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Trial Judiciary Notes

A View from the Bench

Preparing Your Client for Providency

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One of the most important areas of a defense counsel's guilty plea trial preparation, and definitely one of the most challenging aspects, is preparing the client for providency. Though grounded in statutory and case law, most of what a defense counsel learns about providence preparation will come from experience rather than through formal study. In that vein, this article will briefly address the legal requirements of an accused's guilty plea, and will then focus on practice pointers to help counsel ensure that his client is provident. The article will discuss use of the *Military Judges' Benchbook* (*Benchbook*)[1] in preparing for providence, traps for unwary counsel, and practical tips for assuring the client does not lose the benefit of his plea agreement. The article will conclude with a checklist for counsel's use in preparing a client for the court's guilty plea inquiry.

Legal Basis for Providence Inquiry

Since the groundbreaking 1969 case of *United States v. Care*,[2] military judges must inquire into and establish a factual basis for an accused's guilty plea:

> [T]he record of trial . . . must reflect not only that the elements of each offense charged have been explained to the accused but also that the military trial judge . . . has questioned the accused about what he did or did not do, and what he intended (where this is pertinent), to make clear the basis for a determination by the military trial judge . . . whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty.[3]

Article 45, Uniform Code of Military Justice (UCMJ), presumes a military judge will verify the providence of an accused's guilty plea, though it does not specifically require such an inquiry:

> If an accused . . . after a plea of guilty sets up a matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, . . . a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.[4]

Unlike Article 45's presumption that the military judge will inquire into the providence of an accused's guilty plea, Rule for Courts-Martial (RCM) 910 explicitly requires such an inquiry and details particular issues that the judge must address.[5] Before accepting a guilty plea, the military judge must inform the accused of the nature of the offense pled to, the penalty range for that offense, the accused's right to counsel, the accused's right to confront and cross-examine witnesses, and the

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[1] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK (1 July 2003) [hereinafter BENCHBOOK].

[2] 40 C.M.R. 247 (C.M.A. 1969).

[3] *Id.* at 253 (citations omitted). For an excellent summary of *Care*, its origins, and its progeny, see Major Deidra J. Fleming, *The Year in Voir Dire and Challenges, and Pleas and Pretrial Agreements*, ARMY LAW., June 2007, at 31, 35–36.

[4] UCMJ art. 45 (2008).

[5] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 910 (2005) [hereinafter MCM]. For similar requirements in civilian criminal practice, see FED. R. CRIM. P. 11(b).

accused's right against self-incrimination.[6] The judge must advise the accused that if he pleads guilty, there will not be a trial as to the offenses pled to, and that the accused waives his right to confront and cross-examine witnesses, as well as his right against self-incrimination.[7] Finally, the judge must tell the accused that if he pleads guilty, the judge will place him under oath and question him about the offenses to which he has pled guilty.[8]

Under RCM 910, not only must the military judge provide this advice to the accused, he also must insure that the accused understands it.[9] Likewise, the judge must ensure that the plea is voluntary; that is, free from threats or promises not contained in any plea agreement.[10] Just as importantly, the military judge must be satisfied that "there is a factual basis for the plea."[11] The judge should explain the elements of the offenses to the accused, and "the accused must admit every element of the offense(s)" pled to.[12] The judge should explain any potential defenses "raised by the accused's account of the offense," and elicit facts from the accused that negate those defenses.[13] If there is a plea agreement, the military judge must examine it (absent any sentence limitation)[14] and question the accused to ensure that he fully understands the agreement.[15]

The *Benchbook* Is Your Friend

As a defense counsel readying yourself and your client for the court's providence inquiry, the best tool for incorporating these legal standards into your trial preparation is the *Benchbook*.[16] The *Benchbook*'s table of contents and Chapter 2 script are good roadmaps for preparing the client for the court's inquiry.

