

Make the Most of It: How Defense Counsel Needing Expert Assistance Can Access Existing Government Resources

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I. Introduction

In courts-martial, when seeking the assistance of an expert witness or consultant, defense counsel are typically met with a Hobson's choice, a decision allowing only one option. While free to request government funding regardless of financial means, a military accused is not entitled to the expert of his choice. If the defense is able to meet the judicial test to establish that it needs an expert, the Government itself decides which expert will meet the needs of the defense. The defense must then disprove the adequacy of this alternative if unsatisfied.

This primer provides insights into acquiring expert witnesses and consultants at government expense. First, it reviews the legal basis for obtaining experts. Second, it discusses how to capitalize on the checks afforded by military trial courts where an expert is not provided and how to prepare for appellate issues. Third, it explores ways of obtaining the preferred expert at government expense. Fourth, it provides an overview of the rules applicable to government contracting, as they apply to contracting for experts. Finally, methods of obtaining experts at government expense from other areas of the Government are also discussed, including ways to use existing funding mechanisms to cast a wider net for qualified federal employees.

II. The Foundations of the Right to Funding for an Expert

A. Uniform Code of Military Justice Article 46 and Rule for Court-Martial 703(d)

Article 46 provides the statutory authority for a service member to obtain the services of an expert during courts-martial.¹ Its language has remained unchanged for over half a century since introduced.² The record of Senate floor

debate yields little more than that it "seeks to afford the accused an equal opportunity to obtain witnesses and other evidence."³ By its terms Article 46 provides for simply that, and makes no mention of expert witnesses.⁴ The President has provided more specific guidance in Rule for Court-Martial (RCM) 703(d), which discusses the retention of expert witnesses.

This rule allows either party to lobby the convening authority for an expert, but with notice to its opposition required.⁵ Military judges may make determinations at any time the case is before them and can enforce their decisions by abating proceedings if the Government does not comply with their orders.⁶

³ 81 CONG. REC. S6, 162-70 (daily ed. May 13, 1949) (Letter from Sen. Patrick McCarran, to Sen. Millard E. Tydings (Apr. 30, 1949) (commenting on Articles in Senate bill).

⁴ The Uniform Code of Military Justice (UCMJ) Article 46 states in relevant part, that "[t]he trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." UCMJ art. 46 (2012).

⁵ *Employment of expert witnesses.* When the employment at Government expense of an expert is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment. A request denied by the convening authority may be renewed before the military judge who shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute. If the military judge grants a motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the ruling. In the absence of advance authorization, an expert witness may not be paid fees other than those to which entitled under subsection (e)(2)(D) of this rule.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 703(d) (2012) [hereinafter MCM] (emphasis in original).

⁶ See *infra* Part III (discussing abatement). Before the promulgation of Rule 703(d), the convening authority was supposed to approve funding for experts if the military judge ordered it, but if he failed to do so, then the experts could not be paid and there was no other remedy. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, ch. XXIII, ¶ 116 (1969) [hereinafter 1969 MCM] (providing different rules for employment of experts during and in advance of court-martial; but in each case leaving the final decision to the convening authority, with no remedy if the military judge or the court-martial president thought the expert was necessary but the convening authority did not agree); see also Dr. Martin Blinder, et al., Comp. Gen., B-210831, Aug. 2, 1983 (under the pre-RCM 703 regime, the military judge

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¹ In *Ake v. Oklahoma*, 470 U.S. 53 (1985), the Supreme Court held that the Constitution guarantees the right to the assistance of an expert at Government expense. That holding, however, has been largely limited to assistance focused on the issue of sanity. The source of this right under the Constitution, the various areas in which it has been explored, and how the courts have employed the holding of *Ake* is beyond the scope of this primer. However, several articles, particularly, Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305 (2004), can provide further insights.

² Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 107, 122-23.

B. Clarifying the Kind of Expert Assistance Sought

In military practice, and even in this article, the terms “expert assistance,” “expert consultants,” and “expert witnesses” are sometimes used interchangeably. “Expert assistance” is a generic term for expert witnesses and expert consultants. Either side can call for the production of an expert *witness* to provide testimony at trial and the opposing party can interview the witness prior to the proceedings.⁷ An expert *consultant* (including an investigator) may be retained by the *defense* as a member of the trial team. The consultant may participate in the development of case theory and strategy, and may receive confidential communications. She is not subject to pretrial interviews or examination on the record, unless she changes roles by testifying.⁸

Separate, but closely related, tests govern the requests for funding of assistance from experts as members of the defense team and as testifying expert witnesses. For the assistance of an expert consultant, an accused must demonstrate: first, why the expert assistance is needed; second, what the expert assistance would accomplish for the accused; and third, why defense counsel is unable to gather and present the evidence that the expert assistant would be able to develop.⁹ To obtain the testimony of a testifying expert at government expense, the defense must supply either the convening authority or the military judge with a “statement of reasons why the employment of the expert is necessary” pursuant to RCM 703(d), along with the estimated cost of employment. This latter showing of necessity, concerning a testifying expert, is subject to essentially the same considerations as that of an expert consultant.¹⁰ In the context of either type of request, the military judge determines whether the Government has provided, or will provide, an adequate substitute. If the Government refuses to do so, the military judge can order abatement.

“directed” that several psychiatric witnesses be called in the case of *United States v. King*, 24 M.J. 774 (C.M.A. 1987). The convening authority did not approve the experts; the trial counsel may even have failed to request funding from the convening authority. The experts could not be paid.)

⁷ *United States v. Langston*, 32 M.J. 894, 896 (C.M.A. 1991).

⁸ *Id.* (holding that consultants are “provided to the defense as a matter of due process, in order to prepare properly for trial and otherwise assist with the defense of a case).

⁹ *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994) (citing *United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1986)).

¹⁰ Major David Edward Coombs, *Pass Go, Collect \$200, and Hire Yourself an Expert: Article 46 of the Uniform Code of Military Justice and the Defense's Right to a Government-Funded Expert*, ARMY LAW., June 2008, at 28, 36 n.35.

