

# Rehabilitative Potential Evidence: Theory and Practice

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## Introduction

The sentencing rules in courts-martial dramatically favor the defense.<sup>1</sup> No rule better illustrates the advantages the defense has than Rule for Courts-Martial (RCM) 1001(b)(5).<sup>2</sup> This rule allows the trial counsel to offer opinions about the accused's duty performance and the accused's potential for rehabilitation.<sup>3</sup> However, the rule also lists requirements for, and limitations on, the foundation, basis, and scope of a rehabilitative potential opinion that make presentation of rehabilitative potential very tricky for the prosecution. Section 1 of this article discusses the case law that created these requirements and limitations. Defense counsel must read these cases, understand the military courts' concerns, and use the requirements and limitations to their advantage. Defense counsel should not fear the rehabilitative potential opinion offered by government witnesses. If the defense counsel insists on a proper foundation and a properly limited opinion, the witness's opinion will be largely meaningless. Section 2 bridges the gap between theory and practice by addressing tactics to limit and counter the government's presentation of rehabilitative potential testimony. These tactics are general rules to guide defense counsel, and, like all general rules, they have exceptions. Defense counsel must analyze each case individually and choose the tactics that accomplish the goals of the representation. Section 3 discusses the cases that allow defense counsel to offer opinions about the accused's potential for future military service during the case in extenuation and mitigation. This topic is related to, but distinct from, rehabilitative potential. Finally, in Section 4, this article discusses a recent opinion by the Court of Appeals for the Armed Forces that clarifies the foundation required when trial counsel rebut defense-offered opinions about future military service. Like RCM 1001 generally, RCM 1001(b)(5) and the cases that interpret it offer a very limited opportunity to the trial counsel and an expansive opportunity to the defense.

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<sup>1</sup> Compare MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b) (2008) [hereinafter MCM] (listing five restrictive categories of information the trial counsel can present during the pre-sentencing proceeding), with *id.* R.C.M. 1001(c) (listing two broad categories of information the defense can offer during the pre-sentencing proceeding). In particular, compare the restrictive nature of "aggravation" evidence, which must be "directly relating to or resulting from the offenses of which the accused has been found guilty," with the broad nature of "mitigation" evidence, "matter . . . introduced to lessen the sentence of the court-martial."

<sup>2</sup> *Id.* R.C.M. 1001(b)(5).

<sup>3</sup> *Id.* R.C.M. 1001(b)(5)(A).

## The Basics

When the 1984 *Manual for Courts-Martial (MCM)* was originally published, the rule addressing evidence of rehabilitative potential was very short and simple:

The trial counsel may present, by testimony or oral deposition in accordance with R.C.M. 702(g)(1), evidence, in the form of an opinion, concerning the accused's previous performance as a servicemember and potential for rehabilitation. On cross-examination, inquiry is allowable into relevant and specific instances of conduct.<sup>4</sup>

This rule reflected the judgment that the sentencing authority needed a complete view of the accused, that knowledge of the accused's character was so important that its presentation should not be left up to the accused, and that in civilian criminal cases, the sentencing authority considered similar evidence.<sup>5</sup> The rule and its intent favored a very broad discussion of the accused's rehabilitative potential, at least initially. In 1994 the rule was amended to codify recent case law, yielding the rule we have today. The new RCM 1001(b)(5) includes a definition of rehabilitative potential,<sup>6</sup> requirements for the opinion's foundation,<sup>7</sup> a warning that the severity or nature of the accused's offenses is not a sufficient basis for the opinion,<sup>8</sup> and a warning that the

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<sup>4</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b)(5) (1984).

<sup>5</sup> MCM, *supra* note 1, app. 21, at A21-71 to 72 (analysis of Rule for Court-Martial (RCM) 1001(b)(5)). Compare MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b)(5) (1994) (identical to the 1984 rule), with MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b)(5) (1995) (identical to the current rule).

<sup>6</sup> MCM, *supra* note 1, R.C.M. 1001(b)(5)(A). Rule for Court-Martial 1001(b)(5)(A) provides: Rehabilitative potential 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.

<sup>7</sup> *Id.* R.C.M. 1001(b)(5)(B). Rule for Court-Martial 1001(b)(5)(B) provides: *Foundation for opinion.* The witness or deponent providing opinion evidence regarding the accused's rehabilitative potential must possess 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.

<sup>8</sup> *Id.* R.C.M. 1001(b)(5)(C). Rule for Court-Martial 1001(b)(5)(C) provides: *Bases for opinion.* An opinion regarding the accused's rehabilitative potential must be based upon relevant information and knowledge possessed by the witness or deponent, and must relate to the accused's personal circumstances. The opinion of the witness or deponent regarding

witness may not comment on the appropriateness of a punitive discharge.<sup>9</sup> These changes transformed a very broad rule into a very restrictive one. Understanding the evolution from the original rule to the current rule requires examination of three opinions from the Court of Military Appeals (CMA).

*United States v. Horner*<sup>10</sup> was an uneventful, judge alone guilty plea to a single specification of wrongful distribution of hashish. The case seemed routine until the trial counsel called the accused's battery commander as an aggravation witness. The battery commander testified that that the accused was an average Soldier and that drug-related conduct was incompatible with the accused's military duties.<sup>11</sup> When the trial counsel asked whether the accused had rehabilitative potential, the battery commander responded, "I don't think he should be allowed to stay in the Army." The defense counsel objected, and, curiously, the trial judge overruled the objection while noting that the answer was non-responsive to the question. On cross-examination, the witness made clear that his concept of rehabilitative potential was whether the accused should be given another chance to be a Soldier and that his opinion was based only on the fact that drugs were distributed.<sup>12</sup> The court adjudged, and the convening authority approved, a sentence that included a bad conduct discharge, confinement for thirty days, and "accessory penalties."<sup>13</sup>

The CMA held that the military judge erred when he allowed the battery commander to give an opinion on the accused's rehabilitative potential where the opinion was based only on the severity of the offense involved. Before addressing the granted issue, the court clarified the scope of the phrase "potential for rehabilitation." The court observed that rehabilitation can denote a return to a particular status or a return to society generally and then rejected the concept that rehabilitative potential is the potential to be restored to a particular military status. The court clarified two points in this case. First, rehabilitative potential is the potential to return to society in general, not just a return to duty.<sup>14</sup> Second, a rehabilitative potential witness's opinion must be

based on the accused's character and potential, not just the severity of the offenses.<sup>15</sup>

In *United States v. Ohrt*,<sup>16</sup> the CMA addressed the same question in the context of a guilty plea where court members imposed the sentence. The accused, an Air Force staff sergeant (SSgt) with twelve years of service, pled guilty to a single specification of wrongful use of marijuana.<sup>17</sup> During the case in aggravation, the trial counsel called the accused's squadron commander and asked him, "Sir, based upon everything that you know, do you have an opinion as to Staff Sergeant Ohrt's potential for continued service in the United States Air Force?" The commander responded, "I believe he does not have potential."<sup>18</sup> Moreover, in response to a court member's question, the commander said that he had not offered SSgt Ohrt nonjudicial punishment because there is no room for drug use in the military and, when he took command, he warned his subordinates that if they were involved with drugs, he would "have no more use for [their] services in [his] command."<sup>19</sup> The accused was sentenced to a bad conduct discharge and reduction to E-2.<sup>20</sup>

The court reiterated the two points it made in *Horner*. The first point was that rehabilitative potential means the potential to be a useful member of society, not the potential for further military service. In *Ohrt*, the trial counsel's question explicitly asked about "continued service in the United States Air Force." The court did not address the form of this improper question directly, but the court said, "it is clear that some prosecutors view this rule as a license to bring a commanding officer before a court-martial preemptively to *influence* the court members into returning a particular sentence. It is most apparent that the trial counsel are urging adjudication of a punitive discharge. Such witnesses have no place in court-martial proceedings."<sup>21</sup> The court set aside the findings and sentence based on the second point clearly established in *Horner*: the witness's opinion was based only on the nature of the offense. "[The commander's opinion] lacked a proper foundation to demonstrate that the [commander's] opinion was personalized and based upon the accused's character and

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the severity or nature of the accused's offense or offenses may not serve as the principal basis for an opinion of the accused's rehabilitative potential.