When explaining the providence inquiry to the client, start by telling the client the name of the judge and explaining the client's forum rights.[17] Move next to the elements of the offenses to which the client is pleading guilty.[18] Review the elements with your client and discuss how the facts of the particular case meet those elements. Make sure the client can explain to the court how the facts satisfy each and every element of the offenses to which he is pleading. Remind the client that mere "yes" or "no" answers will not suffice.[19] Reassure the client that he "need not describe from personal recollection all the circumstances necessary to establish a factual basis for the plea."[20] Rather, he may "be able to adequately describe the

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[6] MCM, *supra* note 5, R.C.M. 910(c)(1)–(3).

[7] *Id.* R.C.M. 910(c)(4).

[8] *Id.* R.C.M. 910(c)(5). Further, the judge must advise the accused that the accused's answers may later be used against him in a prosecution for perjury or false statement. *Id.*

[9] *Id.* R.C.M. 910(c) ("[A]nd determine that the accused understands . . . .").

[10] *Id.* R.C.M. 910(d).

[11] *Id.* R.C.M. 910(e); *see also id.* R.C.M. 910(e) discussion ("A plea of guilty must be in accord with the truth.").

[12] *Id.* R.C.M. 910(e) discussion.

[13] *Id.*

[14] *Id.* R.C.M. 910(f)(3).

[15] *Id.* R.C.M. 910(f)(4). Not only must the accused understand the agreement, he also must agree to it. *Id.*

[16] In recognizing the *Benchbook*'s value, counsel may want to remember this ditty:

> This is my laptop
>
> Here is its port
>
> Access the Benchbook
>
> And use it in court

[17] BENCHBOOK, *supra* note 1, § 2-1-2; MCM, *supra* note 5, R.C.M. 903. Practically speaking, this also is a good time to explain to the accused any particular reputations that the detailed judge or court members may have. Additionally, remind the accused that the military judge will review the accused's rights to counsel at about this same point in the trial. BENCHBOOK, *supra* note 1, § 2-1-1.

[18] *See generally* BENCHBOOK, *supra* note 1, ch. 3; MCM, *supra* note 5, R.C.M. 910(e) discussion.

[19] United States v. Jordan, 57 M.J. 236, 239 (2002) (answering yes or no to conclusory statements by military judge insufficient in absence of admissions to support them) (citing United States v. Outhier, 45 M.J. 326, 331 (1996)); *accord* United States v. Frederick, 23 M.J. 561, 562–63 (A.C.M.R. 1986).

[20] MCM, *supra* note 5, R.C.M. 910(e) discussion; *see* United States v. Axelson, 65 M.J. 501, 510–11 (Army Ct. Crim. App. 2007) (citing United States v. Moglia, 3 M.J. 216, 218 (C.M.A. 1977)).

offense based on witness statements or similar sources which [he] believes to be true."[21] For example, the client may remember that he smoked marijuana and recognize the validity of the lab report without necessarily having observed the lab's testing of his urine sample.[22]

Along with explaining the elements to the client and making sure he can match the facts to those elements, clarify with the client the various bases of his potential liability, if more than direct liability is at issue.[23] Next, review with the client any defenses that may exist under RCM 916.[24] Assist the client in preparing his explanation to the judge why those defenses do not apply in his case.[25] For both elements and potential defenses, make sure the client understands the applicable definitions and how those definitions fit the facts of his case. Review the appropriate definitions in Chapters 3 (offenses) and 5 (defenses) of the *Benchbook* with the client.[26] Finally, have the client especially prepared to explain how his conduct is service discrediting or prejudicial to good order and discipline if charged under Article 134.[27]

After explaining elements, defenses, and definitions, review the pretrial agreement with your client, paragraph-by-paragraph.[28] Though this usually is not difficult, reviewing the stipulation of fact with the accused is the source of many anxious moments for defense counsel. If the client notes factual inaccuracies, by all means bring them to the attention of the trial counsel and try to resolve them. On the other hand, if the client tells you that everything in the stipulation is true but that he objects to the government's inclusion or characterization of certain facts, remind him that the government holds great leverage because of its offered sentence cap. For instance, if the client wants the benefit of his pretrial agreement, the government can force him to stipulate to aggravation evidence if it is true.[29] Moreover, as part of the pretrial agreement, the government can force the accused to stipulate to uncharged misconduct that is true.[30]