III. Abatement and Appellate Readiness

A. Abatement: When Success Arises from a Lost Pursuit for an Expert

If a dispute over experts proves intractable, abatement can effectively end the case. In *United States v. True*, the military judge granted the defense request for the assistance of a civilian expert, finding that the four alternatives proposed by the Government were not similarly qualified.¹¹ After the convening authority refused to pay for the expert, the military judge directed the convening authority to provide the defense requested expert. After receiving notice that the convening authority had refused, the military judge granted a defense request to abate the proceedings. The Court of Military Appeals equated the effect of abatement with dismissal.¹²

Abatement has been held to be the functional equivalent of a “ruling of the military judge which terminates the proceedings” under Article 62, enabling appeal by the Government.¹³ Thus, the defense should solidify its position for appeal by bolstering the record of trial when abatement seems imminent.¹⁴ Exactly when that is may not be clear.¹⁵ Having already convinced a military judge who imposes abatement of the necessity of an expert, the defense should seek to ensure that the military judge’s findings of fact and conclusions of law related to that necessity be explicit.

¹¹ *United States v. True*, 28 M.J. 1, 2 (C.M.A. 1989).

¹² *Id.* at 4.

¹³ *Id.* at 2. See also UCMJ art. 62(a)(1)(A) (2012) (providing that the United States may appeal “[a]n order or ruling of the military judge which terminates the proceedings with respect to a charge or specification”).

¹⁴ A few practical points to consider are the appropriate point at which abatement should take effect and how to leverage that abatement to dispose of the case. A military judge cannot impose an abatement unilaterally; abatement under Rule for Court-Martial (RCM) 703(d) is triggered by a Government failure to comply with a military judge’s ruling that an expert is necessary and must be provided at Government expense.

¹⁵ The time to impose abatement may range from waiting weeks for compliance to being appropriate for immediate discussion about whether the Government will comply. Compare *United States v. Reinecke*, 31 M.J. 507, 512 (A.F.C.M.R. 1990) (observing that where military judge ruled an expert should be hired within two weeks, abatement would have been proper if the Government were not in compliance after the weeks passed), with a later opinion in the same case, *United States v. Lamer*, 32 M.J. 63, 64 (C.M.A. 1990) (contemplating that an objection by the defense to an “immediate failure” by the Government to comply may have allowed for both sides to argue about the timing of funding). This latter decision is somewhat puzzling. The Court of Military Appeals held that the military judge was premature in abating the proceedings at the same time he directed the defense expert be provided. *Id.* The court also held the defense’s failure to object interfered with the Government’s rights, including its ability to explain its failure to obey the military judge’s directive to employ the defense expert. *Id.* This despite the explanation provided to the military judge by trial counsel that the expert had not been provided due to Government indecisiveness. *Reinecke*, 31 M.J. at 509. In other words, having already obtained the remedy of abatement, the defense was held to have waived its right to contest the very Government conduct that brought about the abatement.

Rulings concerning the appointment of government funded experts are reviewed under an abuse of discretion standard, and may be overturned if the military judge's findings of fact are clearly erroneous or his decision has been shaped by an erroneous view of the law.¹⁶ The stronger the support for those findings, the more likely the decision is to survive appeal by the Government.

B. Abatement to Dismissal: A Test of Wills on Speedy Trial Grounds

Defense counsel can help to make abatement fatal to the Government's case by asserting the accused's right to a speedy trial.¹⁷ Abatement coupled with speedy trial rights is a powerful tool unique to the military amongst American justice systems.¹⁸ One service court has noted that abatement under RCM 703(d) can carry the case to dismissal and "prevail over" or outshine any defense delay, if RCM 707(a)'s 120 day speedy trial clock has been exceeded.¹⁹ As

¹⁶ *E.g.*, United States v. Anderson, 68 M.J. 378, 383 (C.A.A.F. 2010) (citing United States v. Lee, 64 M.J. 213, 217 (C.A.A.F. 2006) and United States v. Gunkle, 55 M.J. 26, 32 (C.A.A.F. 2001)).

¹⁷ Asserting the client's right to a speedy trial, by objecting to delay or by explicitly requesting that the Government proceed as fast as possible, strengthens the defense case for an eventual dismissal on Sixth Amendment or Article 10 speedy trial grounds. *See* Captain Joseph D. Wilkinson II, *Speedy Trial Demands*, ARMY LAW., Dec. 2011, at 24, 25–26. Apart from RCM 707(a)'s 120 day speedy trial clock, under the provisions of UCMJ Article 10, an accused in pre-trial confinement may have an even stronger argument for a violation of his speedy trial rights where an expert's assistance has been denied. *See* United States v. Cossio, 64 M.J. 254, 257 (C.A.A.F. 2007) (noting that the most serious indicia of a speedy trial violation is present where a defendant's case is impaired by delay (quoting *Barker v. Wingo*, 407 U.S. 514, 532 (1972)). Where a convening authority withholds the basic tools for mounting a defense, such as an expert, basic fairness can be called into question, not just the delay. *See id.* at 532 (explaining that "the inability of a defendant adequately to prepare his case skews the fairness of the entire system"). If the delay itself impairs the defense, and it appears to be a "tactical" move by the Government, it may violate the Fifth Amendment as well. United States v. Vogan, 35 M.J. 32, 33–34 (C.M.A. 1992); Wilkinson, *supra*, at 26.

¹⁸ Lieutenant Colonel Theodore Essex & Major Leslea Tate Pickle, *A Reply to the Report of the Commission of the 50th Anniversary of the Uniform Code of Military Justice*, 52 A.F. L. REV. 233, 252 (2002) ("[A]lthough a recalcitrant convening authority might cause a delay, the UCMJ . . . has safeguards against a delay becoming burdensome. The government is held to strict accountability regarding the accused's right to a speedy trial. If a convening authority unnecessarily causes delay, he risks having the charges forever barred by the expiration of the 120-day speedy trial clock."). An assertion of delay based on abatement must be weighed against other speedy trial issues, for instance any delay in the matter already attributable to the defense. Demanding a speedy trial and setting the pace of litigation are strategic decisions, but waiving delay arising from a request for an expert removes the teeth of RCM 703(d)'s abatement remedy. It is thus vital to ensure other delay issues are resolved or no longer attributable to the defense once abatement appears a ripening prospect.

