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Legal Services

Military Judges' Benchbook

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FOREWORD

This Benchbook should be regarded as a supplement to the Uniform Code of Military Justice, as amended; the Manual for Courts-Martial, 2002 Edition; opinions of appellate courts; other departmental publications dealing primarily with trial procedure; and similar legal reference material. Statutes, Executive Orders, and appellate decisions are the principal sources for this Benchbook, and such publications, rather than this Benchbook, should be cited as legal authority.

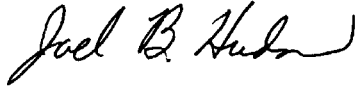
Legal Services

Military Judges' Benchbook

By Order of the Secretary of the Army:

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Summary. This pamphlet sets forth pattern instructions and suggested procedures applicable to trials by general and special court-martial. It has been prepared primarily to meet the needs of military judges. It is also intended as a practical guide for counsel, staff judge advocates, commanders, legal specialists, and others engaged in the administration of military justice.

Applicability. This pamphlet applies to the Active Army, the Army National Guard of the United States, and the U.S. Army Reserve.

Proponent and exception authority. The proponent of this pamphlet is The Judge Advocate General (TJAG). The proponent has the authority to approve exceptions to

this publication that are consistent with controlling law and regulation. The proponent may delegate this approval authority, in writing, to a division chief within the proponent agency in the grade of colonel or the civilian equivalent.

Suggested Improvements. Users are invited to send comments and suggested improvements to the Military Judges' Benchbook on DA Form 2028 (Recommended Changes to Publications and Blank Forms) directly to the Office of the Chief Trial Judge, U.S. Army Legal Services Agency, ATTN: JALS-TJ, 901 N. Stuart St., Arlington, VA 22203.

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Glossary

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Chapter 1

INTRODUCTION

1–1. Purpose and scope.

a. Obligations, duties, and essential characteristics of military judges. Although the primary thrust of this benchbook is to assist military judges in preparation of trial instructions, military judges must constantly be mindful of their judicial responsibilities in and out of the courtroom. In this regard, additional guidance may be found in publications of such organizations as the American Bar Association, American Judicature Society, and National Conference of State Trial Judges. Particular attention should be given to the Code of Judicial Conduct and Standards for the Administration of Criminal Justice pertaining to the Special Functions of the Trial Judge as promulgated by The American Bar Association.

(1) General obligations.

(a) A military judge must maintain a thorough knowledge of military law, including all its latest developments, by careful analysis of the decisions of military appellate tribunals, the United States Court of Appeals for the Armed Forces, and pertinent decisions of other federal courts.

(b) A military judge must administer justice fairly and promptly, and in a simple, uniform, and efficient manner. All judges should retain a flexible trial docket to avoid unnecessary delays in the scheduling and conduct of trials. Whenever practicable and consistent with each accused's right to a speedy trial, judges should endeavor to conduct trials consecutively during specified periods and at specified locations.

(c) A military judge has responsibilities beyond deciding cases. The judge should provide statistical records of the activities of the court at regular intervals. In addition, the judge should conduct formal or informal training sessions for counsel to improve the quality of military justice.

(d) A military judge should analyze problems arising in court and, if appropriate, should recommend legislative and other changes that will improve the administration and cause of justice.

(e) Judges should participate in judicial associations and confer with other judges, particularly with those having similar jurisdiction, to increase their competence.

(2) General duties during trials.

(a) A military judge must administer justice and faithfully, impartially, and independently perform all duties to the best of the judge's ability and understanding in accordance with the law, the evidence admitted in court, and the judge's own conscience.

(b) The judge should seek a full understanding of the factual issues and the applicable law. The judge should generally hear the arguments of counsel regarding interlocutory matters and the admissibility of evidence out of the hearing of the court members.

(c) A military judge is not merely an umpire between counsel. As a representative of justice, the judge is sworn to uphold the law and to ensure that justice is done. The judge should maintain the dignity of trial proceedings and preside with independence and impartiality. However, the judge should not unnecessarily interfere with or interrupt counsel.

(d) A military judge should refrain from displays of temper, personal pique, or manifestations of idiosyncrasies. The judge should avoid comment, conduct, or appearance that may unfairly influence court members or affect their judgment on the outcome of the case. The judge must endeavor to show restraint and understanding and to curb any tendency toward arbitrary or sarcastic remarks, bearing in mind that every word spoken during trial is not merely momentarily audible but is permanently recorded. The judge

should therefore insure that all statements are uttered with due regard not only for the immediate impact upon those present, but upon all those who may subsequently examine the record in close detail.

(e) While proceedings must never be unduly protracted by an excessive display of legal acumen, or other unnecessary verbiage, they must also never be unnecessarily abbreviated by a natural reluctance to avoid repetition in similar but different cases. Through maximum use of the Military Judges' Benchbook and other aids, the judge must always skillfully maintain a prudent balance in this regard.

(f) When delivering instructions, the military judge should speak in a conversational voice, using language that is clear, simple, and understandable. The judge should avoid any inflection, act, or demeanor that suggests a personal opinion, or conveys a meaning that is not expressed in the language employed.

(3) Essential characteristics.

(a) Judicial office imposes great moral responsibilities. However, the mantle of responsibility which goes with the judge does not mean the judge must be aloof to human relations. The judge's individual character, warmth, and human qualities should not be adversely affected by judicial status but should be developed fully as necessary ingredients of a proper judicial temperament. A military judge must have a deep sense of justice and an abiding faith in the law. The judge must possess honesty and courage; wisdom and learning; courtesy and patience; thoroughness and decisiveness; understanding and social consciousness; and independence and impartiality.

