

Trial Judiciary Note

**A View from the Bench:
Publishing Exhibits to Court Members**

*Colonel Timothy Grammel**

Scenarios

Imagine that you are a member of a court-martial panel responsible for making some very important decisions. You heard the trial counsel offer into evidence a written confession of the accused, and the judge admitted it. The lawyers have been arguing about whether or not Criminal Investigation Division (CID) agents put words in the accused's mouth. You know that you and the other members of the panel will eventually get to see the confession when you deliberate, but you think that reading the confession yourself now would help you perform your duties as a court member.

Now imagine you are on another court-martial panel. In this homicide case, the amount of force used appears to be the critical issue. The trial counsel offered several 8x10 photographs from the autopsy, and the judge admitted them into evidence. It sounds like the photographs depict the injuries that were inflicted during the homicide, but you do not know for sure because you have not seen the photographs. You shake your head and think that seeing those photographs now would assist you and the other members of the court in understanding and appreciating all the other evidence, the instructions from the judge, and the arguments by counsel.

Introduction

These hypothetical scenarios provide just two examples of counsel doing a poor job of publishing exhibits to the court members. However, they are also symptomatic of a larger problem: Counsel frequently practice trial advocacy in a lawyer-centric manner, rather than view trials as they unfold from the perspective of the court members. Walking into a court-martial, counsel know many facts surrounding the case, including facts that will never be admitted into evidence. During trial, the facts that matter are the facts that are admitted into evidence and are considered by the court members. In order to present cases effectively, counsel must envision in their minds the facts the members know, as the members get to know them.

This article will discuss different methods for publishing exhibits. Deciding how to publish exhibits is not usually taught in law school; it is one of the many trial advocacy skills one learns on the job. Moreover, one method does not fit all situations, even for exhibits within the same trial. The

nature of the exhibit and the context in which it will be used affect how it should be published. An exhibit could be real evidence, like a shirt or a knife, or it could be documentary evidence, like a confession or telephone records. It could be a photograph, a chart, or a diagram, or it could be a video-tape or an audio-recording. Although equally important, this article will not discuss the significant, but separate, topics of when to use certain exhibits, how to lay foundations for exhibits, or how to effectively use exhibits with witnesses. Instead, this article will simply examine the mechanics of publishing exhibits to court members.

Timing

First of all, most admitted exhibits are sent back with the members to the deliberation room.¹ If the members are able to view an exhibit during the trial, such as a bale of marijuana, an enlarged photograph, or an enlarged diagram, viewing the exhibit again in the deliberation room may provide sufficient opportunity to consider the evidence. Viewing the evidence in the deliberation room may also prove adequate if the members already know the contents of an exhibit, such as when a witness has testified about pertinent parts of a personnel record, a written order, or telephone records. In these situations, slowing down the trial to publish the exhibit to the members would not be helpful, and it may be detrimental to the momentum of the proponent's case.

However, if further examination of an exhibit before deliberations would assist or persuade the members, counsel can and should request permission to publish the exhibit once it has been admitted into evidence.² Because each case is different, the ideal time to publish an exhibit will vary. For example, counsel might want to publish an exhibit immediately after it has been admitted into evidence, when a later witness discusses it in more detail, or before argument.

Sometimes, the proponent may not want the members to scrutinize an extensive document until they return to the

* Judge Advocate, U.S. Army. Currently assigned as Circuit Judge, 1st Judicial Circuit, U.S. Army Trial Judiciary, Fort Campbell, Kentucky.

¹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 921(b) (2008) [hereinafter MCM].

² *Id.* MIL. R. EVID. 611(a).

deliberation room but also does not want the members to feel rushed by sharing a single copy during deliberations. In such a case, counsel may request the military judge's permission to send extra copies back with the members. This would prevent the members from being distracted by the document in the courtroom and would allow the members to take their time in the deliberation room with their own copies.

Exhibits that Do Not Go Back with the Members to the Deliberation Room

Even though they have been admitted, certain exhibits do not go back to the deliberation room with the court members. Therefore, in order to publish an exhibit properly, the proponent should know whether or not that exhibit will be going back with the members.