<sup>9</sup> *Id.* R.C.M. 1001(b)(5)(D). Rule for Court-Martial 1001(b)(5)(D) provides: *Scope of opinion.* An opinion offered under this rule is limited to whether the accused has rehabilitative potential and to the magnitude or quality of any such potential. A witness may not offer an opinion regarding the appropriateness of a punitive discharge or whether the accused should be returned to the accused's unit.

<sup>10</sup> 22 M.J. 294 (C.M.A. 1986).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 295.

<sup>13</sup> *Id.* at 294.

<sup>14</sup> *Id.* at 296. *See infra* note 62.

<sup>15</sup> *Id.*

<sup>16</sup> 28 M.J. 301 (C.M.A. 1989).

<sup>17</sup> *Id.* at 302.

<sup>18</sup> *Id.* at 306-07.

<sup>19</sup> *Id.* at 307.

<sup>20</sup> *Id.* at 302.

<sup>21</sup> *Id.* at 303. For another example of how a government witness can encourage or discourage a particular sentence, see *United States v. Davis*, 39 M.J. 281, 282-83 (C.M.A. 1994). In *Davis*, the trial judge allowed, over objection, the trial counsel to ask the victim how he would feel if the accused received no punishment. The court found the question improper but the victim's equivocal answer was harmless.

potential; rather, it was a view that the appropriate punishment for drug users included a punitive discharge.”<sup>22</sup> Directly or indirectly, the court reminded us of the definition of rehabilitative potential and the scope of the foundation that is required for an opinion about rehabilitative potential.

In *Ohrt*, the court also discussed the foundation required for a rehabilitative potential witness. Stressing the importance of the foundation for a lay opinion on rehabilitative potential, the court said, “[A] foundation must be laid to demonstrate that the witness does possess sufficient information and knowledge about the accused—his character, his performance of duty as a servicemember, his moral fiber, and his determination to be rehabilitated[.] Thus, a witness whose opinion is based upon factors other than an assessment of the accused’s service performance, character, and potential does not possess a rational basis for expressing an opinion.”<sup>23</sup> An opinion based solely on the nature and severity of the offenses is impermissible.<sup>24</sup> The foundation for a rehabilitative potential opinion must be based on the accused’s individual circumstances.<sup>25</sup>

In *United States v. Aurich*,<sup>26</sup> the CMA faced the same issue with a slightly different question. The accused pled guilty to wrongful use and distribution of marijuana and was tried by military judge alone.<sup>27</sup> The government offered a record of prior nonjudicial punishment for wrongful use of marijuana and then called the accused’s company commander. The commander was asked, “Do you want Private Aurich back in your unit[?]” Naturally, he didn’t. The defense counsel objected, citing *Horner*.<sup>28</sup> The military judge overruled the objection, and the witness was allowed to answer the question.<sup>29</sup>

All three judges agreed there was no reversible error. Two judges found the question and answer irrelevant and inadmissible, but found that the error was harmless under the

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<sup>22</sup> *Ohrt*, 28 M.J. at 307.

<sup>23</sup> *Id.* at 304 (citing *United States v. Horner*, 22 M.J. 294, 296 (C.M.A. 1986)).

<sup>24</sup> *Ohrt*, 28 M.J. at 383; *Horner*, 22 M.J. at 296. See also *United States v. Kirk*, 31 M.J. 84, 86–89 (C.M.A. 1990). *Kirk* contains a farcical attempt to offer an opinion about the accused’s rehabilitative potential. After being unable to remember the accused’s name and being unable to identify the accused even after the trial counsel instructed the witness to look at her nametag, the accused’s squadron commander testified that he did not think the accused had potential for future service in the Air Force. The commander’s opinion was based solely on the nature of the offenses of which the accused was convicted. The court found plain error and set aside the sentence.

<sup>25</sup> *Horner*, 22 M.J. at 296.

<sup>26</sup> 31 M.J. 95 (C.M.A. 1990).

<sup>27</sup> *Id.* at 98.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 99.

circumstances in a judge alone case. The third judge found the question and answer permissible under the facts of the case.<sup>30</sup> The majority found the issue irrelevant because “absent a full, logical, and acceptable explanation establishing that the reason he does not want such an accused in the unit is his lack of rehabilitative potential[.]”<sup>31</sup> the commander’s desire not to have the accused back proves nothing. The court noted that RCM 1001(b)(5) limits the witness’s testimony to an opinion, and, therefore, the witness cannot give a full explanation about how he formed his opinion except on cross-examination.<sup>32</sup> This chicken-and-the-egg problem results in an opinion that is largely meaningless; the government witness can give an unfavorable opinion, but the witness cannot explain why he holds that opinion. The court noted two situations where the commander’s opinion on whether to return the accused to his unit may be relevant: first, when the command wants the Soldier back, and, second, in rebuttal when the defense offers evidence that the command wants the Soldier back. “[I]f the 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.”<sup>33</sup>

In addition to prohibiting the commander’s view of whether the accused should be returned to the unit during the case in aggravation, *Aurich* is famous for two other points. First, the court gave us a structured format for admitting a proper rehabilitative potential opinion that will avoid specific instances from being discussed on direct examination and the return-to-the-unit issue. “RCM 1001(b)(5) contemplates one question: ‘What is the accused’s potential for rehabilitation?’—and one answer: ‘In my opinion, the accused has \_\_\_\_\_ [good, no, some, little, great, zero, much, etc.] potential for rehabilitation.’”<sup>34</sup> Second, the CMA injected concerns about unlawful command influence into the analysis. The court pointed out that having the “accused’s commander tell other officers that ‘I do not want this accused in my unit,’ . . . is fraught with danger of undue and unlawful influence.”<sup>35</sup> The court noted if the company commander can express his

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<sup>30</sup> Judge Sullivan, concurring in part and dissenting in part, reasoned that although the court in *Horner* recognized a broad definition of rehabilitative potential, the court did not intend to prohibit all testimony about military rehabilitative potential. He treated military rehabilitative potential as a subset of societal rehabilitative potential. Having found the topic of military rehabilitative potential relevant, Judge Sullivan found the form of the question proper. *Id.* at 100.

<sup>31</sup> *Id.* at 96.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 96–97. *United States v. Claxton*, makes clear, however, that the Government is not limited to offering rehabilitative potential evidence in rebuttal. “We are not aware of having made such an assertion; if we have, we hereby disown it.” 32 M.J. 159, 162 (C.M.A. 1991).

<sup>34</sup> *Aurich*, 31 M.J. at 96.

<sup>35</sup> *Id.* at 97.

view, there is no principled reason not to allow the battalion, brigade, division, or corps commanders to express their opinions.

