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Trial Judiciary Note

A View from the Bench
Instructions: A Primer for Counsel

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Military Judge: Counsel, let's discuss instructions. What instructions do you want me to give the members?

Trial Counsel: [Pause] Uh - I really hadn't thought about that, Your Honor.

Defense Counsel: [Longer Pause] Whatever you decide is fine with us, Judge.

Introduction

In the rush to prepare for a big court-martial, some counsel do not think about instructions for the panel members until the end of trial. At that point it is usually too late to draft instructions that will be either relevant or helpful to their case. This can be a huge mistake, since instructions are one of the most important parts of any trial.

Although the military judge is ultimately responsible for providing instructions to the panel members, he will always ask counsel for input.¹ Counsel should take full advantage of this opportunity and assist the judge in giving instructions, ensuring the members receive proper guidance on the law. Counsel can also help the judge explain the elements of the charged offenses, relevant defenses, and evidentiary issues, making it easier for counsel to argue their theory of the case.

Most instructions have been standardized and are either contained in the *Military Judge's Benchbook (Benchbook)* or posted as interim updates on the Trial Judiciary homepage.² However, the instructions must be tailored to the facts of each individual case and some cases raise unique issues that are not dealt with in the *Benchbook*. In a case with unique circumstances it is especially important for counsel to propose appropriate instructions.

This article discusses the major areas where counsel can assist the judge in drafting instructions.

Elements of the Offenses

It is critical for the panel members to be properly instructed on the elements of the charged offenses.³ Although the military judge ultimately prepares the instructions, he often seeks input from counsel. There are also a number of definitions in the *Benchbook* that may be tailored to fit the facts of each case. Counsel should review these definitions to help the judge identify which are appropriate.

If the accused is charged with an offense under Article 133 or 134 of the Uniform Code of Military Justice (UCMJ)⁴ that is not enumerated in the *Manual for Courts-Martial (MCM)*,⁵ counsel should assist the judge in determining the elements. One example is a disorder prejudicial to good order and discipline charged as a violation of Clause 1 of Article 134, or

¹ *United States v. Poole*, 47 M.J. 17 (1997) (stating that the military judge must give instructions requested by counsel if the proposed instruction is correct, the issue is not covered elsewhere in the instructions, and the instruction involves a vital point in the case).

² U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK (15 Sept. 2002) [hereinafter BENCHBOOK], available at U.S. Army Trial Judiciary Internet site, [https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/USArmyTJ.nsf/\(JAGCNetDocID\)/D+A+PAM+27-9+AND+APPROVED+UPDATES?OpenDocument](https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/USArmyTJ.nsf/(JAGCNetDocID)/D+A+PAM+27-9+AND+APPROVED+UPDATES?OpenDocument).

³ The military judge has a sua sponte duty to instruct on the elements of the offense. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 920(e)(1) (2005) [hereinafter MCM]; *United States v. Mance*, 26 M.J. 244, 254 (C.M.A. 1988).

⁴ UCMJ arts. 133, 134 (2005).

⁵ MCM, *supra* note 3.

service discrediting conduct charged as a violation of Clause 2 of Article 134.⁶ Counsel should research similar offenses under state and federal law and propose tailored instructions on the elements and appropriate definitions. Another example is a violation of a federal criminal statute that is punishable under Clause 3 of Article 134.⁷ Here counsel should provide the judge with a copy of the appropriate statute along with any accompanying definitions.

Counsel should also provide the judge with input on lesser included offenses reasonably raised by the evidence.⁸ Although the *MCM* catalogs a number of potential lesser included offenses,⁹ this list is not exhaustive. The defense may affirmatively waive an instruction on a lesser included offense.¹⁰

Defenses

The military judge is required to instruct the members on all affirmative defenses reasonably raised by the evidence.¹¹ An accused does not waive his right to the instruction by failure to request it or by failure to object to its omission.¹² Determining which defenses have been raised can be difficult. Counsel are more familiar with the evidence and are often in a better position than the judge to identify them. Therefore, it is imperative that counsel notify the judge of all potential defenses.

