

Writing with Conviction: Drafting Effective Stipulations of Fact

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I. Introduction

Three documents should form the backbone of the Government's case against a servicemember: the charge sheet, the prosecution memorandum, and the stipulation of fact. Most practitioners know the benefit of preparing a thorough prosecution memorandum, required by supervisors in some jurisdictions. Trial counsel would also dramatically improve their practice by preparing a draft stipulation of fact for every case, both contested and uncontested alike. The stipulation of fact is one of the most important documents trial counsel produce. Unfortunately, when drafted, stipulations appear as creatures of extremes: either the trial counsel has aggressively included unnecessarily loaded language and inappropriate information or, out of a fear of doing so, the trial counsel has created a bland and conclusory document that fails to assist the finder of fact and sentencing authority.

A properly crafted stipulation should furnish more than merely the factual predicate for the accused's plea or a guide for the military judge's providence inquiry. A well-drafted stipulation should also convey a compelling story of the accused, including his choices, thoughts, and actions, as well as how these affected the victim, the unit, and public. An effective stipulation is, quite simply, the Government's perfected theory of the case. It represents the trial that would have occurred if all witnesses testified in the most persuasive fashion to all pertinent facts; all documents contained only incriminating facts without distracting complications or exculpatory information; all evidentiary questions were resolved in favor of the Government; and the whole sum of the tale left no opportunity for the accused to assert a defense or provide plausible extenuation or mitigation. Despite the importance of the stipulation of fact, it is completely overlooked during the training of new judge advocates and is often given short-shrift by inexperienced counsel and busy supervisors. This article will guide trial counsel to correctly draft and properly employ stipulations of fact.

This article explains the importance of the stipulation of fact in the preparation of uncontested and contested cases, as well as how to marshal facts to support a plea, how to analyze and resolve potential defenses or factual ambiguities, and how to persuasively (and reasonably) convey the Government's theory of the case. Nine distinct tasks are conceptually grouped in three stages of work: (1) laying the groundwork, (2) composing an effective narrative, and (3) packaging a persuasive stipulation.

There is no perfect, static model. Effective stipulations appear in many different formats and use many different persuasive devices; however, this article will provide new trial counsel with a solid method for preparing stipulations. It will also offer experienced counsel a review of relevant law and a selection of various techniques to supplement their knowledge.

II. The Nature and Uses of the Stipulation of Fact

Stipulations of fact serve several purposes at trial. Although the stipulation's *raison d'être* is to undergird the factual basis for the accused's guilty pleas, it is also used to (1) present matters in aggravation,¹ (2) furnish evidence of guilt as to contested charges during the Government's case, provided that use was contemplated by the parties,² (3) present information

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¹ See, e.g., *United States v. Ross*, 34 M.J. 183, 187 (C.M.A. 1992) (allowing the use of a stipulation that included more than twenty incidents of uncharged misconduct to show the “continuous nature of the charged conduct and its full impact on the military community”).

² See *United States v. Resch*, 65 M.J. 233, 237–38 (C.A.A.F. 2007) (acknowledging an accused's right to consent to the Government's use of his stipulation of fact to prove contested charges, but finding an insufficient basis to conclude that the accused knowingly consented to the expanded use of his stipulation); *United States v. Banks*, 36 M.J. 1003, 1006 (A.C.M.R. 1993) (acknowledging accused's right to consent to expanded uses of the stipulation, but finding no valid consent without proper inquiry by the military judge into the accused's understanding of the effect of the stipulation).

to the court that would have been otherwise inadmissible, or inadmissible in a certain form,³ (4) provide information to the convening authority to support a decision to grant or deny clemency, and (5) assist appellate review.⁴ As a practical matter, an effective stipulation that fully supports the factual basis for the accused's plea will, as a necessary consequence, also develop a record that will assist the sentencing authority, the clemency authority, and the appellate courts. All other functions are, therefore, dependent upon and subordinate to a detailed and persuasive recounting of facts for the trial and appellate judges.⁵

