A View from the Bench

Rehabilitative Potential and Retention Evidence

Lieutenant Colonel Roger E. Nell
Military Judge, 2nd Judicial Circuit
U.S. Army Trial Judiciary, Fort Stewart, Georgia

"[O]ur military appellate courts are not very enamored with R.C.M. 1001(b)(5). Counsel must ask themselves, 'Is it worth it?'"[1]

Rehabilitative potential and retention evidence continues to be a source of great frustration for counsel. What testimony can be admitted? Who can admit it? Can the defense get away with more than the government? Can witnesses say that they do or do not want the accused back in the unit? Does rehabilitative potential testimony even make a difference?

Consider the following:

> This case presents a classic example of trial counsel interjecting an appellate issue into a case for no good reason. The prosecution's documentary evidence on sentencing consisted of a stipulation of fact that described the offenses in detail, a personal data sheet, three enlisted performance reports that evidenced limited potential, four letters of counseling, two letters of admonition, three letters of reprimand, and a record of nonjudicial punishment, all of which pertained to disciplinary infractions by the appellant over a 16-month period leading up to her court-martial. Instead of resting on this wealth of derogatory documentary evidence, the trial counsel, with apparently little understanding of the rules regarding opinion evidence, chose to call . . . the appellant's commander, to testify about the appellant's performance and rehabilitative potential.[2]

With that in mind, let's start with the basics.

Who is the proponent of rehabilitative potential evidence? The short answer is—the government. Rule for Courts-Martial (RCM) 1001(b)(5) is within the category of government sentencing evidence.[3] The defense, however, is allowed to introduce "retention evidence."[4] While not technically "rehabilitative potential" evidence, the subject matter can be virtually indistinguishable.

What Foundation Must Be Laid?

The proponent should demonstrate that the witness possesses

> sufficient information and knowledge about the accused to offer a rationally-based opinion that is helpful to the sentencing authority. Relevant information and knowledge include, but are not limited to, information and knowledge about the accused's character, performance of duty, moral fiber, determination to be rehabilitated, and nature and severity of the offense or offenses.[5]

The same holds for defense retention evidence.[6] The witness's knowledge and information must be specific to the accused and not to Soldiers in general.[7] And, importantly, a witness's opinion cannot principally be based upon the severity or nature of the charges.[8]

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[1] United States v. Bish, 54 M.J. 860, 863 n.1 (A.F. Ct. Crim. App. 2001) (citing Major Lawrence M. Cuculic, TJAGSA Practice Notes, Criminal Law Notes, United States v. Aurich*: The Scope of Rehabilitative Potential Opinion Questions*, ARMY LAW., Dec. 1990, at 33. *See also* Major Lauren K. Hemperley, *Looking Beyond the Verdict: An Examination of Prosecution Sentencing Evidence*, 39 A.F. L. REV. 185, 197-205 (1996)).

[2] *Bish*, 54 M.J. at 861-62.

[3] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b)(5) (2005) [hereinafter MCM].

[4] *Id.* R.C.M. 1001(c); United States v. Griggs, 61 M.J. 410 (2005).

[5] MCM, *supra* note 3, R.C.M. 1001(b)(5)(B).

[6] *Griggs*, 61 M.J. at 410.

[7] MCM, *supra* note 3, R.C.M. 1001(b)(5)(C).

[8] *Id.*

What Is "sufficient information and knowledge"?

"Sufficient information and knowledge" is not much. A recent case suggests that to meet the "sufficient information and knowledge" standard, a witness need only have observed the accused and have spoken to the accused's immediate supervisors.[9] Slightly more developed, a witness should testify to the length of time he knew the accused, how often they interacted, the context of the interaction, and that the witness reviewed the accused's personal information file.[10] Of course, from a practical standpoint, the greater the proponent can demonstrate the witness's knowledge of the accused, the more weight the sentencing authority is likely to give the witness's opinion. A barebones foundation that a company commander saw an accused five days a week during physical training (PT) and three times a week in the motor pool and received reports from his squad leader is arguably far less persuasive.

Suggested foundational questions:

Who are you?
How long have you been in the Army?
What supervisory positions have you held?
How long have you been in supervisory positions?
How many Soldiers have you supervised in your career?
What is your current assignment?
How long have you been in this assignment?
How many Soldiers have you supervised in this assignment?
How many Soldiers do you currently supervise?
Is the accused one of those Soldiers?
How long have you supervised the accused?
Did you supervise him in any previous assignments?
How often do you see the accused?
In what context?

Do you see him at PT? How many times a week? For how long?
Do you see him during the rest of the duty day?
Do you see him during training, such as at the range or other classroom training?
Do you see him in field exercises?
Do you see him in operational missions?

Have you reviewed his training records?
Have you reviewed his personnel file?
Have you reviewed other records?
Have you received reports from others, superiors, subordinates, peers about the accused?
From all of that information and personal contact, do you know of the accused's character in general?
Do you know of his performance of duty?
Do you know of his moral fiber?
Do you know about his determination to be rehabilitated?
Are you aware of the nature and severity of the offense(s) for which the accused has been found guilty?