In assault and homicide cases, self-defense and defense of others are often raised.¹³ There are a number of instructions on these issues in the *Benchbook*.¹⁴ Some are given only when deadly force or grievous bodily harm is involved;¹⁵ others are given only in the absence of deadly force and grievous bodily harm,¹⁶ and in some cases both types of instructions must be given, one for a charged offense involving deadly force or grievous bodily harm and the other for a lesser included offense not involving such force or harm.¹⁷ If the accused is trying to prevent trespass or theft when the assault or homicide occurs, defense of property may be raised.¹⁸ There is a separate instruction on this issue.¹⁹

In assault cases involving children, the defense of parental discipline may be raised.²⁰ A parent or guardian may lawfully use corporal punishment to safeguard or promote the welfare of a child, as long as the force used is not unreasonable or excessive.²¹

⁶ Article 134 prohibits “all disorders and neglects to the prejudice of good order and discipline in the armed forces [and] all conduct of a nature to bring discredit upon the armed forces.” UCMJ art. 134. Many of these offenses have been enumerated by the President in the *MCM*. *MCM supra* note 3, pt. IV, ¶¶ 61-113.

⁷ Article 134 also prohibits “crimes and offenses not capital.” UCMJ art. 134. This includes offenses that violate federal criminal statutes, including state criminal laws assimilated into federal law under the Federal Assimilative Crimes Act, 18 U.S.C. § 13 (2000). *MCM, supra* note 3, pt. IV, ¶ 60(c)(4).

⁸ The military judge has a sua sponte duty to instruct on all lesser included offenses reasonably raised by the evidence. *MCM supra* note 3, R.C.M. 920(e)(2); *United States v. Griffin*, 50 M.J. 480 (1999); *United States v. Wells*, 52 M.J. 126 (1999).

⁹ These lesser included offenses are listed under each of the punitive articles. *MCM, supra* note 3, pt. IV.

¹⁰ *United States v. Strachan*, 35 M.J. 362 (C.M.A. 1992).

¹¹ *MCM, supra* note 3, R.C.M. 920(e)(3); *United States v. Gillenwater*, 43 M.J. 10 (1995).

¹² *United States v. Taylor*, 26 M.J. 127 (C.M.A. 1988).

¹³ *MCM, supra* note 3, R.C.M. 916(e).

¹⁴ *BENCHBOOK, supra* note 2, instrs. 5-2 to 5-3-3.

¹⁵ *Id.* instrs. 5-2-1, 5-3-1. It is a defense to homicide or assault involving deadly force that the accused reasonably apprehended death or grievous bodily harm and subjectively believed the force used was necessary. *MCM, supra* note 3, R.C.M. 916(e)(1), R.C.M. 916(e)(5).

¹⁶ *BENCHBOOK, supra* note 2, instrs. 5-2-2, 5-3-2. It is a defense to an assault not involving death or grievous bodily harm that the accused reasonably apprehended bodily harm and subjectively believed the force used was necessary. *MCM, supra* note 3, R.C.M. 916(e)(3), R.C.M. 916(e)(5). In addition, an accused may threaten death or grievous bodily harm if the accused reasonably apprehended bodily harm and offered, but did not apply or attempt to use, force likely to cause death or grievous bodily harm. *Id.* R.C.M. 916(e)(2), R.C.M. 916(e)(5); *United States v. Acosta-Vargas*, 32 C.M.R. 388 (C.M.A. 1962). See *BENCHBOOK, supra* note 2, instr. 5-2-6.

¹⁷ *BENCHBOOK, supra* note 2, instrs. 5-2-3, 5-3-3.

¹⁸ *United States v. Regalado*, 33 C.M.R. 12 (C.M.A. 1963).

¹⁹ *BENCHBOOK, supra* note 2, instr. 5-7.

²⁰ *Id.* instr. 5-16.

²¹ *United States v. Robertson*, 36 M.J. 190 (C.M.A. 1992).

In sexual assault and rape cases, the defense of mistake of fact as to consent is often at issue. This defense is raised where the evidence suggests that the accused had a mistaken belief which would make his actions lawful.²² The affirmative defense of mistake of fact is a required instruction when it is reasonably raised by the evidence, unless it is affirmatively waived by the defense.²³ There are two types of mistake instructions in the *Benchbook*: one for general intent crimes²⁴ and one for crimes requiring specific intent or knowledge.²⁵ Counsel should determine whether the mistake relates to a general intent or a specific intent element before deciding which instruction to request. There are special instructions for mistakes relating to check offenses²⁶ and drug offenses.²⁷ There is also a separate instruction for carnal knowledge cases when the mistake relates to the age of the victim.²⁸

In drug distribution cases and whenever the accused's alleged misconduct was detected through undercover police operations, entrapment may be an issue.²⁹ This defense is raised when there is some evidence that the suggestion for an offense originated with a government agent and the accused was not predisposed to commit the crime.³⁰ Counsel should consider an entrapment instruction whenever the accused's alleged misconduct was detected through undercover police operations.³¹