After reviewing the pretrial agreement and stipulation of fact, review the maximum potential punishment with the client. Tell him that the trial counsel will announce the maximum punishment when queried by the judge, but that the pretrial agreement guarantees a lower punishment if the client is provident. Explain that the judge will not know the sentence terms of the pretrial agreement, even though he will review the rest of the agreement with the accused. When explaining the terms of the pretrial agreement, ensure that the accused understands particular rights that he is waiving, as applicable. For example, if appropriate, clarify for the accused his waiver of his right to a statutory waiting period between service of charges and trial,[31] his waiver of his right to conflict-free counsel,[32] his waiver of his right to an Article 32 hearing,[33] his waiver of his right to trial by members,[34] and his waiver of motions.[35]

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[21] MCM, *supra* note 5, R.C.M. 910(e) discussion.

[22] *But see* United States v. Wiles, 30 M.J. 1097, 1100–01 (N.M.C.M.R. 1989) (setting aside guilty plea where accused convinced by witness statements that he smoked marijuana, but had no memory of smoking it).

[23] BENCHBOOK, *supra* note 1, § 7-1, 7-2; MCM, *supra* note 5, pt. IV, ¶¶ 2, 5; *id.* at R.C.M. 307(c)(5).

[24] MCM, *supra* note 5, R.C.M. 916.

[25] Be especially careful to resolve fully any potential defenses in AWOL and drug cases, as the appellate courts are scrutinizing pleas in these areas. *See* United States v. Gaston, 62 M.J. 204, 207 (2006) (insufficient admission from accused that absence was terminated by apprehension rather than voluntary surrender); United States v. Gosselin, 62 M.J. 349, 352–53 (2006) (insufficient admission from accused that he assisted in introducing drugs onto air base).

[26] BENCHBOOK, *supra* note 1, chs. 3, 5.

[27] *See* United States v. Erickson, 61 M.J. 230, 232 (2005) (accused sufficiently testified regarding how his drug use could prejudice good order and discipline by rendering him unfit and unwilling to perform military duties); United States v. Jordan, 57 M.J. 236, 239 (2002) (conduct was not service discrediting where accused testified where owners of damaged property "appeared neither upset nor agitated").

[28] MCM, *supra* note 5, R.C.M. 910(f)(3), (4).

[29] United States v. Harrod, 20 M.J. 777, 779 (A.C.M.R. 1985); United States v. Sharper, 17 M.J. 803, 807 (A.C.M.R. 1984).

[30] United States v. Vargas, 29 M.J. 968, 970–71 (A.C.M.R. 1990).

[31] BENCHBOOK, *supra* note 1, § 2-7-1; MCM, *supra* note 5, R.C.M. 602; UCMJ art. 35 (2008).

[32] BENCHBOOK, *supra* note 1, § 2-7-3 (defense counsel representing multiple accused); UCMJ art. 27; *see* United States v. Smith, 36 M.J. 455, 457 (C.M.A. 1993).

[33] BENCHBOOK, *supra* note 1, § 2-7-8; MCM, *supra* note 5, R.C.M. 405(k); UCMJ art. 32.

[34] BENCHBOOK, *supra* note 1, § 2-7-9; MCM, *supra* note 5, R.C.M. 903; UCMJ art. 16.

[35] BENCHBOOK, *supra* note 1, § 2-7-10. Be careful, though, as there are some motions that an accused may not waive, even as part of a pretrial agreement. *See id.* at note 1; MCM, *supra* note 5, R.C.M. 705(c)(1)(B), R.C.M. 705(c)(2)(E); *see also* United States v. McLaughlin, 50 M.J. 217, 218–19 (1999) (holding that the accused may not waive his right to speedy trial as part of a pretrial agreement); United States v. Jennings, 22 M.J. 837, 838–39

Traps for the Unwary

Even when using the *Benchbook* as a roadmap for your guilty plea preparation, there remain a few traps for both you and your client that the *Benchbook* does not specifically address. First and foremost, remind the client that if he "busts"[36] providency, that doesn't mean that the court finds him not guilty. What it means instead is that the government will have to prove his guilt at a trial and, more importantly, he loses the benefit of his pretrial agreement if found guilty. Many accused do not initially understand this, but once they do, it provides a powerful incentive to get through providence.