(b) "The Kind of Judges We Need." One of the best descriptions of the kind of judges we need is contained in a statement by the late Chief Justice Arthur T. Vanderbilt of New Jersey, who devoted nearly all of his life to the promotion of programs to improve the administration of civilian and military justice: "We need judges learned in the law, not merely the law in books but, something far more difficult to acquire, the law as applied in action in the courtroom; judges deeply versed in the mysteries of human nature and adept in the discovery of the truth in the discordant testimony of fallible human beings; judges beholden to no man, independent and honest—equally important—believed by all men to be independent and honest; judges above all, fired with consuming zeal to mete out justice according to law to every man, woman, and child that may come before them and to preserve individual freedom against any aggression of government; judges with the humility born of wisdom, patient and untiring in the search for truth, and keenly conscious of the evils arising in a workaday world from any unnecessary delay. Judges with all of these attributes are not easy to find, but which of these traits dare we eliminate if we are to hope for evenhanded justice? Such ideal judges can after a fashion make even an inadequate system of substantive law achieve justice; on the other hand, judges who lack these qualifications will defeat the best system of substantive and procedural law imaginable."

b. Primary objective. This benchbook is primarily designed to assist military judges of courts-martial in the drafting of necessary instructions to courts. Since instructional requirements vary in each case, the pattern instructions are intended only as guides from which the actual instructions are to be drafted. In addition, this publication is designed to suggest workable solutions for many specific problems which may arise at a trial and to guide the military judge past certain pitfalls which might otherwise result in error. Specific examples of situations with which the military judge may have to deal are set forth, and in many instances actual language which may be employed in meeting these situations suggested.

1–2. Necessity for tailoring.

No standardized set of instructions can cover every situation arising in a trial by court-martial. Special circumstances will invariably be presented, requiring instructions not dealt with in this benchbook, or adaptation of one or more of these instructions to the facts of a case. These instructions are not intended to

be a substitute for the ingenuity, resourcefulness, and research skill of the military judge. They will be of maximum value when used as a guide to carefully tailored instructions to be given to court members. The tailoring of instructions to the particular facts of a case contemplates the affirmative submission of the respective theories, both of the Government and of the accused, to the members of courts, with lucid guideposts, to the end that they may knowledgeably apply the law to the facts as they find them.

1–3. Elements of offenses.

a. Each pattern instruction contained in Chapter 3 bears the same number as the corresponding paragraph in Chapter 4 of the Manual for Courts-Martial, United States, 2000 Edition. For example, regarding larceny, paragraph 46, MCM, the pattern instruction is numbered 3–46–1. The instruction for the lesser included offense of wrongful appropriation, also contained in paragraph 46, is Instruction 3–46–2. For most punitive offenses, if there are two or more methods by which the punitive article can be violated, the instructions are set forth separately, and are numbered with a –2, –3, –4, and so forth. Each instruction includes the maximum punishment; the form specification, which may be slightly different from the MCM form specification; the elements of the offense; definitions of terms; and required or desirable supplementary instructions. If an instruction includes a term having a special legal connotation (term of art), the term should be defined for the benefit of the court, and ordinarily appears in the “DEFINITIONS AND OTHER INSTRUCTIONS” section of each instruction. Each pattern instruction set out in Chapter 3 should be prefaced by the language found in Chapters 2 (2–5–9) or 8 (8–3–8), PREFATORY INSTRUCTIONS ON FINDINGS. In the body of the instructions, that is, the elements and definitions sections, language found in parentheses is ordinarily not required in each case, but may be in a particular case, depending on the pleadings, the facts, and the contentions of the parties. Language set forth in brackets denotes elements which are alternative means of committing an offense, or aggravating factors which are not required to be instructed upon in each case, unless pled in the specification. For example, Article 123 may be violated by forging a document or uttering a forged document; thus, the form specification and elements for forgery are found in one set of brackets, and those for uttering are set forth in a second set of brackets.

b. Notes are used extensively throughout the instructions in Chapter 3. When an instruction follows a note in the “DEFINITIONS AND OTHER INSTRUCTIONS” section, that instruction should be given only if the subject matter of the note applies to the facts and circumstances of that case. Notes in other portions of Chapter 3 are intended to explain the applicability of the instruction generally, or to alert the trial judge to optional elements or unusual applications of the instruction.

1–4. Other Instructions.

a. When court members are to determine findings in a case involving a plea of not guilty, the military judge should instruct as to the elements of each offense charged and all lesser included offenses, any special or other defense in issue, and other supplementary matters, bearing in mind the need for tailoring such instructions to the facts of the case. These instructions should conclude with mandatory advice concerning the burden of proof, reasonable doubt, and presumption of innocence, and guidance concerning procedures to follow in deliberations and voting in closed session found in Chapter 2. When court members are to determine a sentence, instructions must be tailored to the law and evidence just as in the case of pre-findings advice.

b. Instructions in Chapter 5 cover general and special defenses, and Chapter 7 includes common evidentiary instructions. As in Chapter 3, instructional language which follows a note is to be given only when the note applies to the facts and circumstances of the offense.

1–5. References.

Paragraph numbers in chapter 3 conform to the paragraph numbers in the MCM. Therefore, no MCM citations are listed at paragraph e, “Reference.” Absent other citations, paragraph e is omitted.