In larceny and wrongful appropriation cases, the defense of self-help under a claim of right should be considered.³² This defense is raised when the evidence suggests the accused took property under a claim of right in satisfaction of a debt or when the accused took property under an honest belief that the property belonged to him.³³

When the accused is charged with disobeying an order, the defenses of physical impossibility, physical inability, and financial or other inability may be raised.³⁴ Physical impossibility means the accused was unable to perform because of a physical injury or disability.³⁵ Physical inability means it was possible for the accused to perform, but he chose not to because of the belief that he was physically unable to do so.³⁶ Financial inability means the accused was unable to perform because of lack of funds.³⁷ Other types of inability may also be raised; in these cases the instruction on financial inability should be tailored to describe the situation.³⁸ Counsel should review the instructions and inform the judge which ones are appropriate.

If the evidence suggests the accused's criminal conduct was unintentional, an accident instruction may be appropriate.³⁹ An accused is not criminally responsible if he was doing a lawful act in a lawful manner, and an unexpected death, bodily harm, or other wrong occurs.⁴⁰ However, the defense is not available if the injury or wrong resulted from the accused's negligence.⁴¹

²² MCM, *supra* note 3, R.C.M. 916(j).

²³ *United States v. Gutierrez*, 64 M.J. 374 (2007).

²⁴ BENCHBOOK, *supra* note 2, instr. 5-11-2; *United States v. Jones*, 49 M.J. 85 (1998).

²⁵ BENCHBOOK, *supra* note 2, instr. 5-11-1; *United States v. Binegar*, 55 M.J. 1 (2001).

²⁶ BENCHBOOK, *supra* note 2, instr. 5-11-3.

²⁷ *Id.* instr. 5-11-4.

²⁸ *Id.* instr. 3-45-2, note 2. This defense is unusual because the accused has the burden of proof. UCMJ, art. 120 (2005).

²⁹ BENCHBOOK, *supra* note 2, instr. 5-6.

³⁰ MCM, *supra* note 3, R.C.M. 916(g); *United States v. Vanzandt*, 14 M.J. 332 (C.M.A. 1982); *United States v. Eason*, 21 M.J. 79 (C.M.A. 1985).

³¹ BENCHBOOK, *supra* note 2, instr. 5-6.

³² *Id.* instr. 5-18.

³³ *United States v. Gunter*, 42 M.J. 292 (1995).

³⁴ MCM, *supra* note 3, R.C.M. 916(i).

³⁵ BENCHBOOK, *supra* note 2, instr. 5-9-1; *United States v. Cooley*, 36 C.M.R. 180 (C.M.A. 1966).

³⁶ BENCHBOOK, *supra* note 2, instr. 5-9-2; *United States v. Heims*, 12 C.M.R. 174 (C.M.A. 1953).

³⁷ BENCHBOOK, *supra* note 2, instr. 5-10; *United States v. Pinkston*, 21 C.M.R. 22 (C.M.A. 1956); *United States v. Hilton*, 39 M.J. 97 (C.M.A. 1994).

³⁸ *See* BENCHBOOK, *supra* note 2, instr. 5-10.

³⁹ *Id.* instr. 5-4.

⁴⁰ MCM, *supra* note 3, R.C.M. 916(f); *United States v. Curry*, 38 M.J. 77 (C.M.A. 1993).

⁴¹ MCM, *supra* note 3, R.C.M. 916(f) discussion.

If an offense requires a causal nexus between the accused's conduct and the harm involved, counsel should consider requesting instructions on lack of causation, intervening cause or contributory negligence.⁴² These defenses are typically raised in cases involving loss of military property and homicide. Instructions on these defenses are already included in the *Benchbook* instructions on the elements of several offenses, such as negligent homicide.⁴³

If the accused consumed alcohol or drugs prior to committing an offense, counsel should consider requesting a voluntary intoxication instruction.⁴⁴ Although voluntary intoxication is generally not a defense to a general intent crime, it may cause the accused to be incapable of entertaining the premeditated design to kill, having certain knowledge, forming a specific intent or acting willfully, as required for certain offenses.⁴⁵

If the accused is charged with attempt under Article 80, UCMJ, counsel should consider the defense of voluntary abandonment.⁴⁶ This instruction should be given if the evidence suggests the accused abandoned his effort to commit a crime under circumstances manifesting a complete and voluntary renunciation of the criminal purpose.⁴⁷

