergent views existed).

<sup>16</sup> *See* United States v. Warner, 62 M.J. 114 (2005) (providing that the government is required to provide defense expert with qualifications similar to those of government expert. Although this case involved an expert consultant, the holding applies equally to expert witnesses since the court pointed out that a consultant may become a witness). *Cf.* United States v. Robinson, 43 M.J. 501 (A.F. Ct. Crim. App. 1995) (defense is not entitled to "best" expert available).

<sup>17</sup> MCM, *supra* note 1, R.C.M. 703(d).

<sup>18</sup> *Id.*

<sup>19</sup> United States v. Short, 50 M.J. 370 (1999) (holding that the military judge properly denied defense request for urinalysis expert consultant where there was no showing that defense counsel was unable to educate herself on subject); United States v. Ndanyi, 45 M.J. 315, 319 (1996).

If the case involves mental health issues, requesting an inquiry into the mental responsibility of the accused under Rule for Courts-Martial 706<sup>21</sup> is another means of obtaining expert assistance. Although the experts who conduct the examination are not covered by the attorney-client privilege, Rule for Courts-Martial 706 generally prohibits release of statements made by the accused during the examination.<sup>22</sup>

Defense counsel should submit requests for experts well in advance of trial. Experts need time to research the case and formulate their opinions. The more lead-time they are given, the more effective their assistance will be.

Defense counsel may request a specific expert by name. Appropriate experts can be found at military medical facilities, local finance and information systems offices, crime and drug testing laboratories, and similar organizations. The U.S. Army Trial Defense Service also has a wealth of information on appropriate experts.<sup>23</sup> Requesting an expert who is employed by the government is usually more effective because it is generally easier to obtain their services and attendance at trial.<sup>24</sup> Civilian experts are typically expensive and arranging their testimony at trial may be difficult or impossible.<sup>25</sup> If the defense requests a civilian expert, the defense must provide an estimate of the expert's fees.<sup>26</sup> Convening authorities are only required to pay *reasonable* fees and expenses.<sup>27</sup>

If the convening authority denies a defense requested expert, defense counsel should promptly bring this issue to the attention of the military judge after referral of charges.<sup>28</sup> Waiting to litigate such issues until the eve of trial means that even if the judge grants the defense request, the defense expert will have little or no time to prepare.

### *The Government Response*

Defense expert requests must be forwarded to the convening authority.<sup>29</sup> Before advising the convening authority on these requests, the government attorneys working on the case should carefully review the request to ensure it is in proper form. The government should ensure that the request properly identifies the type of expert, the necessity of the expert, and whether a consultant or a witness is involved. If the request is deficient, the government attorneys should notify the defense counsel and request clarification.

If the request is in proper form, and the expert is necessary to the case, the government attorneys should look for an appropriate expert in the local area. Government attorneys should first look for an expert who is already employed by the government.<sup>30</sup> If the defense has requested an expert by name, the government may consider finding an adequate substitute.<sup>31</sup>

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<sup>20</sup> Warner, 62 M.J. at 114.

<sup>21</sup> MCM, *supra* note 1, R.C.M. 706.

<sup>22</sup> *Id.* R.C.M. 706(c)(5); *id.* MIL. R. EVID. 302. This privilege prevents any statement made by the accused and any derivative evidence from being received into evidence against the accused. *Id.* MIL. R. EVID. 302(a). The privilege does not apply if the accused first introduces such statements into evidence. *Id.* MIL. R. EVID. 302(b)(1).

<sup>23</sup> See generally Lieutenant Colonel R. Peter Masterton, *The Defense Function: The Role of the U.S. Army Trial Defense Service*, ARMY LAW., Mar. 2001, at 1, 20.

<sup>24</sup> See *United States v. Burnette*, 29 M.J. 473 (C.M.A. 1990) (holding that the military judge did not err in denying defense request for civilian expert consultant in urinalysis where defense rejected the assistance of any government experts).

<sup>25</sup> If the trial is held overseas, there is no compulsory process to require a civilian witness to come overseas to attend. MCM, *supra* note 1, R.C.M. 703(e)(2)(A).

<sup>26</sup> *Id.* R.C.M. 703(d).

<sup>27</sup> *Army Regulation 27-10* provides that payments to expert witnesses will be made under the Department of Justice Expert Rate Schedule. See U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES, MILITARY JUSTICE para. 5-21(d) (13 June 2005). Although an updated version of the Department of Justice schedule is not currently available, the purpose of the Army regulation is to ensure that compensation to experts is reasonable. For a general discussion of this issue, see Major Alan K. Hahn, *Voluntary and Involuntary Expert Testimony in Courts-Martial*, 106 MIL. L. REV. 77, 97 (1984).

<sup>28</sup> MCM, *supra* note 1, R.C.M. 703(d).

<sup>29</sup> *Id.*

<sup>30</sup> *United States v. Ndanyi*, 45 M.J. 315, 319 (1996) (finding that usually the expert services available in the military are sufficient to permit the defense to adequately prepare for trial).

<sup>31</sup> MCM, *supra* note 1, R.C.M. 703(d).

If the government has already employed an expert to assist in their case, the substitute provided to the defense should have professional qualifications reasonably comparable to those of the government expert.<sup>32</sup>

The government should act on defense requests for experts expeditiously. The convening authority must take action before the issue can be litigated.<sup>33</sup> If the convening authority denies the request, the denial should be promptly brought to the military judge's attention. Litigating these issues on the eve of trial may result in delay of the case and greater expense for the government.

### *Expert Testimony at Trial*

As noted above, defense expert consultants often turn into witnesses.<sup>34</sup> Therefore, defense counsel should discuss the trial dates with their expert at the outset, regardless of whether the expert is a consultant or a witness. Defense counsel should ensure that experts have plenty of time to prepare, should their testimony be required.

Once the defense identifies an expert consultant as a witness, the attorney-client privilege no longer applies.<sup>35</sup> This means that the government will be able to interview the expert and review the information the expert used to prepare for trial.

### **Conclusion**

Experts can be critical to the defense. If an accused needs expert assistance, the defense counsel should submit a request to the convening authority as early as possible. The defense counsel must distinguish between expert witnesses and expert consultants, since different rules apply to each. If the convening authority denies a defense request for an expert and the defense wishes to litigate this issue, the defense counsel should notify the military judge as soon as practicable so the issue can be resolved well in advance of trial.

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<sup>32</sup> United States v. Warner, 62 M.J. 114 (2005).

<sup>33</sup> MCM, *supra* note 1, R.C.M. 703(d).

<sup>34</sup> Warner, 62 M.J. at 114.

<sup>35</sup> United States v. Langston, 32 M.J. 894, 896 (A.F.C.M.R. 1991).