The 1994 amendments to RCM 1105(b)(5) are based primarily on *Horner, Ohrt, and Aurich*.<sup>36</sup> These cases reflect four concerns of the CMA. First, the court wants to ensure our military justice system is free of unlawful command influence.<sup>37</sup> Second, the court wants to ensure that each convicted Soldier gets an individualized sentencing proceeding, and, if rehabilitative potential evidence will be offered, the witness's evaluation of the accused's rehabilitative potential is based on the accused's character, performance, and potential and not just the severity or nature of the offenses for which the accused is to be sentenced.<sup>38</sup> Third, the court wants to ensure that courts-martial are more than administrative discharge boards.<sup>39</sup> A punitive discharge is punishment; the issue of whether a given Soldier deserves a punitive discharge is distinct from the issue of whether the Soldier should remain in the military. Fourth, the court wants to ensure that sentencing witnesses do not invade the province of the court-martial panel by making suggestions, directly or indirectly, about whether a particular punishment is appropriate in a given case.<sup>40</sup> With these concerns in mind, we will now address the tactics available to defense counsel.

## Defense Tactics

### *Fight the Foundation*

Defense counsel should adopt the working hypothesis that the defense can prevent the government from presenting rehabilitative potential witnesses (or, at least, complicate their ability to do so) by denying members of the chain of command (or anyone, for that matter) the opportunity to develop an acceptable foundation.<sup>41</sup> A rehabilitative potential opinion must be based on knowledge of the

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<sup>36</sup> See MCM, *supra* note 1, app. 21, at A21-72.

<sup>37</sup> *Aurich*, 31 M.J. at 96.

<sup>38</sup> *Horner*, 22 M.J. at 296.

<sup>39</sup> *Ohrt*, 28 M.J. at 306.

<sup>40</sup> *Id.* at 304-05.

<sup>41</sup> This is a working hypothesis that may or may not be correct. The hypothesis is a supposition assumed to be true to facilitate further discussion. Even if the hypothesis is untrue, the tactics discussed in this article are still valid. Even if the tactics do not prevent the government witness from offering an opinion, the tactics will provide the sentencing authority with information to determine how much weight to give the opinion. Some military trial judges may have a different view about the requirements of the foundation for a rehabilitative potential opinion. See, e.g., Lieutenant Colonel Roger E. Nell, *A View from the Bench: Rehabilitative Potential and Retention Evidence*, ARMY LAW., Apr. 2007, at 42, 43 (arguing that a sufficient foundation can be formed simply by observing the accused and talking to his immediate supervisors). The less rigorous a trial judge is about the foundation, the greater the risk of error.

accused's character and potential. Appellate cases repeatedly stress the importance of the foundation of character witnesses called by the trial counsel to offer an opinion about the accused's rehabilitative potential. "The witness . . . providing opinion evidence regarding the accused's rehabilitative potential must possess 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."<sup>42</sup> By simply not talking to anyone about his case, the accused can deny potential government sentencing witnesses information about his character, moral fiber, and determination to be rehabilitated. A witness cannot fully understand the accused's character, plans for the future, degree of remorse, attempts to make restitution or apologize to the victim, and participation in counseling programs without talking to the accused. Defense counsel must instruct the accused not to talk to anyone about these topics (or anything related to the case) early in the representation.<sup>43</sup>

In cases where the accused has been instructed not to talk about his case to anyone but his defense counsel and the accused has complied, the defense counsel should plan to challenge government-called rehabilitative potential witnesses. The defense counsel can do this in advance of the witness's testimony during an Article 39(a) session or in front of the sentencing authority.<sup>44</sup> Regardless of when the witness's foundation is challenged, the questions remain the same.

Defense counsel should begin by ensuring the witness understands the definition of rehabilitative potential. Many rehabilitative potential witnesses are poorly prepared.<sup>45</sup> Even today, many do not understand the concept and mistakenly believe that their opinion is about whether the accused should be returned to duty. "Rehabilitative potential 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

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<sup>42</sup> MCM, *supra* note 1, R.C.M. 1001(b)(5)(B).

<sup>43</sup> This is but one of the excellent reasons for defense counsel to give this advice. A client who follows it also protects himself from damaging admissions to be brought in under MRE 801(d)(2) when others twist or misremember his words (or remember them all too well).

<sup>44</sup> See *infra* notes 49 to 51 and accompanying text for a discussion of the tactical considerations bearing on the timing of the challenge.

<sup>45</sup> See generally Major Derrick W. Grace, *Sharpening the Quill and Sword: Maximizing Experience in Military Justice*, ARMY LAW., Dec. 2010, at 24 (discussing the inexperience of Army prosecutors and suggesting improvements). See also Colonel Jeffery R. Nance, *A View from the Bench: So, You Want to Be a Litigator?*, ARMY LAW., Nov. 2009, at 48 (discussing the characteristics of successful litigators).

society.”<sup>46</sup> This, of course, is much more than a return to duty. Challenge the witness<sup>47</sup> by asking an open-ended question: “What do you believe rehabilitative potential means?” Odds are the witness has not been properly prepared, has not thought about the answer to this question, and will simply say something to the effect that rehabilitative potential is whether the accused deserves another chance as a Soldier. If you get this answer, you are done. Object to the witness, citing the concerns expressed in *Horner*, *Ohrt*, and *Aurich* and the cases that follow them: the inappropriateness of suggesting to the sentencing authority whether the accused deserves a punitive discharge, the failure to individualize the sentencing proceeding to the accused, and unlawful command influence if the witness is a member of the accused’s chain of command.

In the minority of cases where the witness has been prepared or somehow muddles through the first question, press the attack. Ask a second open-ended question: “How well do you know the accused?” Listen carefully to the answer and identify the weak spots you can exploit with leading questions. The common weak spots are the witness’s knowledge of the accused’s character, moral fiber, and determination to be rehabilitated. If the accused has not discussed these topics with the witness, the witness probably has an insufficient foundation. Develop questions to highlight the deficiencies: “Have you discussed the accused’s childhood with him?” If the accused has complied with your direction not to talk about his childhood, the answer will be “no.” The point being, the witness has no information about the accused during the years when his character was formed. Defense counsel should craft similar questions covering the accused’s high school years and years of military service. Also craft questions showing the witness has no knowledge of the accused’s moral fiber and determination to be rehabilitated. In the end, the witness will be left only with knowledge of the offenses and the accused’s duty performance. Remember, the witness’s opinion must be based on the witness’s knowledge of the accused’s character and potential.<sup>48</sup>

Defense counsel must decide when to challenge the witness.<sup>49</sup> One option is to challenge the witness in advance

<sup>46</sup> MCM, *supra* note 1, R.C.M. 1001(b)(5).

<sup>47</sup> The suggested questions here in no way relieve the defense counsel of his duty to interview the witnesses before trial, or to use information gleaned in the interviews to craft good questions. The witness interview should not simply replicate the anticipated cross-examination or attempt to convince the witness that his opinion is unfounded, as these tactics will serve only to warn the witness of what is coming, but instead should encourage the witness to talk freely about what he knows and how he knows it. See Major Timothy MacDonnell, *It Is Not Just What You Ask but How You Ask It: The Art of Building Rapport During Witness Interviews*, ARMY LAW., Aug. 1999, at 65 (providing some guidelines which apply equally well to opposing and friendly witnesses).

<sup>48</sup> *United States v. Horner*, 22 M.J. 294, 296 (C.M.A. 1986).