If the evidence suggests the accused was ordered to commit a crime, counsel should consider the defense of obedience to orders.⁴⁸ This may constitute a defense even if the order was illegal, unless the accused actually knew the order was illegal or a person of ordinary sense would know it was illegal.⁴⁹

A duress instruction may be appropriate if the accused was subjected to physical force or psychological coercion.⁵⁰ Generally, this defense applies only if the accused reasonably feared immediate death or serious bodily harm to him or another.⁵¹

If the accused's mental condition is in issue, counsel should consider the instructions on the defense of lack of mental responsibility.⁵² This should be identified well before trial, since the defense is required to provide notice of this issue.⁵³ Even if lack of mental responsibility is not raised, the accused's mental condition may negate elements involving premeditation, specific intent, willfulness or knowledge (in the same way that voluntary intoxication can negate these elements). There is a separate *Benchbook* instruction on this issue.⁵⁴

If the evidence suggests the accused was not at the scene of the crime, an alibi instruction may be appropriate.⁵⁵ The accused is required to provide notice on this issue before trial.⁵⁶ If the defense does not request an alibi instruction, the judge is not required to give it.⁵⁷

⁴² BENCHBOOK, *supra* note 2, instr. 5-19.

⁴³ *Id.* instr. 3-85-1.

⁴⁴ *Id.* instr. 5-12.

⁴⁵ MCM, *supra* note 3, R.C.M. 916(1)(2). *See* United States v. Morgan, 37 M.J. 407 (C.M.A. 1993).

⁴⁶ United States v. Byrd, 24 M.J. 286 (C.M.A. 1987); MCM, *supra* note 3, pt. IV, ¶ 4(c)(4).

⁴⁷ BENCHBOOK, *supra* note 2, instr. 5-15.

⁴⁸ *Id.* instr. 5-8.

⁴⁹ MCM, *supra* note 3, R.C.M. 916(d). A related defense is the defense of justification. *Id.* R.C.M. 916(c). *Cf.* United States v. Rockwood, 52 M.J. 98, 112 (1999) (neither international nor domestic law gave accused a duty to inspect Haitian penitentiary for possible human rights abuses).

⁵⁰ BENCHBOOK, *supra* note 2, instr. 5-5.

⁵¹ MCM, *supra* note 3, R.C.M. 916(h). United States v. Jemmings, 1 M.J. 414 (C.M.A. 1976).

⁵² BENCHBOOK, *supra* note 2, instrs. 6-1 to 6-6. There are also separate procedural instructions and sentencing instructions for cases involving mental responsibility. *Id.* instrs. 6-7 to 6-9.

⁵³ MCM, *supra* note 3, R.C.M. 701(b)(2).

⁵⁴ BENCHBOOK, *supra* note 2, instr. 5-17.

⁵⁵ *Id.* instr. 5-13.

⁵⁶ MCM, *supra* note 3, R.C.M. 701(b)(2).

⁵⁷ United States v. Bigger, 8 C.M.R. 97 (C.M.A. 1953). *Cf.* United States v. Jones, 7 M.J. 441 (C.M.A. 1979) (where alibi is raised by evidence and defense requests instruction, military judge is required to give alibi instruction).

Evidentiary Instructions

The military judge is generally not required to give evidentiary instructions, but will often do so when asked.⁵⁸ This is an area where it is particularly important for counsel to request appropriate instructions, because such instructions help explain how the evidence supports the theory of the case.

An instruction on circumstantial evidence is almost always appropriate.⁵⁹ The *Benchbook* has special instructions on circumstantial evidence for charged offenses that involve specific intent or a specific knowledge.⁶⁰ An instruction on credibility of witnesses is also usually appropriate.⁶¹ The *Benchbook* instruction informs panel members to evaluate credibility based on factors such as the ability to observe and remember, sincerity, and bias.⁶² If character for untruthfulness or truthfulness has been introduced,⁶³ there is a separate instruction on this issue.⁶⁴ The issue of eyewitness identification is discussed in a separate *Benchbook* instruction⁶⁵ with a subpart on interracial identification issues.⁶⁶

Many cases involve prior inconsistent statements by witnesses.⁶⁷ If such statements are introduced at trial, counsel should request the *Benchbook* instruction on this issue.⁶⁸ Counsel should tell the judge which witnesses are involved and what the prior statements were. A similar instruction⁶⁹ may be appropriate if prior consistent statements are introduced in rebuttal.⁷⁰

Character witnesses may be asked if they have heard about prior misconduct by the person they are vouching for.⁷¹ When this happens, counsel may request the *Benchbook* instruction on “have you heard” impeachment questions.⁷² This instruction lets the members know that they may only consider the question for impeachment purposes.