¹⁹ *Reinecke*, 31 M.J. at 512. The U.S. Air Force Court of Military Review has stated that for abatement of proceedings under RCM 703(d) to prevail over other speedy trial delays several conditions must be met. First, the military judge must find the requested expert assistance is relevant and necessary. Second, the military judge must either grant the defense

suggested above, the defense should request immediate Government compliance, and object to Government delay in providing the necessary expert, so that the resulting delay will be attributed to the Government in the event of RCM 707 speedy trial litigation.²⁰ Also, explicit written objections to government delay can serve as the accused's "assertion of his right," and support a later dismissal with prejudice on Sixth Amendment or Article 10 speedy trial grounds even if RCM 707 does not apply.²¹ It is in the defense's interest that the military judge explicitly attribute delays to each side when and if he grants speedy trial relief, as well as any competing or overlapping reasons for delay.

C. Measures to Consider in Preserving Appellate Issues

Just as defense counsel must be mindful of the steps available to "defend a win" in the event of abatement, they should also take the right steps in requesting the expert in the first place. Rule for Court-Martial 703(d) does not specify when a request for an expert should be made, but RCM 905(b)(4) requires that motions for the production of

requested expert or make a finding that the Government must provide a substitute. Third, a ruling must be issued granting the defense request for the expert and directing the Government to employ and fund that expert for the defense. Fourth, the Government must fail to comply with the military judge's ruling. It is a good practice for defense counsel to request of the military judge that the ruling set a date certain for the funding to issue. *See also* discussion *supra* notes 14 and 15.

²⁰ *Reinecke*, 31 M.J. at 513 (Rives, J., concurring) ("Throughout the 95 day delay in appointing the expert, the defense never raised the speedy trial issue, nor did they demand the expert be appointed immediately.").

²¹ *Barker*, 407 U.S. at 528–29 ("objections" by the defense are analyzed as the defendant's "assertion of his right" under the four-part test for Sixth Amendment speedy trial violations); *see also* Wilkinson, *supra* note 17, at 25–26 & n.14 (discussing Sixth Amendment speedy trial dismissal in the military context, and the importance of explicit objections or requests for speedy trial in securing it). The Government can object the RCM 707 speedy trial clock from running by dismissing and re-preferring charges, MCM, *supra* note 5, RCM 707(b)(3), but it cannot so easily stop its accountability under the Sixth Amendment (and nothing prevents the defense from raising both grounds in the same motion, a highly desirable move, as a constitutional violation requires dismissal with prejudice, whereas a "pure" 707 violation does not). If the accused remains flagged, restricted, reassigned, etc. while awaiting eventual disposition of his case, if in short he is being treated like someone under suspicion even before re-preferral, then the entire period from first referral to trial should be considered for Sixth Amendment purposes. *See* United States v. Grom, 21 M.J. 53, 55–56 & n.3 (C.M.A. 1985) (Sixth Amendment accountability can be measured from first referral, even if the accused is ultimately brought to trial on other charges); United States MacDonald, 456 U.S. 1, 10 (1982) (a civilian accused against whom charges are dismissed "is able to go about his affairs, to practice his profession, and to continue with his life" so that his Sixth Amendment speedy trial rights are not implicated until charges are brought again; contrast this with a flagged military accused, who cannot be promoted or attend military schools to advance his career). The defense may also argue that a dismissal and re-preferral is "ineffective" for RCM 707 purposes because the accused remained flagged, not allowed to work in his Military Occupation Specialty, and so forth, especially if it appears to be a ploy for the Government to avoid its RCM 707 accountability. *See* United States v. Robinson, 57 M.J. 506, 510 (N-M. Ct. Crim. App. 1997).

witnesses be brought before arraignment or else the issue is deemed waived by the defense. Rule for Court-Martial 703(c)(2)(C) requires the defense to notify the Government of its witnesses with sufficient notice to guarantee their production and lets the military judge set deadlines in his scheduling order, and RCM 905(e) treats issues not timely raised as waived. Military appellate courts can decide many issues on waiver grounds²² and have done so on the issue of the production of an expert witness.²³ An untimely motion can seal a loss and foreclose any later consideration of the issue. Thus, defense counsel should develop their plan for experts as part of the trial strategy and file related motions before entering a plea.

Objections also present an opportunity to lose a fight on expert funding. The opportunities are many, but several key junctures are typical in the progression of requests for expert funding: the initial denial of a request by the convening authority, the affirmation of that denial by the military judge, and the Government's appointment of a purported adequate substitute. Each presents a possible ground for arguing an abuse of discretion has occurred,²⁴ but the defense must make the record by presenting arguments and evidence at *each* of these stages. This may persuade the court and convening authority that a defense expert is appropriate, beyond what may have been submitted in support of the initial request.²⁵ If the defense has the expert testimony ready, but the military judge excludes it, then the defense can use an offer of proof under MRE 103(a)(2) to get the substance of the evidence into the record.²⁶

²² See generally Patricia A. Ham, *Making the Appellate Record: A Trial Defense Attorney's Guide to Preserving Objections—The Why and How*, ARMY LAW., Mar. 2003, at 10.

²³ E.g., *United States v. Bell*, 34 M.J. 937, 950 (A.F.C.M.R. 1992) (“[T]here was no complaint before pleas that the defense had requested but been denied [an expert] witness. Accordingly, any such complaint was waived.”). However, see *United States v. Robinson*, 24 M.J. 649, 650–51 (N.M.C.M.R. 1987) (military judge erred in denying request to order production of expert witness even though the request was made two days before trial was scheduled; defense counsel showed adequate “good cause” for relief from timeliness requirements of RCM 703(c)(2)(C)).

²⁴ See, e.g., *United States v. Anderson*, 68 M.J. 378, 383 (2010).

²⁵ See, e.g., *Robinson*, 24 M.J. 649, 653 (finding error in the denial of a defense expert, based in part on defense counsel's offer of proof as to how that expert's conclusions—relayed to defense counsel the day he made the offer of proof—differed from that of the Government supplied expert). Even where a trial court is not inclined to entertain discussion or hear an oral offer of proof, one can still be prepared and made part of the appellate record. See also Ham, *supra* note 22, at 22.