<sup>49</sup> Defense counsel should also consider whether to challenge the witness’s foundation. Defense counsel must identify those situations where the

when the members are not present.<sup>50</sup> This could be days before trial or minutes before the witness is to appear before the members. The other option is to challenge the witness with the members present. Defense counsel could mount the challenge in front of the members before the opinion is offered by requesting an opportunity to *voir dire* the witness or after the opinion is offered during cross-examination.<sup>51</sup> The factors defense counsel should consider are the likelihood the military judge will allow the testimony and the amount of good character evidence available to the defense. Generally speaking, if the judge is certain to allow the opinion testimony, wait and challenge the witness before the members. If there is a chance the judge will not allow the testimony, defense counsel should, generally speaking, challenge the witness in an Article 39(a) session. Of course, there are exceptions to these general rules.<sup>52</sup>

### *Limit the Opinion*

Even if the military judge allows a rehabilitative potential witness to offer his or her opinion, the defense counsel still has options. The first option is simple, but critical: limit the witness’s opinion. Remember the structured format for admitting a rehabilitative potential opinion from *Aurich*.<sup>53</sup> After the witness demonstrates an adequate foundation, “RCM 1001(b)(5) contemplates one question: ‘What is the accused’s potential for rehabilitation?’—and one answer: ‘In my opinion, the accused has \_\_\_\_\_ [good, no, some, little, great, zero, much, etc.] potential for rehabilitation.’”<sup>54</sup> If the trial counsel’s question varies from “What is the accused’s potential for rehabilitation?” in any meaningful way, object. Most experienced judges will not press you to explain your objection because they will recognize the issue and understand the objection. If the military judge does not

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witness has an adequate foundation but the trial counsel does a poor job presenting the witness’s basis of knowledge. Cross-examining such a witness likely will be counterproductive. Even if not counterproductive, attacking the foundation will give the trial counsel the opportunity to rehabilitate the witness during redirect examination. The better tactic in this situation may be not to challenge the foundation but urge the members not to give the opinion any weight during closing argument. Identification of these situations requires background knowledge that must be gained before trial through witness interviews.

<sup>50</sup> Article 39(a) authorizes the military judge to conduct court-martial proceedings without the members being present to rule upon various issues including whether witness testimony is admissible. This situation may fall under either Article 39(a)(1) or Article 39(a)(2). UCMJ art. 39 (2008).

<sup>51</sup> If the military judge is the sentencing authority, he or she will probably deal with this issue during the case in aggravation for efficiency purposes.

<sup>52</sup> One exception is when the defense has a great case in extenuation and mitigation and the defense counsel wants to present good character evidence during the case in aggravation. See *infra* note 59 and accompanying text. See also *supra* note 49.

<sup>53</sup> See *supra* note 34 and accompanying text.

<sup>54</sup> *United States v. Aurich*, 31 M.J. 95, 96 (C.M.A. 1990).

recognize the issue, explain that the trial counsel is eliciting an improper opinion and cite *Aurich*. In addition to the improper questions in the cases discussed, improper questions that are commonly heard in courts-martial include: “What is your opinion of the accused?”, “What is your opinion of the accused’s potential?”, and “What is your opinion of the accused’s character?” Trial counsel who do not understand the requirements of RCM 1001(b)(5) often ask improper questions that invite the witness to stray into inappropriate areas.<sup>55</sup>

The second way to limit the witness’s opinion is to limit the answer. Listen carefully to the first sentence of the witness’s response. If it deviates meaningfully from, “In my opinion, the accused has \_\_\_\_\_ [good, no, some, little, great, zero, much, etc.] potential for rehabilitation,” object quickly. If the judge asks for an explanation, cite *Aurich* and explain the witness is giving an improper opinion. Often, government rehabilitative potential witnesses are not properly prepared and do not understand the limits on what they can say; they innocently give what they believe to be a responsive answer to the question. Common inappropriate answers include: “In my opinion the accused has no potential for further service,” “The accused has no integrity,” and “The accused has no character.” Military officers and noncommissioned officers are naturally inclined to explain how they arrived at an opinion when asked to give one. Even if the witness gives the properly limited answer, “In my opinion, the accused has \_\_\_\_\_ [good, no, some, little, great, zero, much, etc.] potential for rehabilitation,” the witness will be tempted to continue and explain his opinion. If the witness starts to explain his or her opinion, object. Remember, the witness

cannot give a full explanation or discuss specific instances of conduct until cross-examination.<sup>56</sup> Whether the problem is the content of the witness’s answer or what comes after, you must object quickly to stop the witness from discussing forbidden topics.

### *Make the Government Sorry They Asked*

Before deciding to call a witness, all counsel should conduct a cost-benefit analysis to see if their cause is, on balance, helped or harmed by the witness.<sup>57</sup> Defense counsel can limit the benefit to the government’s case by challenging the foundation, insisting the trial counsel’s question is properly framed, and limiting the answer to the question. Even if you run across a trial counsel who can properly present rehabilitative potential evidence, you can increase the cost of deciding to call a rehabilitative potential witness. This can be done during cross-examination and must only be attempted after careful consideration of the trial counsel’s response to this tactic. Put another way, the defense counsel must anticipate the trial counsel’s reaction and conduct his or her own cost-benefit analysis.

In an appropriate case, the defense counsel can inflict a lot of damage to the government’s case when cross-examining the government’s rehabilitative potential witness. Of course, the cross-examination can begin with the same questions asked to challenge the witness’s foundation, if those questions have not already been asked in front of the sentencing authority. The more you can highlight the fact that the witness does not really know the accused, the less weight the sentencing authority will give the opinion.

Occasionally rehabilitative potential witnesses go too far. Often, a witness will testify, “In my opinion, the accused has no rehabilitative potential.” Very, very rarely does an accused have no rehabilitative potential. This is usually a sign that the witness believes he is being asked to give an opinion about whether the accused should be returned to duty. An effective way to deal with this is to ask

<sup>55</sup> See *United States v. Warner*, 59 M.J. 590, 594–95 (C.G. Ct. Crim. App. 2003) (providing for an example of how this can happen during cross-examination). In *Warner*, the accused’s supervisor testified “that Appellant was an excellent worker who sought advice on achieving a ‘healthy lifestyle’ through exercise, improved nutrition, and stress management.” When asked, without objection from the trial counsel, if he had an opinion as to Appellant’s rehabilitative potential, he said that Appellant had “taken the right steps . . . to better his future after the Coast Guard.” On cross-examination, trial counsel asked the witness if he was familiar with the “Coast Guard’s drug policy” and whether appellant had “rehabilitative potential *in the Coast Guard*, given his drug abuse?” (emphasis added). When the witness reiterated his opinion that appellant had rehabilitative potential, trial counsel asked if he understood that illicit drug use was “contrary to the [Coast Guard’s] core mission” and drug use “can create problems in efficiency and otherwise for the chain of command?” The court held these questions to be improper but found their admission to be harmless error, in part because the defense counsel did not object. Cf. *United States v. Armon*, 51 M.J. 83, 84–87 (1999). In *Armon*, the accused was convicted of making false official statements and wearing unauthorized military accoutrements, including a combat infantryman’s badge, a Special Forces tab, a Special Forces combat patch, and a parachute badge with bronze star. The Government called several sentencing witnesses who had actually earned some of these accoutrements, and who gave very emotional accounts of what the ribbons and badges meant to them, their low opinions of anyone who would wear them falsely, and their unwillingness to serve with such a Soldier. This case shows how quickly leadership testimony can become impermissible commentary on the offenses. The court affirmed the sentence, partly because the defense counsel did not object. See also *United States v. Randolph*, 20 M.J. 850, 851 (A.C.M.R. 1985).