When the defense introduces evidence of the accused’s good character,⁷³ the judge can instruct the members that this may cause a reasonable doubt as to the accused’s guilt.⁷⁴ If evidence of the victim’s character for violence or peacefulness has been introduced,⁷⁵ the judge can instruct the members on the use of this evidence as well.⁷⁶

⁵⁸ United States v. Damatta-Olivera, 37 M.J. 474 (C.M.A. 1993).

⁵⁹ BENCHBOOK, *supra* note 2, instr. 7-3. See MCM, *supra* note 3, R.C.M. 918(c) discussion.

⁶⁰ BENCHBOOK, *supra* note 2, instr. 7-3 notes 2, 3.

⁶¹ *Id.* instr. 7-7-1. See MCM, *supra* note 3, R.C.M. 918(c) discussion.

⁶² BENCHBOOK, *supra* note 2, instr. 7-7-1.

⁶³ MCM, *supra* note 3, MIL. R. EVID. 608(a); United States v. Everage, 19 M.J. 189 (C.M.A. 1985) (evidence of truthfulness permitted if witnesses’ truthful character attacked).

⁶⁴ BENCHBOOK, *supra* note 2, instr. 7-8-3.

⁶⁵ *Id.* instr. 7-7-2.

⁶⁶ *Id.* instr. 7-7-2 note 2. See United States v. Thompson, 31 M.J. 125 (C.M.A. 1990) (cross-racial identification instruction required only if this is primary issue in case).

⁶⁷ Prior statements may be used to impeach a witnesses’ credibility. Extrinsic evidence of a prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement. MCM, *supra* note 3, MIL. R. EVID. 613. A prior inconsistent statement is admissible as substantive evidence if it was given under oath at a prior hearing or deposition. *Id.* MIL. R. EVID. 801(d)(1)(A). See United States v. Taylor, 44 M.J. 475 (1996) (court described interplay between use of prior statements as impeachment and as substantive evidence).

⁶⁸ BENCHBOOK, *supra* note 2, instr. 7-11-1 (Interim Update available on Trial Judiciary Internet site, [https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/USArmyTJ.nsf/\(JAGCNetDocID\)/D+A+PAM+27-9+AND+APPROVED+INTERIM+UPDATES?OpenDocument](https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/USArmyTJ.nsf/(JAGCNetDocID)/D+A+PAM+27-9+AND+APPROVED+INTERIM+UPDATES?OpenDocument)).

⁶⁹ *Id.* instr. 7-11-2.

⁷⁰ A prior consistent statement is admissible as substantive evidence if offered to rebut a charge of recent fabrication, improper influence or motive. MCM, *supra* note 3, MIL. R. EVID. 801(d)(1)(B); United States v. Faison, 49 M.J. 59 (1998); United States v. Allison, 49 M.J. 54 (1998).

⁷¹ When character evidence is introduced, inquiry is permitted into specific instances of conduct on cross-examination. MCM, *supra* note 3, MIL. R. EVID. 405(a). When evidence of a witnesses’ character for truthfulness has been introduced, inquiry is permitted into specific instances of conduct if they are probative of truthfulness or untruthfulness. *Id.* MIL. R. EVID. 608(b). See United States v. Pearce, 27 M.J. 121 (C.M.A. 1988). *Cf.* United States v. Toohey, 63 M.J. 353 (2006) (military judge erred by permitting “have you heard” questions on accused child pornography charges in rebuttal to testimony of the accused’s peacefulness).

⁷² BENCHBOOK, *supra* note 2, instr. 7-18.

⁷³ MCM, *supra* note 3, MIL. R. EVID. 404(a)(1); United States v. Court, 24 M.J. 11 (C.M.A. 1987) (accused’s good military character admissible); United States v. Brown, 41 M.J. 1 (C.M.A. 1994) (accused’s religious opposition to drug use admissible).

⁷⁴ BENCHBOOK, *supra* note 2, instr. 7-8-1.

When a witness is culpably involved in a crime the accused is charged with, the defense should consider the accomplice testimony instruction.⁷⁷ If a witness was granted immunity, counsel should consider requesting an instruction on this issue as well.⁷⁸ The *Benchbook* instructions explain that these issues may be considered in evaluating the witness' credibility.⁷⁹

When judicial notice,⁸⁰ expert witnesses,⁸¹ stipulations of fact or expected testimony⁸² or depositions⁸³ are involved in a case, the military judge will usually provide the *Benchbook* instructions on these issues.⁸⁴ Counsel can assist the judge by providing a list of the items judicially noticed, the names of the expert witnesses, and a list of the stipulations and depositions.