²⁶ See, e.g., *United States v. Myles*, 29 M.J. 589, 592 (A.F.C.M.R. 1989) *aff'd*, 31 M.J. 7 (C.M.A. 1990) (finding military judge erred in excluding expert testimony based on defense offer of proof, but concluding exclusion was not prejudicial). *But cf. id.* at 593 (Kastl, J., dissenting) (“There is no way to measure how much credibility the Government expert would have retained had the defense's . . . expert countered him and proved him fallible.”).

IV. Demonstrating the Need for Expert Assistance Without First Receiving Expert Assistance

If the outright denial of assistance is problematic, demonstrating that such assistance is needed without the benefit of the specialized knowledge sought is especially difficult. Courts tend to assume that “[i]n the usual case, the investigative, medical, and other expert services available in the military are sufficient to adequately prepare for trial,”²⁷ and are reluctant to “provide investigative services for a mere ‘fishing expedition.’”²⁸ How does one prove a need to know something without having already learned it? This has been described as the “classic military defense counsel dilemma.”²⁹ The key to unlocking the professional insight a defense needs is the very funding sought to pay the expert, and without payment many are reluctant to render assistance.³⁰

In seeking such “threshold” information, the defense should first consider whether it may be obtained from military or other federal personnel who have not been appointed to the defense team. In *United States v. Anderson*, the defense sought funding for a psychiatrist to examine the accused. The defense team did not attempt to see whether the same examination could be performed by the military psychiatrists available on base. The convening authority and the military judge denied funding in part for that reason. The Navy-Marine Court of Criminal Appeals affirmed. “The defense never opted to pursue this alternative. As a result, it forfeited its right to such assistance.”³¹

²⁷ *United States v. Gonzalez*, 39 M.J. 459, 460–61 (C.M.A. 1994).

²⁸ *United States v. Kinsler*, 24 M.J. 855, 856 (A.C.M.R. 1987).

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The best way to articulate and explain the need for an expert is by using just such an expert to describe their evidence analysis and development process. But experts, when not already employed by the Government, charge fees for their services, and detailed defense counsel normally do not have access to money to pay for such initial services, in order to obtain preliminary consultation or evaluation services.

United States v. Warner, 62 M.J. 114, 122 (C.A.A.F. 2005) (citing *United States v. Kreutzer*, 59 M.J. 773, 777 (A. Ct. Crim. App. 2004) *aff'd*, 61 M.J. 293 (C.A.A.F. 2005)).

³⁰ See, e.g., *United States v. Mann*, 30 M.J. 639 (N-M. Ct. Crim. App. 1990) (ruling that there was no error in denying funding of an expert because “no evidence” was presented to the military judge from the expert, despite acknowledging there was “no way to develop this evidence without first paying” the expert) (emphasis in original); see also *United States v. True*, 28 M.J. 1057, 1059 (N-M. Ct. Crim. App. 1989) (observing that a defense request before the military judge spoke in more generalities than specifics, chiefly because the expert sought told the defense he needed to be paid up front “before I give you the real benefit of my expertise”).

³¹ *United States v. Anderson*, 50 M.J. 856, 862–63 (N-M. Ct. Crim. App. 1999). A lawyer wishing to consult with a military doctor who has examined or treated his client must obtain the client's permission to obtain confidential medical information on DD Form 2870, Authorization for Disclosure of Medical or Dental Information (Dec. 2003). Block 5 (“Information to be Released”) should include an authorization for the

Free-of-charge assistance from military sources may get the defense enough information to show why it needs a hired expert; and if not, a good faith effort to use these resources can at least help to persuade the military judge that the request is a serious one, and not just a defense ploy to make the case more expensive. Sometimes these resources will not be enough, and then the defense must pursue other means to get over the threshold.

A. Seeking Limited Assistance to Demonstrate the Need for More Extensive Assistance

“Due process requires that the accused be given the ‘basic tools’ necessary to present a defense, but defense counsel is responsible for doing his or her homework.”³² Requests for experts often fail because the defense has not done enough of this homework to demonstrate the need for full expert assistance, but has relied on bare assertions and lawyers’ conjecture.³³ Sometimes the Government or the military judge can be persuaded to provide the defense “help with its homework.”

Thus, in *United States v. Gonzalez*, the accused was charged with murdering his wife in Spain. The defense requested a Spanish-speaking investigator (investigators, remember, are treated as consulting experts) to investigate whether she had been killed by members of “the Spanish criminal drug element.” The military judge did not allow this, but did provide the defense with an interpreter “under an order of confidentiality.” If the defense, using this interpreter, had uncovered any evidence to support its theory that someone else had done the crime, it could have re-petitioned the court for the full-fledged investigation. Apparently, the defense made no use of this interpreter, and for that reason the Court of Military Appeals upheld the denial of an investigator.³⁴

Defense counsel who are worried that their foundations for seeking expert assistance are too weak should consider whether some kind of limited assistance—which would be cheaper and more palatable to the Government—can be sought as an alternative to get them over the threshold.

treating personnel to *talk* to the defense counsel and discuss the case, not merely provide records. See Major Kristy Radio, *Why You Can't Always Have It All: A Trial Counsel's Guide to HIPAA and Accessing Protected Health Information*, ARMY LAW., Dec. 2011, at 4, 13 for a sample. Personnel at military hospitals, compared to their civilian counterparts, are often far more willing to talk to TDS counsel (provided counsel has the appropriate release).

³² *United States v. Short*, 50 M.J. 370, 373 (C.A.A.F. 1999).

³³ See *Anderson*, 50 M.J. at 862–63. “To require psychiatric assistance based on mere conjecture ‘would be tantamount to a judicial license for a paid fishing expedition.’” *Id.* (citing *United States v. Thomas*, 33 M.J. 644, 648 (N.M.C.M.R. 1991)).

³⁴ *United States v. Gonzalez*, 39 M.J. 459, 460–61 (C.M.A. 1994).

B. Go It Alone? Another Way to Unlock the Government’s Cooffers

The last thing an accused may want is to devote personal funds to hiring an expert. This may especially be so when his attorney could not articulate to the judge’s satisfaction why the expert was needed. Nonetheless, sometimes it is worthwhile to advise an accused to spend his own money.