Discuss with the client the consequences of raising a defense or a matter inconsistent with his plea. Whether the client raises the defense or inconsistency during providence or later during sentencing, the judge must resolve the defense or inconsistency.[37] Therefore, defense counsel must "scrub" both the accused's providence statements and the sentencing case to ensure that he raises no defenses or inconsistent matters that he cannot resolve consistent with his pleas.

Remind the client of any potential collateral consequences of his guilty conviction. For example, ensure that the client understands that he may have to participate in a Mandatory Supervised Release program,[38] and that he may need to comply with certain state criminal registration requirements, particularly if convicted of sex-related offenses.[39] Though not necessarily a bad thing for the client, it is important to remind him that any adjudged forfeitures will be at the rate of his new pay grade, if reduced in rank.[40] Finally, explain to the client his post-trial and appellate rights, remind him that the military judge will review these with him, and have him sign a post-trial and appellate rights form.[41]

Call Mama, Or What They Didn't Teach You in Law School

Even after thoroughly reviewing the *Benchbook* along with statutory and case law, there are some practice pointers that defense counsel should know that are not found in books. When reviewing the following practice pointers, counsel should first remember to be themselves. What works for certain counsel may not work for other counsel. Be willing to try new techniques, but more importantly, be willing to adopt those that work for you and jettison those that do not.

Before you even get to the stage of preparing the client for providency, work on building a strong rapport with the client. Though not always an easy task, it is essential that the client trusts your judgment as you begin discussing providence. Before you even reach this stage, spend time with the client, let him know what work you are doing on his case, listen to him and answer his questions.

Though it may not be difficult to convince the client to plead guilty in return for a sentence limitation, persuading him to admit guilt in open court and recount his misdeeds is an altogether different challenge. Counsel walk a fine line between urging the client to plead guilty because the pretrial agreement is in his best interests, and not coercing the client into pleading guilty when that's not what the client wants. Ultimately, of course, the decision to plead guilty is solely the client's. However, once he makes that decision, counsel can help the client see that decision through.

In preparing the client for his providence inquiry, remember the old adage, "train as you fight." In this instance, give the client a copy of the *Benchbook* script and review it with him. Like most Soldiers, the client will likely be familiar with "by-the-numbers" training, and will feel more comfortable in court if he recognizes the script from "training." When reviewing the script, role-play with the client. Practice asking him questions that the judge likely will pose during providence. When practicing, try to get the client to bust providence. Ask questions like, "You didn't really know it was marijuana, did you?"

(N.M.C.M.R. 1986) (holding that accused's attempt to "waive any pretrial motion I may be entitled to raise" as part of pretrial agreement is "null and void" as "contrary to public policy").

[36] To "bust" providence means that the accused is not able to establish a legal and factual predicate, to the satisfaction of the military judge, to support his plea of guilty.

[37] MCM, *supra* note 5, R.C.M. 910(e) discussion, 910(h)(2).

[38] United States v. Pena, 64 M.J. 259, 263–64, 267 (2007).

[39] United States v. Miller, 63 M.J. 452, 458–59 (2006).

[40] MCM, *supra* note 5, R.C.M. 1003(b)(2).

[41] BENCHBOOK, *supra* note 1, § 2-6-14; MCM, *supra* note 5, R.C.M. 1010.

or "When you left your unit, you really meant to come back, didn't you?" Remind the client that in asking these type of "nice guy" questions, the judge is not the client's friend. Explain that the judge has to ask such questions to protect the record, and that if the client's answers to these "nice guy" questions cause the judge to refuse to accept the guilty plea, the client then loses the benefit of his plea bargain.[42] Explain to the client that he must accept criminal responsibility for his acts, despite the judge's dangling the bait of potential defenses. Even better, make sure the client is able to articulate to the court why those potential defenses do not apply in his case.