When a military accused pleads guilty,⁶ he forfeits some of the most important rights granted by the Constitution, Congress, and attendant case law: the right against self-incrimination,⁷ the right to trial by court-martial at which he could confront and cross-examine witnesses,⁸ the right to obtain relief for improperly obtained evidence,⁹ and the right to challenge deficiencies in the Government's pre-trial processing of the case.¹⁰ Because a guilty plea waives so many important rights—and in recognition of the potentially coercive effect the military environment can have on an accused—the military judge is responsible for carefully advising the accused of his rights,¹¹ ascertaining whether his plea is voluntary,¹² and ensuring his plea accurately reflects his misconduct.¹³ The stipulation of fact is concerned with this last issue; the record must contain an account of the facts underlying the plea that is sufficiently detailed to avoid a “substantial basis in law or fact” for questioning the plea.¹⁴

³ See, e.g., *United States v. McCrimmon*, 60 M.J. 145, 154 (C.A.A.F. 2004) (allowing the inclusion of uncharged misconduct); *United States v. Glazier*, 26 M.J. 268 (C.M.A. 1988) (“[W]e see no reason why evidence, even though otherwise inadmissible under the Military Rules of Evidence, cannot come into the trial by way of stipulation.”).

⁴ See, e.g., *United States v. Sweet*, 42 M.J. 183, 185 (C.A.A.F. 1995) (relying on facts contained within a stipulation to resolve a challenge to the factual sufficiency of a plea).

⁵ Because it is a voluntary, bilateral agreement, parties may expressly limit the permissible uses for the stipulation. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 811 (2008) [hereinafter MCM]; *Glazier*, 26 M.J. at 270 (“The scope, or the permitted use, of the stipulation in a trial or proceeding normally is self-evident from the terms of the document. . . . [S]ubject to limitations imposed by the military judge, a stipulation may be used in accordance with the agreement or understanding between the parties.”). There are, however, few legitimate reasons for the Government to allow such restrictions when the accused genuinely desires to enter into a pretrial agreement. The sole exception to this premise would be an agreement to allow the Government to use the stipulation to support its case on the merits with regard to other unrelated or greater contested offenses. Only an accused who finds himself in the position to obtain a remarkably favorable pretrial agreement would likely accede to such an aggressive use of the stipulation.

⁶ The Uniform Code of Military Justice (UCMJ) expressly contemplates the option of an accused to enter a plea of guilty. UCMJ art. 45 (2008); MCM, *supra* note 5, R.C.M. 910. However, the option does not rise to the level of a constitutional right and can therefore be limited in the interests of justice. *McCrimmon*, 60 M.J. at 152 (citing *Santobello v. New York*, 404 U.S. 257 (1971)); *United States v. Penister*, 25 M.J. 148, 151 (C.M.A. 1987).

⁷ MCM, *supra* note 5, R.C.M. 910(c)(5); see also *United States v. King*, 30 M.J. 59, 68 (C.M.A. 1990) (discussing the right to have counsel present during custodial interrogation). See generally U.S. CONST. amend. V; UCMJ art. 31.

⁸ MCM, *supra* note 5, R.C.M. 910(c)(3). See generally U.S. CONST. art. I, § 2; amend. VI.

⁹ MCM, *supra* note 5, R.C.M. 905(b)(3); MIL. R. EVID. 311(i), 312 to 317 (guilty plea waives Fourth Amendment challenges to government searches, seizures, inspections, body views and intrusions, and wire and electronic interception); MIL. R. EVID. 321(g) (guilty plea waives improper witness identification).

¹⁰ *Id.* R.C.M. 707(e) (speedy trial issues); R.C.M. 905(b)(1), (3) (defects in the preferral, forwarding, investigation or referral of charges); R.C.M. 910(j) (any factual issues of guilt); *United States v. Santoro*, 46 M.J. 344, 347 (C.A.A.F. 1997) (defects in the specifications short of failure to state an offense). *But see United States v. Johnston*, 39 M.J. 242, 243 (C.M.A. 1994) (refusing to apply the doctrine of waiver to challenges based upon allegations of unlawful command influence). The waiver of many of these issues can also be prevented by an accused who litigates his motion before entering his plea. See, e.g., *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007) (explaining speedy trial issues waived by guilty plea unless fully litigated before acceptance of pleas) (citing *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005)).