A small investment by the accused can help to open the Government’s much larger resources. In *United States v. Pomarleau*, the accused’s family was able to assemble \$750 for a pair of accident reconstruction experts. Their initial report involved little more than a critique of the state trooper’s investigation relied upon by the prosecution. No significant independent research, fact finding, or testing was necessary. The experts’ preliminary findings were enough to suggest that someone else had committed the vehicular homicides at issue. Two days after this report was provided, the convening authority approved up to \$4,000 to pay one of these experts to help the defense with trial preparation and testimony.³⁵

Where a request for government funding is denied and an expert is privately retained, however, courts may avoid weighing in on the necessity of such an expert. In *United States v. Gunkle*, the military judge declined to grant funding of an expert consultant. The accused hired the consultant at his own expense. The military judge did not rule on the defense request to have this expert produced as a witness. He later stated that he might allow the witness to testify on surrebuttal, but the defense ultimately decided not to call the expert.³⁶ The teaching point is that by paying for the expert’s services when the Government would not, the accused enabled his counsel to prepare for trial and have at least an opportunity to call this expert as a witness. Even trial counsel who opposed funding may elect not to object to privately funded expert testimony. If the accused hires the expert, the earlier denial is a moot issue for appeal,³⁷ and the Government may not want to create a new appellate issue by objecting to testimony that is costing them nothing.

While the accused, if he has the funds, may hire expert assistance on his attorney’s advice, his attorney may not do this for him. Army Trial Defense Service (TDS) attorneys cannot contract for the services of experts nor obligate the Army, the command prosecuting the client, or TDS to pay

³⁵ *United States v. Pomarleau*, 57 M.J. 351, 354 (C.A.A.F. 2002).

³⁶ *United States v. Gunkle*, 55 M.J. 26, 32 (C.A.A.F. 2001).

³⁷ See *id.* (the issue of whether the expert should have been funded was rendered moot by the accused’s hiring of the expert). The CAAF acknowledged that the accused might seek *reimbursement* for the expense, but this was not at issue in the appeal. *Id.* at 32 n.2

for the services of an expert.³⁸ Furthermore, “[a] lawyer may not provide financial assistance to a client in connection with pending or contemplated litigation,” so TDS counsel may not hire experts at their own expense.³⁹ However, if the client has means to hire a private expert, the defense should be involved to ensure that privately funding the expert is adding to the defense team and is in harmony with the defense theory of the case. The decision to hire a privately funded expert remains that of the client, and while defense counsel can assist with framing the parameters of the assistance, perhaps even the language of the agreement, the contract is between the expert and the client.⁴⁰

In a few rare circumstances privately retaining an expert *without* first trying to obtain expert assistance from the Government is a good idea. This is so if the accused is claiming innocence and wants to take an exculpatory polygraph to persuade the command to drop the case, or is admitting guilt in a sex offense and wants to take a psychological recidivist test to use in mitigation. If the client pays for the test himself, and the results are not good for the defense, then the Government need never be told the test took place.

C. Leveraging the Government’s Purported Adequate Substitutes

Often the Government offers a substitute, frequently a government employee, in response to a defense request for a private sector expert. They can do this because even an accused who is entitled to expert assistance is not entitled to the expert of his choice, and because the RCM 703(d) explicitly allows the Government to provide an “adequate substitute” for the requested expert.⁴¹ Several cases show how the defense can demonstrate that the proffered substitute is inadequate. Inadequacies include experts lacking the proper expertise,⁴² failing to embrace the defense’s theory of the case,⁴³ and lacking qualifications

comparable to the experts used by the Government.⁴⁴ Sometimes the inadequate substitute’s own testimony can be used to show that he is inadequate, and thus pave the way for a better expert.

Thus, in *United States v. Warner*, the Government retained the foremost Air Force expert while providing the defense an expert with lesser qualifications. In asking the court for a different expert, the defense used an affidavit from the appointed substitute herself, who candidly admitted that she did not have specialized expertise in the subject matter of the case.⁴⁵ While the military judge did not grant the defense motion to order the appointment of another expert, the CAAF reversed his decision in part because of this affidavit. The court did not hold that there must be parity between the Government’s chosen expert and that given the defense. Instead, it inquired “whether the expert the Government provided to the defense was an adequate substitute for the defense-requested civilian expert.” Whether the defense expert’s professional qualifications were “reasonably comparable” with the Government expert’s was simply one factor to be considered in deciding whether a substitute was adequate.⁴⁶

As the “standard for determining whether a substitute for a defense-requested expert is adequate . . . is a fact-intensive determination that is committed to the military judge’s sound discretion,”⁴⁷ defense counsel must use evidence to demonstrate any inadequacy to the trial court and to cement a record for appeal. The expert offered by the Government can be a key source of evidence. He can be asked to testify or prepare an affidavit outlining his limitations in or lack of experience as an expert witness and making comparisons between his expertise and that of the Government’s expert or that of a proposed defense alternative.⁴⁸ Sworn affidavits and testimony, rather than

³⁸ U.S. ARMY TRIAL DEFENSE SERVICE, STANDARD OPERATING PROCEDURES para. 1-12 (2009).

³⁹ U.S. DEPT’S OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, app. B, Rule 1.8(e) (1992). This rule applies to military lawyers. A civilian lawyer representing an indigent client at court-martial “may pay court costs and expenses of litigation on behalf of the client.” *Id.*

⁴⁰ *Id.*

⁴¹ *United States v. Van Horn*, 26 M.J. 434, 439 (C.M.A. 1988).

⁴² *E.g.*, *United States v. Lee*, 64 M.J. 213 (C.A.A.F. 2006) (finding a violation of fundamental fairness where the military judge denied the defense an expert in the emerging field of media analysis—a novel, complex scientific discipline—based on the belief that an interview between the defense counsel and the Government expert prior to trial was a sufficient substitute). *See also* *United States v. McAllister*, 55 M.J. 270 (C.A.A.F. 2001) (returning the case to the court below for a hearing with the benefit of the DNA testing expert assistance denied at trial).

⁴³ *E.g.*, *United States v. Van Horn*, 26 M.J. 434 (C.M.A. 1988); *United States v. Guitard*, 28 M.J. 952 (N.M.C.M.R. 1989).

⁴⁴ *United States v. Warner*, 62 M.J. 114, 122 (C.A.A.F. 2005).