The instruction on uncharged misconduct⁸⁵ will inform the members of the limited use for which the uncharged misconduct was admitted and caution them not to consider it for any other purpose.⁸⁶ Both the trial counsel and defense counsel should let the judge know their positions on the use of uncharged misconduct.

If the accused is charged with unrelated offenses, an instruction on "spillover" may be appropriate.⁸⁷ This instruction informs the members that a finding of guilty on one offense cannot be used to infer the accused is guilty of another offense. If evidence of one offense is relevant to another offense, however, a second portion of the "spillover" instruction explains that the members may consider this evidence for both offenses.⁸⁸ This portion of the instruction is similar to the uncharged misconduct instruction.⁸⁹ If this issue is raised, trial and defense counsel should let the judge know their positions.

If the evidence suggests that the accused is guilty as an aider, abettor⁹⁰ or co-conspirator,⁹¹ an instruction on vicarious or co-conspirator liability may be appropriate.⁹²

Often the evidence suggests that a crime occurred in a manner that varies slightly from the manner alleged in the specification. In this situation a variance instruction is appropriate.⁹³ Counsel should inform the judge of potential variances and request an instruction if this issue is raised.

⁷⁵ MCM, *supra* note 3, MIL. R. EVID. 404(a)(2).

⁷⁶ BENCHBOOK, *supra* note 2, instr. 7-8-2.

⁷⁷ *Id.* United States v. Gillette, 35 M.J. 468 (C.M.A. 1992); United States v. Bigelow, 57 M.J. 64 (2002).

⁷⁸ BENCHBOOK, *supra* note 2, instr. 7-19. See generally MCM, *supra* note 3, R.C.M. 704 (procedures for granting immunity), MIL. R. EVID. 301(c)(2) (prosecution required to notify defense of grant of immunity).

⁷⁹ BENCHBOOK, *supra* note 2, instr. 7-19.

⁸⁰ MCM, *supra* note 3, MIL. R. EVID. 201, 201A. Military Rule of Evidence 201(g) requires the military judge to instruct members that they may, but are not required to, accept as conclusive any matter judicially noticed. *Id.* MIL. R. EVID. 201(a).

⁸¹ *Id.* MIL. R. EVID. 702. See generally *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

⁸² MCM, *supra* note 3, R.C.M. 811.

⁸³ *Id.* R.C.M. 702.

⁸⁴ BENCHBOOK, *supra* note 2, instrs. 7-6 (judicial notice), 7-9-1 (expert testimony), 7-4-1 (stipulations of fact), 7-4-2 (stipulations of expected testimony), 7-5 (depositions).

⁸⁵ MCM, *supra* note 3, MIL. R. EVID. 404(b), 413, 414; BENCHBOOK, *supra* note 2, instr. 7-13-1.

⁸⁶ *Id.*; United States v. DiCupe, 21 M.J. 440 (C.M.A. 1986).

⁸⁷ BENCHBOOK, *supra* note 2, instr. 7-17; United States v. Haye, 29 M.J. 213 (C.M.A. 1989).

⁸⁸ BENCHBOOK, *supra* note 2, instr. 7-17.

⁸⁹ *Id.* instr. 7-13-1.

⁹⁰ UCMJ art. 77 (2005); MCM, *supra* note 3, pt. IV, ¶ 1.

⁹¹ UCMJ art. 81; MCM, *supra* note 3, pt. IV, ¶ 5.

⁹² BENCHBOOK, *supra* note 2, instr. 7-1.

⁹³ *Id.* instrs. 7-15, 7-16. See MCM, *supra* note 3, R.C.M. 918(a)(1) discussion. Cf. United States v. Evans, 37 M.J. 468 (C.M.A. 1993) (findings may not substantially differ from offense charged).