Now, bear in mind that the proper answer to the majority of these questions should only be "yes" or "no". Specific instances of conduct cannot be elicited.

From time to time, the government will attempt to introduce expert testimony regarding an accused's rehabilitative potential, typically in child sexual abuse cases. Counsel must, of course, comply with Military Rule of Evidence (MRE) 702,[11] but special attention must be paid to RCM 1001(b)(5)(C).[12] The expert's opinion must be based on information about the accused specifically. The expert cannot give an opinion based on general research.[13]

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[9] United States v. Lewis, 2003 CCA LEXIS 59, at *2, *4 (A.F. Ct. Crim. App. 2003).

[10] *Id.*

[11] MCM, *supra* note 3, MIL. R. EVID. 702.

[12] *Id.* R.C.M. 1001(b)(5)(C).

[13] *See* United States v. McElhaney, 54 M.J. 120, 133-34 (2000).

What Evidence Can Be Admitted?

For the government, admissible evidence consists of opinions regarding an accused's rehabilitative potential.[14] Rehabilitative potential evidence "refers to the accused's potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society."[15] Note that it is evidence of an accused's potential to be restored in *society*, not in the Army. Also note that it is a person's potential to be restored through *training or other corrective measures*, not just through the accused's own, innate potential (although that certainly is a large part). Further, the witness may testify as to the "magnitude or quality" of that potential.[16]

Well, what does that actually sound like at trial? About like this:

> Q: Based on all of that (the foundational questions above), have you formed an opinion about the accused's potential to be rehabilitated?
> A: *Yes.* (Nothing more than "Yes" or "No").
> Q: What is your opinion?
> A: "*In my opinion, the accused has _____ (good, no, some, little, great, zero, much, etc.) potential for rehabilitation.*"[17]

Not very "sexy," riveting or effective, is it? It is at this stage counsel typically draw the judge's ire because they have not adequately prepared the witness to limit his answer to what is allowed.

If counsel intends to introduce this type of testimony, trial counsel must explain to the witness during pretrial preparation what responses are and are not permitted. On more than one occasion, a military judge has interrupted an examination at the point of the ultimate question and has asked the witness: "Tell me, Sergeant Smith, what has counsel just asked you?" Invariably, the witness replies, "Whether the accused should remain in the Army, your honor." Of course, we all know the government cannot elicit a response whether the accused should be punitively discharged.[18] So at this point, most judges will stop the line of questioning and suggest that counsel move on.

For the defense, evidence of mitigation may be presented.[19] Generally, matters in mitigation are those that tend to lessen the punishment or that support clemency.[20] They include "particular acts of good conduct or bravery and evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or *any other trait that is desirable* in a servicemember."[21]

Unlike the government, the defense can introduce evidence that others are willing to continue to serve with the accused.[22] This may seem unfair. The government cannot have a witness testify, "He should get a bad conduct discharge," or anything that can remotely be construed as saying that, but the defense can have a witness testify, "I'd serve with him again." This apparent imbalance has been addressed by the appellate courts. "[I]f an accused 'opens the door' by bringing witnesses before the court who testify that they want him or her back in the unit, the Government is permitted to prove that that is not a consensus view of the command."[23]

Also, on cross-examination trial counsel is permitted to inquire "into relevant and specific instances of conduct."[24] This cross-examination is similar to cross-examination under MRE 405(a)[25] and should be similarly analyzed. Counsel are limited to asking the

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[14] MCM, *supra* note 3, R.C.M. 1001(b)(5)(A).

[15] *Id.* R.C.M. 1001(b)(5).

[16] *Id.* R.C.M. 1001(b)(5)(D).

[17] United States v. Bish, 54 M.J. 860, 863 (A.F. Ct. Crim. App. 2001).

[18] United States v. Griggs, 61 M.J. 402, 408 (2005) (citing United States v. Ohrt, 28 M.J. 301, 304 (C.M.A. 1989)).

[19] MCM, *supra* note 3, R.C.M. 1001(c)(1).

[20] *Id.* R.C.M. 1001(c)(1)(B).

[21] *Id.* (emphasis added).

[22] *Id.*

[23] *Griggs*, 61 M.J. at 410 (quoting United States v. Aurich, 31 M.J. 95, 96-97 (C.M.A. 1990)).

[24] MCM, *supra* note 3, R.C.M. 1001(b)(5)(E); *see* United States v. Hoyt, 2000 CCA LEXIS 180, at *6 (A.F. Ct. Crim. App. July 5, 2000).

[25] MCM, *supra* note 3, MIL. R. EVID. 405(a).

witness “have you heard” or “do you know” about a specific instance of conduct in order to test the witness’s opinion. Extrinsic evidence is not permitted. Certainly, though, trial counsel must have a good faith basis for asking the question.

So, before going down this road, a trial counsel must ask: “Will rehabilitative potential add anything to my case beyond what I already have?” A defense counsel must ask: “If I introduce retention evidence, what bad things can the trial counsel bring out on cross-examination or rebuttal evidence?” Then both counsel should should ask themselves, “Is it worth it?”