⁴⁵ In some ways the dispute over funding can be avoided by winning the foot race to the foremost Government expert. In *Warner*, “the Government had already secured its expert witness before the defense had an opportunity to seek its own.” *Id.* at 118. If the defense is able to request first the preeminent expert available to the convening authority, not only might the defense secure that expertise, but the prosecution would also be denied the benefit of the finite resources of that person. It is unclear though, if the acts of making contact and having an initial consultation with an expert would suffice to create a conflict preventing the Government from retaining that expert. Consultants made subject to orders of confidentiality by the convening authority may be a “viable alternative to requiring the convening authority to fund a private investigator.” *United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1986). But less clear is whether such confidentiality could be imposed post hoc on a Government employee informally consulted for defense use. There may be no professional ethics or other restriction such that a duty of loyalty would preclude that same expert from assisting the Government if not appointed to the defense team.

⁴⁶ *Warner*, 62 M.J. at 118, 122.

⁴⁷ *Id.* at 120.

⁴⁸ *See id.* at 124–25 (Crawford, J., dissenting) (considering affidavit of proposed Government expert stating that though she feels competent she is

lawyers' assertions or unsworn documents, should be used whenever possible.⁴⁹ Education, training, published works, clinical and other experience—anything on or related to a curriculum vitae—can be made a subject of comparison.

It may be embarrassing to ask a Government appointed expert to diminish his own qualifications in comparison to another—in a sworn statement for a court, no less—but it may be vital for the defense.⁵⁰ Moreover, as cases involving complex questions frequently devolve into a battle of the experts, it may be worth fighting some of that battle before trial. A scrimmage with one's Government appointed expert is useful in any event as the prosecution is not foreclosed from attacking, or at least diminishing, the qualifications of the very expert they offer to the defense.⁵¹ If the Government does so after the defense has unsuccessfully challenged the adequacy of the substitute expert, then they are giving the defense ammunition to renew the request for a better expert.

V. How Contracting Norms Apply to the Hiring of Experts

A. Sole Source Acquisition of Experts

As with all government acquisitions, several analytical steps are involved in obtaining civilian expert services at government expense. The contracting process, while complex overall, is relatively straightforward in this area. A full and open competition process is the norm in acquiring goods and services by the Government.⁵² Under this system, the Government does not go about making its decision as an attorney would in retaining a subject matter expert, such as through research, contacting contemporaries, informal interviewing and consultation, and personal vetting. Rather,

not the equivalent of the defense's initially requested expert, and that others are better qualified).

⁴⁹ See *id.* at 124–25 (Crawford, J., dissenting) (emphasizing *inter alia* that “averments of counsel during motions practice and oral argument . . . are not evidence” and that an unattested CV is not evidence); see also MCM, *supra* note 5, RCM 905(h) (motions may be supported by affidavits or evidence presented at Article 39(a) sessions); Military Rules of Evidence (MRE) 1101(a) (MRE) apply to 39(a) sessions, including motions hearings).

⁵⁰ *Warner*, 62 M.J. at 126 (Crawford, J., dissenting) (contemplating that a Government appointed expert might be used “to assist [the defense] in making a more credible request for the services of” their preferred expert); see also *id.* at 136 n.20 (Crawford, J., dissenting) (noting that one of the capabilities of one rendering expert assistance might be “recommending an expert witness or another consultant”).

⁵¹ See, e.g., *United States v. Anderson*, 68 M.J. 378, 382 (C.A.A.F. 2010); *United States v. Langston*, 32 M.J. 894, 896 (C.M.A. 1991).

⁵² 10 U.S.C.A. § 2304(a) (2012) (stating that except where otherwise provided, a competitive procedure or a combination of procedures shall be used in obtaining goods or services).

a formal advertisement is published⁵³ and interested parties prepare detailed bids, expending time and effort reviewing the minimum requirements, and draft proposals on how they will meet the strictures set forth.

As experts' time is valuable, and time is often limited in the run-up to court-martial, it is fortunate that experts may be hired through sole source acquisition.⁵⁴ Because this method of contracting departs from the default rule, the Federal Acquisition Regulation requires that a Justification and Authorities memorandum be prepared by the contracting office.⁵⁵ Beyond that, the contracting office may use a series of letters or one of several standard forms to record the details of the employment and the required signatures.⁵⁶

B. Borrowed Experts: More Available Prospects, Better Suited Alternatives, and Already Paid For

When the Government denies funding for a specific private sector expert, it will frequently offer an “adequate substitute” who works for the Government, and sometimes the defense will request such assistance to start with. This can work to the benefit of all parties, but is not always as simple as it seems, especially if the expert is from a nonmilitary department.

1. Considering Other Military Resources

Beyond the personnel on the local installation, perhaps most likely to occur to trial counsel, other commands may have witnesses who are qualified and able to testify. Rule for Court-Martial 703(e)'s discussion notes the ease with which military personnel near and far can be made to appear.⁵⁷

⁵³ See, e.g., FEDBIZOPPS.GOV, <https://www.fbo.gov> (last visited Mar. 15, 2013).

⁵⁴ *Id.* Agencies do not need to follow competitive procedures to procure the services of an expert for use, in any litigation or dispute . . . involving the Federal Government, in any trial, hearing, or proceeding before any court, administrative tribunal, or agency, or to procure the services of an expert or neutral for use in any part of an alternative dispute resolution or negotiated rulemaking process, whether or not the expert is expected to testify. . . . 10 U.S.C.A. § 2304(c)(3) (2012). See also FAR 6.302-3(a)(iii) (2012) (allowing for the simplified acquisition of “the services of an expert or neutral person for any current or anticipated litigation or dispute”); *id.* 6.302-3 (b)(3)(i) (allowing the use of the authority in sub-section (a)(iii) to obtain the services of experts as described in 10 U.S.C.A. § 2304(c)(3)).

⁵⁵ See FAR 6.302-3(c).

⁵⁶ See, e.g., U.S. Dep't of Def., DD Form 2292, Request for Appointment or Renewal of Appointment of Expert or Consultant (Sept. 2011); U.S. Dep't of Army, DA Form 3953, Purchase Request and Commitment (Mar. 1991).