<sup>56</sup> See *supra* notes 32 to 33 and accompanying text.

<sup>57</sup> An example illustrates the danger:

A classic example in the books is a character witness in a trial for murder. She testified she grew up with defendant, knew his reputation for peace and quiet, and that it was good. On cross-examination, she was asked if she had heard that the defendant had shot anybody, and, if so, how many. She answered, “Three or four,” and gave the names of two, but could not recall the names of the others. She still insisted, however, that he was of “good character.” The jury seems to have valued her information more highly than her judgment, and, on appeal from conviction, the cross-examination was held proper.

*Michelson v. United States*, 335 U.S. 469, 479 n.16 (1948) (citing *People v. Laudiero*, 192 N.Y. 304, 309 (1908)).

the witness, “So, in your opinion, the accused has no potential to \_\_\_\_\_?” Fill in the blank with any civilian, entry-level job you can think of. “So, in your opinion, the accused has no potential to be a laborer at a construction site?” “So, in your opinion, the accused has no potential to flip burgers at a fast-food restaurant?” “So, in your opinion, the accused has no potential to pump gas?” The witness, sensing a trap, will usually respond that he did not mean that, what he meant was the accused has no potential to be a Soldier. Thinking he has avoided the trap, he walked right into it. If the witness answers these questions affirmatively, the witness usually looks ridiculous. As the cases discussed in this article illustrate, the government typically offers opinions about rehabilitative potential evidence only in low-level cases with no true victim—drug use, for example—because there is nothing else to offer.<sup>58</sup> A witness will look ridiculous trying to convince others that the accused has no potential to be a useful member of society when the accused has only been convicted of smoking marijuana.

In addition to minimizing the witness’s foundation and challenging absurd opinions, defense counsel can inject the entire defense case in extenuation and mitigation<sup>59</sup> into the government’s case in aggravation. This is as simple as repeatedly asking questions in the form, “Did you know \_\_\_\_\_?”<sup>60</sup> The defense counsel simply fills in the blank with each piece of favorable information. Some questions might be: “Did you know the accused won the National Geography Bee in 4th grade? Did you know the accused has two varsity letters in football? Did you know the accused is an Eagle Scout? Did you know the accused was president of

<sup>58</sup> This pattern calls into question whether RCM 1101(b)(5) evidence *ever* has value for the prosecution. As a practical matter, the accused in a low-level case will be returned to society (military or civilian) after a brief period of punishment no matter what the witnesses say about him, so that his potential to function there is not really at issue. The accused in a high-level case, who might actually be kept out of society for life, does not face this kind of evidence because better, stronger aggravation is available to the prosecution. There is no benefit in offering rehabilitative potential evidence in a low-level case, but there is the possibility of creating an appellate issue. See *United States v. Bish*, 54 M.J. 860, 861–62 (A.F. Ct. Crim. App. 2001) (excoriating trial counsel for “interjecting an appellate issue into a case for no good reason,” by introducing rehab potential evidence from a commander when much better aggravation was in evidence).

<sup>59</sup> “Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse.” MCM, *supra* note 1, R.C.M. 1001(c)(1)(A). “Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation for clemency.” *Id.* R.C.M. 1001(c)(1)(B). Matter in mitigation includes specific acts of good conduct, bravery, good duty performance, or any evidence of a trait that is desirable in a Soldier. *Id.*

<sup>60</sup> Counsel should be aware that the military judge will be likely to give Instruction 7-18, “Have you Heard” Questions to Impeach Opinion. This instruction tells members that they can only consider “have-you-heard” or “did-you-know”-type questions to determine how much weight to give to a character witness’s testimony. The members will also be told that the question cannot be considered for any other purpose. U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHMARK para. 7-18 (1 Jan. 2010).

his high school class? Did you know the accused was active in his church’s youth group? Did you know the accused was the runner-up at the Brigade Soldier of the Month board?” The defense counsel can methodically and patiently cover every achievement of the accused during his entire life. Cover every segment of the accused’s life: early childhood, high school, and military service. The point is to illustrate that the accused is an achiever with a special emphasis on those things that show the accused was raised to have good character. In addition to demonstrating that the witness does not know the accused, this tactic sets up the argument that the current misconduct is out of character, and the accused deserves another chance. Many of these questions will foreshadow what the defense will present later, but the cross-examination of a rehabilitative potential witness is not limited to what the defense will present later. That means the defense counsel can ask “did-you-know”-type questions to challenge the foundation of the witness even if the defense counsel cannot prove the favorable information for whatever reason, as long as the defense counsel has a good-faith basis for asking the question.<sup>61</sup> The more times the witness answers “no” to these questions, the less weight the sentencing authority will give to the opinion.<sup>62</sup> Another benefit is that the defense counsel gets to foreshadow the favorable information sooner—during the government’s case in aggravation. In a particular case, it may be important to

<sup>61</sup> The defense counsel is required to have a good faith basis in order to ask the question. See *United States v. Pruitt*, 46 M.J. 148, 151 (1997).

<sup>62</sup> The defense counsel might even renew his objection if the witness answers negatively to all of the “did-you-know”-type questions. The less the witness knows about the accused’s background before his military service, the more the opinion seems to be an inappropriate comment on the accused’s lack of potential for further military service. Defense counsel should be aware of an odd and incorrect opinion by the Army Court of Military Review (ACMR), *United States v. Sylvester*, 38 M.J. 720, 722–24 (A.C.M.R. 1994). In that case, a government sentencing witness testified that the accused had “low” rehabilitative potential. On cross, he admitted that this was based solely on the accused’s potential for military service. The defense moved to strike his testimony and the trial court overruled. Contrary to substantial authority, the ACMR affirmed, and held “that R.C.M. 1001(b)(5) opinion evidence is not per se inadmissible merely because it is shown to be based solely on the witness’s view of the appellant’s potential for military service,” *Id.* at 723 (The court also held that the testimony was not an improper euphemism because the defense had raised it on cross.). *Id.* at 724. The flaw in the court’s holding is caused by a fundamental misreading of *Horner*. In *Sylvester*, the court states, “[T]he Court of Military Appeals, interpreting the term ‘rehabilitative potential’ from R.C.M. 1001(b)(5), adopted an expansive definition consistent with a return to a particular status *and* a return in society in general.” *Id.* (citing *Horner*) (emphasis in original). The CMA did no such thing. After reviewing the definitions of rehabilitation and rehabilitate from *Webster’s* dictionary, the court stated, “[I]n other words, ‘rehabilitation’ can denote both a return to a particular status and a return to society. Our view of ‘potential for rehabilitation’ is consistent with Webster’s more expansive definition.” *United States v. Horner*, 22 M.J. 294, 296 (C.M.A. 1986). In *Horner*, the CMA selected the expansive definition (return to society) and rejected the narrow definition (return to a particular status). The correct interpretation of *Horner* is reflected in the 1994 amendment to the rule, so *Sylvester’s* impact has been minimal. See MCM, *supra* note 1, R.C.M. 1001(b)(5); see also Major Charles E. Wiedie, Jr., *Rehab Potential 101: A Primer on the Use of Rehabilitative Potential Evidence in Sentencing*, 62 A.F. L. REV. 43, 60 (2008).

present the favorable information contemporaneously with aggravation evidence to prevent the sentencing authority from concluding the accused is a bad person.