¹¹ MCM, *supra* note 5, R.C.M. 910(c). The necessary elements of the inquiry and rights advisement spring from *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969), and its progeny and is codified in the Manual for Courts-Martial. MCM, *supra* note 5, R.C.M. 910.

¹² MCM, *supra* note 5, R.C.M. 910(d). The standard is that the plea must be made “voluntarily, knowingly, and intelligently, ‘with sufficient awareness of the relevant circumstances and likely consequences.’” *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) (quoting *Brady v. United States*, 397 U.S. 742, 747 (1970)).

¹³ MCM, *supra* note 5, R.C.M. 910(e); *United States v. Mitchell*, 66 M.J. 176, 177–78 (C.A.A.F. 2008); *United States v. Aleman*, 62 M.J. 281, 283 (C.A.A.F. 2006); *Care*, 40 C.M.R. at 253.

¹⁴ *United States v. Yanger*, 67 M.J. 56, 57 (C.A.A.F. 2008); see also *United States v. Inabinette*, 66 M.J. 320, 321–22 (C.A.A.F. 2008); *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). Factual ambiguities or inconsistencies, if significant, will impugn the providence of the plea. See generally UCMJ art. 45(a) (2008); art. 66(c); MCM, *supra* note 5, R.C.M. 910(d), (e).

The stipulation of fact should be the most extensive and elaborate document introduced by either party at trial because a thorough stipulation will bolster the providence inquiry and foreclose later appellate challenges to the legal sufficiency of the plea. Although non-collateral issues are normally resolved by appellate courts upon review of the entire record, legally sufficient findings of guilt must be supported by facts admitted at trial for both contested and uncontested cases.¹⁵ Trial judges and appellate courts are explicitly authorized to rely on facts contained in a stipulation to establish the necessary predicate for findings of guilt.¹⁶ Conversely, appellate courts may not use a bland, conclusory stipulation to support an inadequate providence inquiry.¹⁷ Well-written stipulations may resolve factual ambiguities or reinforce inadequate inquiries by clarifying the factual predicate of a plea,¹⁸ as well as foreclose defenses not discussed by the judge.¹⁹

A truly effective stipulation should go beyond this minimum and provide the trial judge with a compelling account of the accused and his conduct that will inform the sentencing decision. The following sections will outline a solid process for preparing a stipulation designed to meet the expectations of military judges and appellate courts. More importantly, the resulting stipulation should also fulfill the Government's primary obligation: to present a clear, powerful account of the truth that will bring the accused to justice.

III. Laying the Groundwork

Trial counsel can make important strides or stumble early in the preparation of a case. The most vulnerable portion of the Government's case occurs during the translation of a jumbled collection of facts from numerous sources into a coherent and reasonable charge sheet. It is no coincidence that the first three, and most critical, steps to constructing an effective stipulation involve this process.

A. STEP ONE: Gather All the Facts

Early and direct involvement in all information-gathering efforts is essential. "For trial counsel, this begins with proper legal advice to law enforcement personnel who are investigating the alleged criminal activity."²⁰ Rendering proper legal advice involves more than simply answering questions as they arise; it requires that trial counsel meet with investigators, review their investigative plan, and explicitly divide labor between offices.

Maintaining positive relationships with investigators can ensure trial counsel are informed of attempts to question suspects or significant witnesses, such as the alleged victim, before they occur. At this stage, trial counsel should meet frequently with investigators to discuss, at a minimum, (1) the elements of suspected offenses, (2) the elements of foreseeable defenses, and (3) any prior statements, interviews, and most importantly, previously unsuccessful attempts to interview individuals. Failure to address these issues with regard to suspects can often result in, at best, partial admissions rather than true confessions.²¹ At worst, unguided questioning can result in inadmissible statements or no statements at all. Finally,

¹⁵ See *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980) ("[E]vidence from outside the record will not be considered by appellate authorities to determine anew the providence of the plea."); *United States v. Stokes*, 65 M.J. 651 (A. Ct. Crim. App. 2007).