If the accused is charged with committing an offense on “divers” occasions, counsel should ensure that this term is properly defined.⁹⁴ If the members subsequently find that the accused committed the offense, but on only one occasion, their finding must specify which occasion.⁹⁵ There is a special instruction for this situation.⁹⁶

If the accused does not testify, the defense should consider an instruction on the accused’s failure to testify.⁹⁷ Many defense counsel ask the judge not to give this instruction, since it may highlight the issue to the members to the accused’s detriment. The judge is bound by the defense’s request to omit this instruction unless the judge determines it is necessary in the interests of justice.⁹⁸

Sentencing Instructions

The *Benchbook* contains a number of standard sentencing instructions⁹⁹ and the judge will usually ask counsel for their input on tailoring these instructions.¹⁰⁰

If the accused is convicted of several offenses arising from a single event, the military judge may instruct the members to treat them as one for sentencing purposes.¹⁰¹ Defense counsel should be alert to these situations and request such an instruction, if appropriate.¹⁰² If the defense has unsuccessfully litigated a motion based on multiplicity¹⁰³ or unreasonable multiplication of charges,¹⁰⁴ the defense should raise this issue again during the discussion of sentencing instructions.

The military judge can inform the members of a number of factors about the accused that they may consider, such as the accused’s good character traits, education, family difficulties and military record.¹⁰⁵ If the defense desires such an instruction, defense counsel should submit a summary of these factors to make it easier for the judge to give the instruction. A standard instruction on these factors is contained in the *Benchbook*.¹⁰⁶

If the accused is eligible for retirement or close to retirement, the defense should consider requesting an instruction on the effect of a discharge on retirement.¹⁰⁷ Such an instruction will reinforce any defense evidence offered on this subject. There are standard instructions on this issue in the *Benchbook*.¹⁰⁸

If the accused did not testify during sentencing, the defense can ask the judge to give an instruction on this issue.¹⁰⁹ There is a separate instruction if the accused provides an unsworn statement.¹¹⁰ If the accused provides otherwise

⁹⁴ BENCHBOOK, *supra* note 2, instr. 7-25 (Interim Update available on Trial Judiciary Internet site, [https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/USArmyTJ.nsf/\(JAGCNetDocID\)/D+A+PAM+27-9+AND+APPROVED+INTERIM+UPDATES?OpenDocument](https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/USArmyTJ.nsf/(JAGCNetDocID)/D+A+PAM+27-9+AND+APPROVED+INTERIM+UPDATES?OpenDocument)).

⁹⁵ United States v. Walters, 58 M.J. 391 (2003); United States v. Augspurger, 61 M.J. 189 (2005).

⁹⁶ BENCHBOOK, *supra* note 2, instr. 7-25 (Interim Update).

⁹⁷ *Id.* instr. 7-12.

⁹⁸ MCM, *supra* note 3, MIL. R. EVID. 301(g); United States v. Forbes, 61 M.J. 354 (2005).

⁹⁹ BENCHBOOK, *supra* note 2, instrs. 2-5-21 to 2-5-24; 2-6-9 to 2-6-12.

¹⁰⁰ MCM, *supra* note 3, R.C.M. 1005(c).

¹⁰¹ *Id.* R.C.M. 906(b)(12); United States v. Traxler, 39 M.J. 476, 480 (C.M.A. 1994).

¹⁰² BENCHBOOK, *supra* note 2, instrs. 2-5-21, 2-6-9.

¹⁰³ *See* United States v. Teters, 37 M.J. 370 (C.M.A. 1993).

¹⁰⁴ *See* United States v. Quiros, 55 M.J. 334, 339 (2001) (court compared unreasonable multiplication of charges and multiplicity for sentencing purposes).

¹⁰⁵ United States v. Wheeler, 38 C.M.R. 72 (C.M.A. 1967).

¹⁰⁶ BENCHBOOK, *supra* note 2, instrs. 2-5-23, 2-6-11.

¹⁰⁷ United States v. Boyd, 55 M.J. 217 (2001).

¹⁰⁸ BENCHBOOK, *supra* note 2, instrs. 2-5-23, 2-6-11.

¹⁰⁹ *Id.* instrs. 2-5-23, 2-6-11.

¹¹⁰ *Id.*

inadmissible evidence in an unsworn statement (such as the sentence of a co-accused), the prosecution should consider requesting a limiting instruction.¹¹¹

If the accused pled guilty, the judge must instruct the members that such a plea is a matter in mitigation.¹¹² The defense should request such an instruction, if appropriate.¹¹³ If the accused testified on the merits and was subsequently convicted, a mendacity instruction may be appropriate.¹¹⁴ The prosecution should request this instruction if the issue is raised.¹¹⁵

Practice Tips

Several weeks before trial, counsel should review the *Benchbook* and decide which instructions they will ask the judge to give. This will help them focus their trial preparation and provide a better understanding of the applicable law. Counsel should use the instructions checklist in the back of the *Benchbook* to make a list of the applicable instructions.¹¹⁶ During trial, counsel should be alert to instructional issues raised by the evidence and counsel should update their instructions checklist so they can ask the judge for appropriate instructions after all the evidence has been received.