Defense counsel must carefully select when he or she cross-examines a government rehabilitative potential witness (or any character witness) with specific instances of conduct. If the defense cross-examines with specific instances, the government can discuss specific instances of conduct on redirect examination.<sup>63</sup> The defense counsel must know what unfavorable information is available to the trial counsel, anticipate the trial counsel's likely response, and decide whether the benefit to the defense case is sufficient given the cost imposed by giving the trial counsel the opportunity to discuss specific instances of bad conduct the members would not otherwise hear.

### What's Good for the Goose Doesn't Apply to the Gander

In *United States v. Griggs*,<sup>64</sup> the accused was convicted of wrongfully using marijuana and ecstasy, and wrongfully distributing ecstasy. He was sentenced to a bad conduct discharge, confinement for 150 days, total forfeiture of pay and allowances, and reduction to E-1.<sup>65</sup> Senior Airman Griggs (SrA) pled guilty to the marijuana offense but contested the other charges. During the sentencing portion of the trial, the defense counsel offered six letters. The trial counsel objected to specific language in the letters that amounted to a recommendation that SrA Griggs be retained in the Air Force.<sup>66</sup> The military judge sustained the

objection and the passages of the letters were redacted. Although his reasons were unclear, it appears that the trial judge based his ruling limiting the evidence the defense could present on RCM 1001(b)(5)(D), a rule normally used to limit the evidence the government can present. The Court of Appeals for the Armed Forces (CAAF) considered whether the trial judge based his decision on an erroneous view of the law.<sup>67</sup>

The court noted that its analysis should be as simple as looking at the structure of RCM 1001. Rule for Court-Martial 1001(b) is titled, "Matters to be presented by the prosecution." Rule for Court-Martial 1001(c) is titled, "Matters to be presented by the defense." So, a restriction in RCM 1001(b)(5)(D) that limits the evidence the trial counsel can present during the case in aggravation would not apply to the defense case in extenuation and mitigation.<sup>68</sup> The court recognized that the analysis was not that simple and the complicating factor was the court's decision in *United States v. Ramos*.<sup>69</sup>

Specialist Ramos was convicted of larceny, forgery and larceny of mail matter and sentenced to a bad conduct discharge, confinement for six months, and a \$2,000 fine.<sup>70</sup> During the sentencing case, the defense called three noncommissioned officers who testified that SPC Ramos was still a good Soldier and that they would take him back in their unit, even knowing about the convictions.<sup>71</sup> The trial judge, *sua sponte*, gave the members a limiting instruction to

<sup>63</sup> MCM, *supra* note 1, R.C.M. 1001(b)(5)(F) discussion:

For example, on redirect a witness or deponent may testify regarding specific instances of conduct when the cross-examination of the witness or deponent concerned specific instances of misconduct. Similarly, for example, on redirect a witness or deponent may offer an opinion on matters beyond the scope of the accused's rehabilitative potential if an opinion about such matters was elicited during cross-examination of the witness or deponent and is otherwise admissible.

See also *United States v. Eslinger*, 69 M.J. 522, 534 (A. Ct. Crim. App. 2010).

<sup>64</sup> 61 M.J. 402 (C.A.A.F. 2005). See Major John Rothwell, "I Made A Wrong Mistake": Sentencing and Post-Trial in 2005, *ARMY LAW.*, June 2006, at 41, 41-44.

<sup>65</sup> *Griggs*, 61 M.J. at 403.

<sup>66</sup> The specific passages were:

*I have no doubt SrA Griggs will continue to be an asset to the mission of the squadron and Air Force. I can honestly say his future is not in my hands, but I ask the panel to have compassion and SrA Griggs is given a second chance to be a productive member of the United States Air Force. I would still like to be able to work with SrA Griggs.*

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*In fact I have two airmen I'd gladly trade just to keep him. I feel the Air Force could use more airmen like him. Even with the stress of a pending court martial he has remained dedicated, motivated, and faithful till [sic] the end.*

*I would not hesitate to have SrA Griggs working for me or with me. I continue to hear, "This is not a one mistake Air Force" so I feel SrA Griggs can learn a valuable lesson from this experience.*

*I believe strongly that everyone deserves a second chance to prove him or herself. I have no doubt SrA Griggs will continue to be an asset to the mission of the squadron and Air Force. I ask the panel to have compassion and SrA Griggs is given a second chance to be a productive member of the United States Air Force.*

*I am convinced that he has learned from this experience and can still be of great potential to the United States Air Force ... We seem to "eat our young" sometimes and see the only course of action is to toss them out after investing so much time, effort, and money.*

*Id.* at 406 (emphasis in original).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 406-07.

<sup>69</sup> *Id.* at 408 (citing *United States v. Ramos*, 42 M.J. 392, 396 (1995)).

<sup>70</sup> *Ramos*, 42 M.J. at 393.

<sup>71</sup> *Id.* at 393-94.

disregard the portion of the witness testimony where they said the accused could still be a Soldier in the Army. On appeal, the accused complained that the trial judge abandoned his impartial role. In affirming the judge's decision to give the limiting instruction, the court said,

In *United States v. Ohrt* [citation omitted] this Court recognized that "use of euphemisms, such as 'No potential for continued service'; 'he should be separated'; or the like are just other ways of saying, 'Give the accused a punitive discharge.'" The mirror image might reasonably be that an opinion that an accused could "continue to serve and contribute to the United States Army" simply is a euphemism for, "I do not believe you should give him a punitive discharge." If so, then such testimony would seem to be what the *Ohrt* Court had in mind when it explicitly stated that "a witness—*be he for the prosecution or the defense*—should not be allowed to express an opinion whether an accused should be punitively discharged."<sup>72</sup>

This language caused the trial judge in *Ramos* to give the limiting instruction, and the language can be reasonably interpreted to mean that *Ohrt* prohibits both sides from using euphemisms to influence the members' decision about adjudging a punitive discharge. Whether a defense witness can give testimony that could be interpreted as a euphemism for "do not discharge the accused" is the matter the court resolved in *Griggs*.

In *Griggs*, the court reviewed two lines of cases that seemed to be at odds: the *Ohrt-Ramos* line of cases, and an older line of cases recognizing evidence that the accused should be returned to duty as "classic mitigation evidence," and admissible as such.<sup>73</sup> In resolving this tension, the court concluded "the better view is that RCM 1001(b)(5)(D) does not apply to defense mitigation evidence, and specifically does not preclude evidence that a witness would willingly serve with the accused again."<sup>74</sup> The court warned, however, that "there can be a thin line between an opinion that an accused should be returned to duty and the expressions of an opinion regarding the appropriateness of a punitive discharge. . . . [A]n explicit declaration that an accused should not receive a punitive discharge or that any such discharge should be of a certain severity is disallowed for the defense not because of R.C.M. 1001(b)(5)(D), but

because such evidence invades the province of the members to decide alone on punishment."<sup>75</sup> Thus, both lines of cases were upheld, and the left and right limits of this kind of evidence were established.

The bottom line is clear, correct, and easy to implement: no witness, regardless of which side calls him or her, can express an opinion on whether the accused deserves a punitive discharge. The trial counsel cannot call a rehabilitative potential witness and elicit a euphemism for "the accused deserves a discharge."<sup>76</sup> The defense can present testimony that a witness would be willing to serve with the accused again, even though this resembles a euphemism for "the accused does not deserve a discharge."