¹⁶ *United States v. Sweet*, 42 M.J. 183, 185 (C.A.A.F. 1995).

¹⁷ See, e.g., *Aleman*, 62 M.J. at 284 (finding the stipulation and inquiry insufficient as to an element of an offense of suffering the wrongful disposition of military property).

¹⁸ See, e.g., *United States v. Lewis*, No. 36401, 2006 CCA LEXIS 197 (A.F. Ct. Crim. App. Aug. 25, 2006) (unpublished) (relying on the stipulation of fact to establish multiple distributions of cocaine in support of an "on divers occasions" specification when the inquiry only clearly established one distribution); *United States v. Brown*, 30 M.J. 911, 911 (A.C.M.R. 1990) (upholding an inquiry wherein the military judge did not clearly advise the accused of each of the elements, because the accused "acknowledged that everything in the stipulation was true, and candidly admitted that he possessed the cocaine and the marijuana in the amounts alleged").

¹⁹ See, e.g., *Prater*, 32 M.J. at 434-37 (using both the stipulation of fact and the providence inquiry to resolve a potential defense); *United States v. Turley*, No. 02-01960, 2003 CCA LEXIS 184, *6 (N-M.C.C.A. Aug. 22, 2003) (unpublished) ("Given the stipulation of fact and the appellant's statements during the providence inquiry, taken as a whole, we conclude that the military judge had no duty to delve any further into the appellant's consumption of alcohol.").

²⁰ Lieutenant Colonel Lawrence M. Cuculic, *Trial Advocacy—Success Defined by Diligence and Meticulous Preparation*, ARMY LAW., Oct. 1997, at 4 n.1.

²¹ The recently revised Article 120 most accurately demonstrates this point. Under the previous statutory scheme, the Government was charged with proving only two elements: that the accused "commit[ed] an act of sexual intercourse by force and without consent . . ." 10 U.S.C. § 920 (2000). The current scheme includes a dizzying array of fourteen different offenses, several of which implicate defenses explicitly unavailable to others within the same article. See 10 U.S.C. § 920 (2006). It was difficult for an investigator to obtain admissions as to both original elements of Article 120; now, the investigator has to be aware of all of the elements of any of the offenses contained within the current Article 120 and elicit responses regarding any that may potentially apply. Judge advocate involvement in the interview plan is essential.

intrepid trial counsel should endeavor to be present as an unseen observer during interviews, observing the investigators' progress and making useful adjustments.

Fact development is a process, not a solitary task. It requires constant review of evidence that has been gathered—not simply to catalogue its existence, but to reveal further avenues for inquiry, judge the credibility of witnesses and reliability of information, and identify valid, supportable inferences upon which the case may come to rely. At least once per week, trial counsel should review each open case and consider what new facts have been identified, decide how those facts affect the theory of the case, and determine what further tasks are implicated by the new additions.

B. STEP TWO: Review the Applicable Law

Although the applicable provisions will vary from case to case, judge advocates should always refresh their understanding of (1) the punitive articles of the Uniform Code of Military Justice (UCMJ) and the relevant discussion in Part IV the Manual for Courts-Martial (*MCM*),²² (2) the panel instructions in the *Military Judges' Benchbook*,²³ (3) the Rules for Courts-Martial (RCM),²⁴ and (4) the Military Rules of Evidence (MRE).²⁵ Trial counsel should also consult the latest edition of the *Crimes and Defenses Deskbook* to orient themselves and begin a review of applicable law.²⁶