As a general rule of thumb, documents or recordings that are the equivalent of witness testimony do not go back with the court members for their consideration during deliberations. Rule for Courts-Martial (RCM) 921 provides, "Unless otherwise directed by the military judge, members may take with them in deliberations their notes, if any, any exhibits admitted in evidence, and any written instructions."³ However, half a century ago in *United States v. Jakaitis*,⁴ the Court of Military Appeals (CMA) stated that "a deposition may not, in the strict sense of the word, be deemed an exhibit. Rather, it is the equivalent of a witness who was unavoidably absent from the trial."⁵ The court held that it was error to permit the court members to take depositions back with them in deliberations.⁶ The reason for the rule is that sending this type of document or recording, such as a deposition, back with the court members would give the proponent an impermissible advantage over a party whose evidence consisted of actual in-court testimony.⁷

Some rules precluding certain evidence from going back with the members have been codified in the RCM and the Military Rules of Evidence (MRE). For example, transcripts of depositions are ordinarily read to the members by the proponent, and the transcripts may not be inspected by the members.⁸ In the discretion of the military judge, recorded depositions may be played for the members or may be transcribed and read to them.⁹ Also, stipulations of expected testimony are read, but not presented, to the members.¹⁰ A

³ *Id.* R.C.M. 921(b).

⁴ 27 C.M.R. 115 (C.M.A. 1958).

⁵ *Id.* at 118.

⁶ *Id.*

⁷ *Id.* at 117-18.

⁸ MCM *supra* note 1, R.C.M. 702(a) discussion.

⁹ *Id.* R.C.M. 702(g)(3).

¹⁰ *Id.* R.C.M. 811(f).

memorandum or record with a past recollection recorded is read into evidence, but it is not admitted into evidence as an exhibit, unless offered by the opponent.¹¹ Also, statements contained in a learned treatise, which were relied on by an expert during direct examination or cross-examination, may be read to the court members, but they will not be admitted into evidence as an exhibit.¹²

Even if not covered within the RCM or the MRE, case law precludes a document or recording that is substantially similar to a deposition from going back with the members in their deliberations. In *United States v. Austin*,¹³ the CMA held that it was prejudicial error to send back with the court members the transcript of the alleged victim's Article 32 testimony, which had been previously admitted into evidence as a prior inconsistent statement under MRE 801(d)(1).¹⁴ The court found "no substantial difference" between a deposition and the verbatim transcript of the alleged victim's Article 32 testimony in that case.¹⁵ It concluded that "a verbatim pretrial-investigation transcript was not an exhibit which RCM 921 would authorize the military judge to send to the members' deliberation room."¹⁶

When the proponent knows that an exhibit cannot go back with the members, the proponent should request permission from the military judge to read the document or to play the recording for the members at the appropriate time within the context of their case. Because some members might think they will be able to take the document or the recording with them to the deliberation room, the proponent can request that the military judge instruct them that they will not take the document or recording with them to the deliberation room. Such an instruction ensures that the members will pay as much attention during the reading or the playing of the exhibit as they would during live testimony. Of course, when counsel read documents to the members, they should do so in a clear and even-handed manner.

Real Evidence

With real evidence, the members' observation of an exhibit during trial, while it is handled by counsel and the witnesses, might not be sufficient to make the point counsel wishes to convey. If the chance to see the exhibit up close or to feel it could help persuade the members, counsel should consider having the members handle the exhibit. Counsel can request to publish the exhibit to the members,

¹¹ *Id.* MIL. R. EVID. 803(5).

¹² *Id.* MIL. R. EVID. 803(18).

¹³ 35 M.J. 271 (C.M.A. 1992).

¹⁴ *Id.* at 275.

¹⁵ *Id.*

¹⁶ *Id.* at 276.

and the military judge may allow it within the judge's discretion.¹⁷ If the request is approved, the judge will generally order the bailiff to hand the exhibit to the member at one end of the panel box, instruct the members to pass it down, and then have the bailiff retrieve it from the last member. Counsel should remember to take any necessary precautions, such as requiring the use of gloves. Also, a firearm should always be cleared and rendered inoperable in a manner that does not change its evidentiary value before it is brought into the courtroom.¹⁸

Documentary Evidence

With documentary evidence, depending on the nature of the document, counsel may want the members to read all or part of the document before they go to the deliberation room. If the members' knowledge of the contents of the document, before they observe the rest of the evidence or before they hear arguments, will assist in the goal of persuasion, then counsel can request to publish the exhibit to the members. The military judge may allow it within the judge's discretion.¹⁹ Some documents can be enlarged on poster boards or projected on a screen or monitor to allow members to read them as the witness testifies. Enlarging the evidence may be the most effective and efficient method for some documents, such as checks. For other documents, such as confessions or telephone records, allowing members to hold the evidence while they read or examine it may be more effective and efficient. In these situations, the proponent may request the military judge's permission to publish a copy of the document to each member.²⁰