Of course, before offering testimony of a witness's willingness to serve with the accused again, the defense counsel must carefully analyze the costs and benefits of doing so. The defense counsel must know what unfavorable information is available to the trial counsel, because the trial counsel will be able to test the witness's foundation with specific instances of bad conduct during cross-examination. Defense counsel do not want to give the trial counsel an opportunity to ask "did-you-know"-type questions and present information to the sentencing authority that the sentencing authority would not otherwise hear.

In addition, defense counsel must frame the questions carefully. A defense witness cannot testify that the accused does not deserve a punitive discharge and should not say anything close to that. If the defense properly limits the opinion of its witness, the defense is also limiting the opinion of any government-called rebuttal witness.<sup>77</sup> If the defense witness mistakenly says, "In my opinion, the accused should remain in the Army," the trial counsel may be allowed to rebut this testimony with witness testimony that shows this opinion is not the consensus of the command. An appropriate question would elicit an answer, the theme of which is, "I would serve with the accused again." An appropriate question and answer will limit the scope of the government's cross-examination of the defense sentencing witness.<sup>78</sup> An appropriate answer by the defense witness

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<sup>75</sup> *Id.*

<sup>76</sup> In fact, the Government rehabilitative potential witness is very limited in the opinion he or she can give. See *supra* note 34 and accompanying text.

<sup>77</sup> The testimony of a defense witness may allow the prosecution to present rebuttal evidence that would be inadmissible without the defense witness's testimony. *United States v. Tipton*, 23 M.J. 338, 344 (C.M.A. 1987).

<sup>78</sup> See *United States v. Hill*, 62 M.J. 271, 275 (C.A.A.F. 2006):

Once the defense opened the door to the issue of whether the battalion commander would want Appellant back in the unit, the prosecution appropriately sought to explore the witness's response on cross-examination by addressing the desirability of retaining in the unit a person who had

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<sup>72</sup> *Id.* at 396 (emphasis added).

<sup>73</sup> *Id.* at 407. See, e.g., *United States v. Aurich*, 31 M.J. 95, 97 (C.M.A. 1990); *United States v. Vogel*, 37 C.M.R. 462, 463 (1967).

<sup>74</sup> *Griggs*, 61 M.J. 409.

will also limit the government rebuttal witness to an opinion, the theme of which is, “I would not be willing to serve with the accused again.”<sup>79</sup> *United States v. Eslinger*<sup>80</sup> is a good illustration of what can go wrong if these clear and easy-to-implement rules are not followed.

### Watch Out for Rebuttal Witnesses

In *Eslinger*, the accused was convicted of wrongful possession of child pornography.<sup>81</sup> The accused was a sergeant first class (SFC) with eighteen years of service; he was a Special Forces medic, high-altitude, low-opening (HALO) qualified, and a veteran of four deployments. He had been awarded the Bronze Star Medal for Valor. On the other hand, the accused also had two general officer memoranda of reprimand for driving under the influence of alcohol and a civilian conviction for criminal trespass, which were offered by the prosecution during the case in aggravation.<sup>82</sup> The accused was sentenced to a bad conduct discharge, confinement for three years, reduction to E1, and forfeiture of all pay and allowances.<sup>83</sup>

As mitigation evidence, the defense offered a stipulation of expected testimony that included:

I definitely think there is a place for [the accused] in the Army and within the 10th Special Forces Group. I truly believe that Special Forces is the only place for SFC Eslinger. I would be proud to serve with him in the future despite this conviction. . . . [I] would welcome him to my team any day.<sup>84</sup>

The defense also called several witnesses who testified in response to various questions, “I would take him on my team

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committed the offenses of which Appellant had been convicted.

The battalion commander, called by the defense, went on to clarify that he was willing to take the accused back if the judge decided not to discharge him, but if he was a panel member, he would discharge the accused. *Id.* at 273. Defense counsel must be very careful in selecting witnesses and limiting the scope of the witness’s opinion on direct examination.

<sup>79</sup> The Government may call rebuttal witnesses to prove the defense-called witnesses’ opinions that they would serve with the accused again are not the consensus of the command. *See supra* note 33 and accompanying text. *See also* Colonel Mike Hargis, *A View from the Bench: Findings, Sentencing and the “Good Soldier,”* ARMY LAW., Mar. 2010, at 91, 93.

<sup>80</sup> 70 M.J. 193 (C.A.A.F. 2011).

<sup>81</sup> *Id.* at 195.

<sup>82</sup> *Id.* at 201.

<sup>83</sup> *Id.* at 195.

<sup>84</sup> *Id.* at 196.

in a minute[.]” “I would say, yes, we need to keep this soldier . . . I think, you know, something needs to be done, you know. Past that, I think he needs to stay in the service[.]” and “he ‘would like to have Sergeant First Class Eslinger on the plane’ with him when he deployed.”<sup>85</sup> The government called five rebuttal witnesses, three of whom barely knew the accused. However, they were unanimous in their opinion that the accused should not remain in the 10th Special Forces Group or the Army.<sup>86</sup>

The Army Court of Criminal Appeals found plain error, but found the error harmless and affirmed the findings and sentence.<sup>87</sup> The court held that the trial judge “committed error by permitting the government rebuttal testimony essentially calling for the panel to discharge [the accused] without imposing a meaningful foundation requirement or providing a necessary limiting instruction.”<sup>88</sup> In its opinion, the court extensively discussed the cases and principles discussed in Sections 1 and 3 of this article.<sup>89</sup> The Army Court held, “[T]he foundation and scope of testimony by government witnesses rebutting so-called defense retention evidence must generally conform with the principles of R.C.M. 1001(b)(5)(B)-(D).”<sup>90</sup>

The court repeatedly emphasized the importance of the witnesses’ foundations. Three of the trial counsel’s rebuttal witnesses would have had a hard time picking the accused out of a one-man line-up. These witnesses simply did not know SFC Eslinger, his background, or his character. The complete lack of personal knowledge of the accused made the court acutely concerned about the related issue of unlawful command influence. The accused’s acting battalion commander was “wholly devoid of foundation,”<sup>91</sup> and the acting commander “repeatedly invoked the name—and sought to quote the opinion of—the battalion commander regarding whether [the accused] should deploy and remain in the SF Group and the Army. In addition to improperly reciting specific facts of [the accused’s] prior disciplinary actions on direct examination, [the acting

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<sup>85</sup> *United States v. Eslinger*, 69 M.J. 522, 527 (A. Ct. Crim. App. 2010); *see also Eslinger*, 70 M.J. at 196 (C.A.A.F. 2011).

<sup>86</sup> *Eslinger*, 69 M.J. at 527–29 (A Ct. Crim. App. 2010). The first rebuttal witness, the accused’s acting battalion commander, admitted on cross-examination that he had no prior contacts or knowledge of the accused and had only learned of his disciplinary problems during the trial. The second witness, the accused’s acting battalion command sergeant major, admitted on cross-examination that he had no prior knowledge of the accused and his opinion was based on the nature of the child pornography offenses. The fourth witness, the accused’s group commander, only knew the accused was in his unit and his disciplinary history.

<sup>87</sup> *Id.* at 535.

<sup>88</sup> *Id.* at 530.

<sup>89</sup> *Id.* at 529–35.

<sup>90</sup> *Id.* at 536.

<sup>91</sup> *Id.* at 534.

commander] noted those actions (reprimands) reflected the judgments of a flag officer regarding [the accused's] character."<sup>92</sup> Similarly, the foundation for the group commander's and the battalion command sergeant major's testimony was no broader than their knowledge of any Soldier under their command. Referring to superiors and calling commanders with no knowledge of the accused, his background, and his character hints at unlawful command influence because the probative value of the witnesses' opinions is no greater than that of a commander expressing the hope that the accused is discharged.