⁵⁷

When military witnesses are located near the court-martial, their presence can usually be obtained through informal coordination with them and their commander. If the witness is not near the court-martial and attendance would involve travel at Government expense, or if informal

Apart from counterparts in other Army installations' medical facilities, criminal investigation offices, or laboratories, sister services may have personnel worthy of consideration. They may have more extensive training, more relevant experience, and may appear more appealing as potential members of the defense team because they owe nothing to the Army. Another service's foremost expert can be sought where the Army's top expert is already retained by the prosecution. Stand-alone facilities, such as Uniformed Services University of Health Sciences, are akin to civilian academic institutions with resident experts.⁵⁸ Such personnel may be willing to consult remotely and may relish the opportunity to put their knowledge to practical application, whether testifying or on a more limited basis outside the courtroom as a consultant. As members of the military, or even federally employed Department of Defense civilians, the cost of their involvement amounts to little more than a temporary duty (TDY) assignment.⁵⁹

2. Looking to Other Federal Entities for Expert Assistance

The responsibility for funding experts rests on the convening authority. The use of witnesses already employed by the federal government relieves unit funds of this burden (except as discussed below).

a. Conflict Issues—Who Does the Expert Work for Anyway?

As an initial matter, it is important that a federal employee not act as consultant or witness in a court-martial in a private capacity. Chiefly, this is because the usual method of funding an employee is through a TDY type arrangement, which covers official duties and not personal arrangements. Furthermore, federal employees are generally forbidden by regulation to serve as expert witnesses in federal court unless they (1) are appearing for the Government, or (2) have permission from their agencies.⁶⁰

coordination is inadequate, the appropriate superior should be requested to issue the necessary order." MCM, *supra* note 5, R.C.M. 703(e)(1) discussion.

⁵⁸ Prior to its closure, the Armed Forces Institute of Pathology (AFIP) and its assigned personnel regularly consulted on medical issues in legal matters involving the military in both civil and criminal litigation. Though not identical, some of AFIP's capabilities have been absorbed by the Joint Pathology Center, a newly established entity. See 10 U.S.C.A. § 176 (2012). See also National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3, 722 (2008) (listing the findings of Congress relating to the closure of AFIP and the establishment of the Joint Pathology Center).

⁵⁹ See 5 U.S.C.A. § 5537 (2012) (prohibiting federal employees from receiving fees for service "as a witness on behalf of the United States").

⁶⁰ 5 C.F.R. § 2635.805(a) (2012).

It is also conceivable that, however unlikely this may be in practice, an employee of the Government participating in a court-martial proceeding could be subject to prosecution for acting as "an agent or attorney for anyone before any . . . court-martial . . . in connection with any covered matter in which the United States is a party. . . ." ⁶¹ While the Department of Justice has opined that serving as an expert witness does not count as "acting as an agent or attorney" and so does not violate this law,⁶² and the law contains an exception for persons testifying under subpoena,⁶³ at least one federal district court has suggested that expert testimony unauthorized by the expert's agency could be a prosecutable offense.⁶⁴ Suffice to say that advance coordination with the supervisor of the prospective expert who is a federal employee is indispensable, if only to ensure that TDY will be feasible.

b. Fiscal Issues—Is This Expert Already Being Paid for This?

Further caution is also advisable in using the employees of one agency to do the work of another. Historically, and in a general sense, federal agencies are branches of a single

⁶¹ 18 U.S.C.A. § 205(a)(2) (2012) (making it a crime for an officer or employee of the United States to act as an "agent or attorney for anyone before any department, agency, court, court-martial, officer, or civil, military, or naval commission in connection with any covered matter in which the United States is a party or has a direct and substantial interest," *except* "in the proper discharge of his official duties"); *Young v. United States*, 181 F.R.D. 344, 347-48 (W.D. Tex. 1997) ("Testimony contrary to the provisions of 5 C.F.R. § 2635.805 invites prosecution . . ."). See also 5 U.S.C.A. § 5537 (2012) (precluding the receipt of fees by federal employees for service "as a witness on behalf of the United States" but not criminalizing such conduct).

⁶² See Expert Witness Agreements Between the Department of Justice and Employees of the Department of Veterans Affairs, 13 Op. O.L.C. 317 (1989). The memorandum opinion of the Department of Justice, Office Of Legal Counsel, expresses doubt that mere testimony as an expert would violate 18 U.S.C.A. § 205. "[A] witness, including an expert witness, would not be thought to act as 'agent or attorney' for another person within the ordinary meaning of those words." *Id.* at 318. Greater involvement in a case, however, such as helping to shape case strategy as a consultant might go too far. In some cases, expert witnesses can be expected to do considerably more than testify—they can be the architects of the case in preparation of specialized studies, development of theories, etc. Such pre-trial involvement, coupled with testimony at trial, might well rise to the level of acting as 'agent or attorney' within the meaning of 18 U.S.C. § 205(2). *Id.* at 319 (citing Letter from Leon Ulman, Acting Assistant Att'y Gen., Office of Legal Counsel, to Arthur Kusinski, Assistant to the General Counsel, Nat'l Sci. Found., at 4 n.3 (May 13, 1976)).

⁶³ 18 U.S.C.A. § 205(g) ("Nothing in this section prevents an officer or employee from giving testimony under oath or from making statements required to be made under penalty for perjury or contempt."); *United States v. Lecco*, 495 F. Supp. 2d 581, 588-89 (S.D. W. Va. 2007) (allowing a Veteran's Administration psychiatrist who had not been given authorization by his agency or its ethics official to testify, and citing this section as authority).

⁶⁴ *Young*, 181 F.R.D. at 347-48.

system, and cooperate as a matter of basic comity.⁶⁵ Yet, the potential for borrowing agencies to augment their appropriations through the use of other agencies' employees, and for loaning agencies to undertake purposes for which they have not received appropriated funds, has been of concern to Congress.⁶⁶ Thus, a convening authority can agree to pay the travel expenses of salaried federal employees called as experts, just as he would for any military witness traveling to participate. However, the salary of that employee on temporary duty may be subject to the same fiscal scrutiny a civilian's expert fee might be. In other words, the loan of personnel from another agency to a court-martial cannot be regarded as a simple interagency accommodation, though this was once the case.⁶⁷