"Train as you fight" also means practicing in the courtroom, if available. Though your office may serve as an adequate "simulation center," have the client "train" "on" the actual battlefield so as to be better prepared for trial. Practice the providence inquiry while in the courtroom. When in the courtroom, tell him which parties will be in court, and where they will be. Along with the judge, court reporter, trial counsel, and bailiff, remind him that an audience may be in the gallery, including victims and members of his unit. Mechanically, tell him he will have to stand at counsel table when placed under oath by trial counsel. Advise him to stand when the judge enters and departs the room.

The idea behind all these tips is to ensure that the accused is as familiar and comfortable as possible with the courtroom and guilty plea proceeding. The more familiar he is with the "battlefield," the more capable he will be of completing his "mission," in this case, completing providence.

Despite all this practice, however, the client still may be reluctant to admit guilt in open court. If that happens, enlist the help of your fellow defense counsel. Try the "good cop—bad cop" routine with one of you pressing the client hard to admit guilt, and the other gently explaining the consequences of losing the benefit of the pretrial agreement. Sometimes hearing the same advice from a different attorney with a different approach will do the trick. Consider making the "jail is not your happy place" speech; that is, explain the unpleasant conditions found in prison and remind the client of the maximum potential punishment that he faces without the protection of a sentence cap. With the right client, employ the "come to Jesus" or "be a man" talks; that is, remind the client of the importance of "making things right" by his victims, by his family, by his unit, and perhaps by his God.

If all else fails, call Mama. Yes, consider calling the client's mother and enlist her help in convincing the client to carry through on his guilty plea. Some of the toughest criminals from some of the roughest neighborhoods in the country cower before their mothers. If you can explain to Mama[43] the nature of the charges, the strength of the inculpatory evidence, and the severity of the sentence likely to be adjudged without a pretrial agreement, Mama may be able to convince her baby that you really do know what you are talking about when recommending a pretrial agreement.

When exercising any of these tactics, remember not to push the client too far. Ultimately, the client has the right to decide whether to plead guilty.[44] Remind the client that, even after all your practice for his plea, he has the absolute right to change his mind in the middle of the providence inquiry. In strong terms, however, remind him also of the consequences of busting providence.

Conclusion

In preparing a client for the providence inquiry, defense counsel must be familiar with the legal requirements for an accused's guilty plea. Additionally, counsel must be aware of traps for the unwary. Most importantly, counsel must learn through experience how best to assure a truly voluntarily plea that wins the client the benefit of his hard-earned pretrial agreement.

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[42] Though the military term is "pretrial agreement," do not shy away from using terms the accused may be more familiar with, such as "plea bargain."

[43] Don't limit your calls to your client's mother. If you sense that your client has a close relationship with his father, sibling, aunt, uncle, or close friend, enlist that person's help in convincing the client to do what truly is in his best interests.

[44] UCMJ art. 45 (2008); MCM, *supra* note 5, R.C.M.910(d).

Appendix

Suggested Checklist for Providence Preparation

Law

 Review who will be the judge and request for judge-alone trial.

 Review the elements of offenses and how the facts meet those elements. Mere "yes" or "no" answers are not enough.

 Explain theories of liability.

 Review potential defenses and why they do not apply.

 Review applicable definitions.

 Review the pretrial agreement.

 Review the stipulation of fact.

 Review and resolve inconsistencies between the stipulation and the client's testimony.

 Review maximum potential punishment and protection of the pretrial agreement.

 Review waiver of potential motions.

 Review waiver of members.

 Review waiver of Article 32 hearing.

 Review waiver of three or five day waiting period.

 Review waiver of conflict-free counsel.

 Review post-trial and appellate rights.

Traps

 Explain that if the plea is not accepted, the client goes to trial without a sentence limitation.

 Explain collateral consequences of conviction.

 Explain forfeitures at new rank.

 Do not forget post-trial and appellate rights form.

Practice Pointers

- [x] Give client a copy of *Benchbook* script.
- [x] Practice providence questions.
- [x] Explain the courtroom layout and the parties in courtroom.
- [x] Practice providence in the courtroom.
- [x] Enlist the help of fellow defense counsel.
- [x] Enlist the help of the client's family and friends.
- [x] Remind the client of the consequences of busting providence.
- [x] Remind the client that the decision to plead guilty is solely his.