When the court members are given copies of an exhibit, the military judge will generally ask the proponent whether the proponent would like the members to read it immediately. Diligent members will naturally want to read everything they receive. Counsel should give them some time to at least orient themselves to the document so they are not looking at it instead of listening to the witness. For some documents, like confessions, counsel will usually want the members to take the time to read the whole document. Counsel can effectively publish other documents, such as telephone records, by giving the members sufficient time to orient themselves to the layout of the document and to have it with them when it is referred to by witnesses or counsel. If the layout of the document is not obvious, the witness should explain how the document is organized. Also, when referring to a document the members have in their possession during the examination of a witness or during argument, counsel should give them sufficient reference

¹⁷ MCM *supra* note 1, MIL. R. EVID. 611(a).

¹⁸ See U.S. ARMY TRIAL JUDICIARY, RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL R. 15.6 (15 Sept. 2009).

¹⁹ MCM *supra* note 1, MIL. R. EVID. 611(a).

²⁰ *Id.*

points and time to locate relevant provisions. This is a matter of both courtesy and advocacy. For lengthy documents, page numbers and sometimes even tabs may assist both the witness and the members in locating the provision to which counsel is referring.

Photographs, Charts, and Diagrams

As with publishing documents, counsel can use different methods to publish admitted photographs, charts, and diagrams to the court members. If the photograph, chart, or diagram has been enlarged or projected and viewed by the members during the testimony of the witness, then nothing further is required. Obviously, during the testimony of the witness, the exhibit should be located where it can be seen by the members, the witness, the military judge, counsel, and the accused. Sometimes it may be necessary, based on the layout of the courtroom, for counsel and the accused to move to see the exhibit. If the location of an exhibit will be an issue, then counsel should ask the military judge before trial where the judge wants the exhibit to be located. If photographs have not been enlarged, counsel can request to publish them to the members, and the military judge may allow counsel to do so within the judge's discretion.²¹ If there is more than one photograph related to the same issue, counsel can publish them together for efficiency. The judge will likely have the bailiff hand all the photographs to the member at one end of the panel box, have the members pass them down one at a time, and then have the bailiff retrieve them from the last member. For large charts and diagrams, enabling all the members to be able to view the exhibits as the witness testifies should serve as adequate publication.

Recordings

After they have been admitted, video and audio recordings can be played during the direct examination or cross-examination of a witness. If a recording is not played during a witness's testimony, the proponent should request permission from the military judge to play the recording for the members in the courtroom. Also, unless precluded by the rules or the military judge, admitted recordings can go back to the deliberation room with the members. However, the proponent of the recording should request that a user-friendly television, tape player, CD player, clean computer, or other similar device be placed in the deliberation room to enable the members to review the recording during closed session deliberations. Alternatively, the proponent can request that the military judge advise the members that, if they need to observe the recording again, the court will be opened and the recording will be played again in the courtroom.²²

²¹ *Id.*

²² See *id.* R.C.M. 921(b).

Conclusion

If clarity of a recording is an issue, the proponent should use all technological and other means to produce the clearest recording possible in advance of trial. A recording that court members cannot hear or understand is not persuasive. Additionally, if unintelligible portions of a recording are so substantial that the recording as a whole is considered untrustworthy, the judge will not admit the recording into evidence.²³

Sometimes, even the clearest version of a recording may contain portions that are difficult to hear or understand on a single listening or without special equipment. When this is the case, the proponent should consider whether a transcript would assist the members in considering the recording. If so, counsel must prepare well in advance and lay the appropriate foundation for the use of a transcript.²⁴ Lastly, counsel should always use common sense in the courtroom and should be adaptable enough to make temporary adjustments to air conditioners, fans, and lights that will assist the members in hearing or seeing an exhibit.

Before each trial, counsel should consider how to best publish each exhibit to the members of the court. Counsel should plan when and how each exhibit should be published and should choose the method of publication that most effectively allows the members to understand, believe, and remember the evidence. In order to achieve these goals, counsel must view the trial, as it unfolds, from the perspective of the court members. Only then can counsel fully appreciate the best way to present evidence and, hopefully, persuade members of the merits of their case.

²³ See *United States v. Craig*, 60 M.J. 156, 160 (C.A.A.F. 2004).

²⁴ The Court of Appeals for the Armed Forces' opinion in *Craig* provides a helpful framework for the foundation and procedural protections required for the use of a transcript of a recording. *Id.* at 160–61.