The court warned counsel about the impermissible practice of having government witnesses explain the basis of their opinion on direct examination. The court noted that the specific instances of conduct that challenge or support the witnesses' opinions are properly covered only during cross-examination and redirect examination.<sup>93</sup> The government rebuttal witnesses extensively discussed, on direct examination and without objection, why they held the opinions they offered the court.<sup>94</sup> Finally, the court was concerned that the opinions of the government rebuttal witnesses went beyond what is allowed by *Griggs*. Instead of merely demonstrating that the defense witnesses' opinions that they would be willing to serve with the accused in the future were not the consensus of the command, the government rebuttal witnesses, with varying degrees of directness, recommended that the members discharge the accused.<sup>95</sup> The court found clear and obvious errors, but held the errors were harmless.<sup>96</sup>

The CAAF reviewed the case and affirmed the result,<sup>97</sup> but changed the legal analysis. "[A]lthough rebuttal testimony of the type in this case may raise some of the same concerns addressed by RCM 1001(b)(5), that is different than concluding that this rule specifically applies to rebuttal evidence. Rebuttal evidence is governed by RCM 1001(d), which does not contain the same restrictions as RCM 1001(b)(5)."<sup>98</sup> While recognizing the concerns that

arise when members of the chain of command testify that they do not want the accused returned to their unit, CAAF warned defense counsel that if the defense opens the door by presenting *Griggs* evidence, "[P]rinciples of fairness warrant the opportunity for the opposing party to respond, provided the response is fair and is predicated on a proper testimonial foundation."<sup>99</sup> Noting that the Military Rules of Evidence (MRE) apply to presentencing proceedings, the CAAF analyzed the testimony of the government rebuttal witnesses as lay opinions. "M.R.E. 701(a) requires that lay opinions or inferences be limited to those that are 'rationally based on the perception of the witness.' In similar fashion, MRE 602 provides that '[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.'"<sup>100</sup> Evaluating the witnesses' testimony according to this standard, the CAAF concluded that the trial judge did not commit plain error.<sup>101</sup>

The lessons for defense counsel are many. First, do not call a "*Griggs* witness" if the government can effectively negate the benefit of the *Griggs* witness by calling a series of rebuttal witnesses. Carefully conduct a cost-benefit analysis before calling a character witness. Second, understand that the foundational requirements of RCM 1001(b)(5) do not apply to government rebuttal witnesses. Military Rule of Evidence 701(a) provides the correct standard. Under either standard, the defense may have prevented at least three of the government rebuttal witnesses in *Eslinger* from testifying based on their razor-thin foundations by simply objecting. Challenge the government's character witness's foundation the same as you would if the witness were called in the government case in aggravation because, in the end, it all comes down to the witness's personal knowledge.

Third, defense counsel should carefully limit the opinions offered by *Griggs* witnesses. The government may call witnesses in rebuttal to defense retention evidence to show that the defense witness's opinion is not the consensus of the command. The scope of the rebuttal witness's opinion will be determined by how far the defense has opened the door. If a defense witness testifies, "I definitely think there is a place for [the accused] in the Army and within the 10th Special Forces Group," the defense counsel should expect the government to rebut this opinion with a witness whose opinion is that there is no place in the Army or 10th Special Forces Group for the accused. If the defense surgically limits the defense witness's opinion to, "I would gladly serve with the accused again," the government's rebuttal witness would be limited to, "I am not willing to serve with

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* See also *United States v. Powell*, 49 M.J. 460, 461–62 (C.A.A.F. 1998); *United States v. Rhoads*, 32 M.J. 114, 115–16 (C.M.A. 1991); *United States v. Gregory*, 31 M.J. 236, 238 (C.M.A. 1990).

<sup>94</sup> *Eslinger*, 69 M.J. at 527–29 (A. Ct. Crim. App. 2010).

<sup>95</sup> *Id.* at 534–35. Without a doubt, the defense may have invited the improper opinions from the government witnesses by eliciting opinions from the defense witnesses that went beyond expressing a willingness to serve with the accused again. For example, one defense witness testified, "I think [the accused] needs to stay in the Army." *Id.* at 527. The court noted that even if the defense provoked the improper rebuttal evidence, the trial judge should have limited the improper testimony and put it in context with an appropriate instruction. *Id.* at 530.

<sup>96</sup> *Id.* at 536.

<sup>97</sup> *United States v. Eslinger*, 70 M.J. 193, 201 (C.A.A.F. 2011).

<sup>98</sup> *Id.* at 199.

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<sup>99</sup> *Id.* at 198.

<sup>100</sup> *Id.* at 199.

<sup>101</sup> *Id.* at 200. Even though the court did not find plain error, the court tested for prejudice, the last step in the plain error analysis. The CAAF concluded that even if the military judge committed plain errors, the errors were harmless. *Id.*

the accused again.” Defense counsel should object to any testimony offered by the government rebuttal witness that goes beyond, “I am not willing to serve with him again.” In this situation, testimony to the effect, “I don’t want him back in my unit,” “there’s no place in the 10<sup>th</sup> Special Forces Group for him,” “I don’t think he can remain in the Army,” or “there’s no place in our ranks for the accused” goes too far, does not rebut the defense witness’s opinion, and implicates the concerns the courts have expressed since *Horner*.

Finally, do not allow the government’s witness to explain his or her basis for the opinion on direct examination with specific instances of conduct. The witness will be allowed generally to describe how well and how long the witness knows the accused, but the witness should not be allowed to go into specific instances of conduct. Craft your cross-examination carefully, keeping in mind if you cross-examine with specific instances of conduct, the witness will likely be allowed to explain the basis of his opinion on redirect examination, including specific instances of bad conduct.

### **Conclusion**

Defense counsel can set the agenda for the discussion about the accused’s potential for rehabilitation and future service. If the accused’s potential is low or there are many specific instances of bad conduct that the trial counsel can exploit, prevent all discussion of the accused’s low potential and bad behavior by denying the government witnesses the information necessary to form a legally acceptable foundation. This means the accused must follow the standard advice given to all clients: do not discuss your case with anyone. If the trial counsel calls a rehabilitative potential witness, defense counsel must know how to attack the witness’s foundation and prevent the testimony. If the accused’s potential is low or there are many specific

instances of bad conduct that the trial counsel can exploit, do not give the trial counsel a second opportunity to bring unfavorable information to the attention of the sentencing authority by calling defense witnesses willing to serve with the accused again.

If the misconduct reflected in the specifications for which the accused is to be sentenced is truly a one-time mistake, the accused’s potential for rehabilitation and further military service are probably high. If the accused’s misconduct is a one-time mistake, there should be no other specific acts of bad behavior available to the trial counsel. In this situation, the defense counsel should not hesitate to call a *Griggs* witness and start a discussion of the accused’s potential for further service.

For the cases that fall in between the easy situations, defense counsel must exercise judgment; knowledge of the law and tactics, though important, are not enough. Before starting or expanding a discussion of the accused’s potential, defense counsel must become thoroughly acquainted with the client’s background, in both its favorable and unfavorable aspects, anticipate the trial counsel’s response, and decide whether the favorable information warrants risk of more unfavorable information being presented to the sentencing authority. Many times, the issue is close, but these are among the hard decisions that defense counsel make every day.