The *Benchbook* is a critical resource. Not only does it contain most of the instructions the judge will give, it also contains summaries of the law and useful forms, including sample findings and sentencing worksheets. Counsel should always bring a copy of the *Benchbook* with them to trial.

Although the *Benchbook* instructions are relatively up-to-date, there are situations where a recent appellate decision will require changes.¹¹⁷ Counsel should keep abreast of changes in the law by reading new cases as they come out.¹¹⁸ Counsel should also review the annual articles on instructions published by the trial judges in *The Army Lawyer*.¹¹⁹ When changes in the law affect the instructions in a case, counsel must bring this to the attention of the military judge.

If counsel intend to ask the judge to give a novel instruction, they should submit their proposal well before trial. The judge needs time to research the proposal to determine if it is accurate and necessary. Military judges are less likely to give such instructions when they are submitted on the eve of trial.

Most military judges prepare written instructions for the members.¹²⁰ Counsel should request a copy of these before they are read to the panel members. If counsel believe the instructions are erroneous or that required instructions have been omitted, this will give them an opportunity to bring this to the attention of the military judge before deliberations. In addition, if counsel wish to mention instructions during their arguments, this will help ensure their descriptions of the instructions are accurate.

Counsel should pay attention while the judge is instructing the members. Despite belief to the contrary, judges are not infallible and may misread critical portions of the instructions. Such an error is easily remedied if counsel identifies it before deliberations begin.

¹¹¹ *Id.*; United States v. Grill, 48 M.J. 131 (1998); United States v. Friedmann, 53 M.J. 800 (A.F. Ct. Crim. App. 2000); United States v. Barrier, 61 M.J. 482 (2005).

¹¹² United States v. Prater, 43 C.M.R. 179 (C.M.A. 1971).

¹¹³ BENCHBOOK, *supra* note 2, instrs. 2-5-23, 2-6-11.

¹¹⁴ United States v. Warren, 13 M.J. 278 (C.M.A. 1982).

¹¹⁵ BENCHBOOK, *supra* note 2, instrs. 2-5-23, 2-6-11.

¹¹⁶ *Id.* app. J.

¹¹⁷ *E.g.*, United States v. Dearing, 63 M.J. 478 (2006) (military judge erred by using *Benchbook* instruction on mutual combatant's right to self defense; instruction did not adequately explain issue of escalation).

¹¹⁸ Decisions of the Court of Appeals of the Armed Forces can be obtained on the Internet at <http://www.armfor.uscourts.gov/index.html>. Decisions of the service courts are also available on the Internet. Army Court of Criminal Appeals decisions can be found at <http://www.jagcnet.army.mil/acca>. Air Force Court of Criminal Appeals decisions are available at <https://afcca.law.af.mil/index.php>. Decisions of the Navy-Marine Corps Court of Criminal Appeals are available at <http://www.jag.navy.mil/FieldOffices/NMCCA.htm>. Coast Guard Court of Criminal Appeals decisions can be found at <http://www.uscg.mil/legal/cca/>.

¹¹⁹ *See, e.g.*, Colonel Michael J. Hargis & Lieutenant Colonel Timothy Grammel, *Annual Review of Developments in Instructions—2005*, ARMY LAW., Apr. 2006, at 80.

¹²⁰ MCM, *supra* note 3, R.C.M. 920(d), R.C.M. 1005(d).

Conclusion

Counsel have an important role to play in proposing instructions and objecting if required instructions are not given. Counsel should consider what instructions may be appropriate well in advance of trial by starting with the instructions checklist in the back of the *Benchbook*. Counsel should also review recent case law to determine if the standard *Benchbook* instructions need to be changed. When the case involves a novel evidentiary issue or an offense under Article 133 or 134 of the UCMJ that does not have enumerated elements, counsel should submit proposed instructions on these issues to the military judge at their earliest opportunity.

During trial, counsel should be alert to instructional issues raised by the evidence, update their instructions checklist, and be ready to respond intelligently when the judge asks what instructions should be given. Counsel should also stay alert while the judge is reading the instructions to ensure they are given properly.

Instructions are a critical part of the trial. Counsel can help shape the instructions by reviewing the *Benchbook* prior to trial and being alert to instructional issues during trial.