Generally speaking, the Economy Act governs situations in which one agency obtains goods or services from another, including performance of services by the personnel of one agency for another.⁶⁸ The loaning of personnel may or may not require reimbursement. When it does, a convening authority may have to use operational funds to cover the salary of a federal employee while serving as an expert. However, a *de minimis* exception allows for the use of federal employee services by another agency without the need to reimburse the loaning agency, so in a typical case where only one expert is provided for a limited time and the expense is minor, the convening authority will not have to do this. While not yet precisely adjudicated, the typical expert role in a case—be it as a consultant or

testifying witness—is likely a *de minimis* transaction.⁶⁹ Another exception to the reimbursement requirement allows personnel to be loaned where the transaction will aid the loaning agency in performing a mission for which Congress has made appropriations.⁷⁰

For recurring procurements between the military and other federal agencies, a cross servicing agreement must be established, but for one-time services these might not be required.⁷¹ Close coordination between the lending and borrowing agencies' personnel or human resources offices is essential to address or avoid this issue, as well for coordination of any particulars implicated by the expert assistance sought. Federal agencies may have different definitions of what to call such a relationship, be it a detail, assignment, or otherwise.⁷² Each agency may further have policies in favor or against details and may or may not require reimbursement.

VI. Conclusion

While courts-martial accuseds are not required to show indigence to obtain expert assistance at government expense, numerous barriers—such as the thrift of the convening

⁶⁵ Department of Health and Human Services Detail of Office of Community Services Employees, 64 Comp. Gen. 370, 377–78 (1985) [hereinafter HHS Detail of Employees Decision].

⁶⁶ *Id.* at 377.

⁶⁷ *Id.* at 378 (referencing Departments and Establishments—Services Between—Loan of Employees, 13 Comp. Gen. 234 (1934) *abrogated* by HHS Detail of Employees Decision, *supra* note 65 (“In the absence of a written order or agreement in advance providing for interdepartmental personal services, or unless the written order or agreement specifically provides for reimbursement, the loan of personnel between departments or offices will be regarded as having been made as an accommodation for which no reimbursement or transfer of appropriation will be made for salaries.”)).

⁶⁸ 31 U.S.C.A. § 1535 (2012). Unfortunately, the most relevant portion of the Federal Acquisition Regulation, FAR Subpart 17.5, concerning Interagency acquisitions, states by its own terms that it does not apply to “reimbursable work performed by Federal employees (other than acquisition assistance), or interagency activities where contracting is incidental to the purpose of the transaction.” 48 C.F.R. § 17.500(c)(1) (2012). While this portion of the FAR is not applicable, the remainder of the provisions concerning these types of transactions is informative. Generally, under the Economy Act, requests for services by interagency acquisition are supported by a determination and findings memorandum, commonly called a D&F. The D&F (approved by a contracting officer of the requesting agency and furnished to the servicing agency) should state that the supplies or services cannot be obtained as conveniently or economically by contracting directly with a private source and that the use of an interagency acquisition is in the best interest of the Government. *Id.* § 17.502-2(c).

⁶⁹ See generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-978SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 12–56 (3d ed. 2008). Though the General Accounting Office itself has not clearly defined the parameters of the *de minimis* exception, it has determined that it “could not, for example, be stretched to cover a detail of 15–20 people.” *Id.* (citing Non-Reimbursable Transfer of Administrative Law Judges, B-221585, 65 Comp. Gen. 635, June 9, 1986). Additionally, the Department of Justice's Office of Legal Counsel has opined on the applicability of the exception in several situations: see Reimbursement for Detail of Judge Advocate General Corps Personnel to a United States Attorney's Office, 13 Op. O.L.C. 188 (1989) (opining that the United States Attorney's Office for the District of Columbia must reimburse Department of Defense for year-long detail of 10 lawyers); see also Reimbursement of the Internal Revenue Service Provided to the Independent Counsel, 12 Op. O.L.C. 233 (1988) (determining the detail of Internal Revenue Service agents to investigate tax fraud for an Independent Counsel could be non-reimbursable under the commonality of functions exception).

⁷⁰ HHS Detail of Employees Decision, *supra* note 65, at 380.

⁷¹ Cross servicing agreements can be formalized by memorandum or on a Government form. *E.g.*, U.S. Dep't of Def., DD Form 1144, Support Agreement (Nov. 2001). In instances of a onetime service, an order or requisition may be sufficient without preparing a support agreement. See U.S. DEP'T OF DEF., INSTR. 4000.19, INTERSERVICE AND INTRAGOVERNMENTAL SUPPORT para. 4.5 (9 Aug. 1995).

⁷² Compare U.S. DEP'T OF COMMERCE, AGREEMENTS HANDBOOK (Nov. 2011), available at www.nist.gov/.../Final-DOC-Agreements-Handbook-Nov-2011.pdf (defining “Detail” as “Where an employee performs duties other than those of their current position” and “Assignment” as “Where an employee performs one or more of their regular duties in a different location or undertakes training or developmental assignments”), with U.S. DEP'T OF ARMY, REG. 690–300, FINANCIAL ADMINISTRATION, FINANCE AND ACCOUNTING FOR INSTALLATIONS, TRAVEL AND TRANSPORTATION ALLOWANCES para. 8-1 (12 Aug. 1994) (defining both reimbursable and non-reimbursable details as temporary assignments of an employee outside DoD).

authority bringing the case, and the requirement that the defense demonstrate the necessity of funded assistance—restrict access to such funding. Whether one seeks funding for a consultant or for a testifying witness, the showing of necessity required is virtually identical. If the defense shows necessity and the Government fails to provide assistance, the military judge may abate proceedings, and the defense may take advantage of this abatement using speedy trial doctrine.

Defense practitioners can make a case for funding, either for experts of their choosing or for expert assistance better matched to the defense's needs, rather than accept the first suggestion made by the Government. By engaging with purported adequate substitute experts, the defense may persuade the convening authority to pay for an expert of defense counsel's choosing. Even if not successful at the

trial level, the same material can build a stronger appellate record for later consideration of the issue. The defense may use free government resources, limited initial grants of funding, or the accused's own funds to "jump start" the funding machinery.

The Government can sometimes provide adequate assistance using federal resources, in or out of the military, at little or no additional cost to the Government, provided the experts act in an official capacity. Where such assistance is de minimis, and the arrangement acceptable to the outside federal agency concerned, an accused can enjoy having the resources of the Government at his disposal and have the meaningful equal access to witnesses as intended by Congress.