The punitive articles, their discussion, and the panel instructions should help trial counsel identify offenses and identify charging alternatives should additional evidence arise. The statutory language and panel instructions should guide trial counsel when drafting charge sheets²⁷ and stipulations of fact. After identifying possible offenses, trial counsel should create an elements matrix which lists the charged offenses and the elements of those crimes, and provides space for known facts and evidentiary sources. Trial counsel should continually populate these fields as information becomes available.²⁸ A preparation tool of this kind, when accompanied by an understanding of the applicable law, can assist trial counsel to identify, organize, and evaluate relevant evidence that may support or disprove elements of the charged offenses.²⁹

Trial counsel must review applicable case law to ensure the facts of their case support the offenses.³⁰ Appellate decisions, particularly ones derived from guilty pleas, contain valuable discussions concerning the legal sufficiency of evidence to support convictions.³¹ These decisions provide myriad examples that can be analogized to, or distinguished from, the trial counsel's present case and should be required reading when drafting a stipulation.

Finally, trial counsel should review RCMs and MREs for guidance on which facts and what evidence will be admissible at trial, permissible in a stipulation, or questionable for either purpose. Trial counsel should not rely solely on experience; they should refresh their knowledge of the procedural rules during the preparation of every case.³²

²² MCM, *supra* note 5, pt. IV.

²³ U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK (15 Sept. 2002) (C2, 1 July 2003) [hereinafter BENCHBOOK].

²⁴ MCM, *supra* note 5, pt. II.

²⁵ *Id.* pt. III.

²⁶ CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 337, CRIMES AND DEFENSES DESKBOOK (2008).

²⁷ U.S. Dep't of Def., DD Form 458, Charge Sheet (May 2000).

²⁸ An example spreadsheet is included at Appendix B. Facts and their evidentiary sources must be catalogued separately. Many pieces of evidence, especially statements, will include facts that may support more than the offense. Additionally, many pieces of evidence include facts of varying reliability or even admissibility.

²⁹ "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MCM, *supra* note 5, MIL. R. EVID. 401.

³⁰ One of the worst positions in which a trial counsel can find himself is arguing the viability of specifications based on a cursory or outdated review of the applicable case law. Motions for a finding of not guilty are routine in contested cases, and legal sufficiency of the evidence is questioned in almost every uncontested case; trial counsel will *always* need a current understanding of the precedents. *See id.* R.C.M. 917.

³¹ Legal sufficiency is a question of law that appellate courts review de novo. *United States v. Tollinchi*, 54 M.J. 80, 82 (C.A.A.F. 2000). A conviction is legally sufficient if a reasonable fact-finder could have determined that each of the elements of an offense was satisfied beyond a reasonable doubt. *United States v. Day*, 66 M.J. 172, 173 (C.A.A.F. 2008). During this analysis, the appellate court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Rogers*, 54 M.J. 244, 246 (C.A.A.F. 2000) (quoting *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991)).

³² In addition to the text of the rules, trial counsel should consult a comprehensive reference that will provide a procedural context for the individual rules. One of the most useful is David A. Schlueter, *Military Criminal Justice: Practice and Procedure* (6th ed. 2004). Trial counsel should routinely consult chapters 6 (charging), 9 (plea bargaining), 12 (pretrial agreements), 14 (pleas), and 16 (sentencing). *Id.*

C. STEP THREE: Make Appropriate Charging Decisions

Various resources discuss the basics of drafting charges and specifications, but few resources explain the “how” and “why” of charging decisions.³³ Almost all trial advocacy guides begin with the assumption that a case already exists—in other words, that proper charging decisions have already been made. These materials focus on preparing counsel to prosecute existing charges, not on ensuring success from the start by drafting charges consistent with a considered, coherent, and compelling theory of the case.³⁴ Although outside the scope of this article, some discussion of the charging process is necessary because charging choices profoundly affect the clarity and persuasiveness of cases.

At a minimum, select charges and draft specifications³⁵ that (1) allege all essential facts,³⁶ (2) are supported by sufficient evidence, and (3) are “consistent with the interests of justice.”³⁷ The first goal—adequately alleging facts to properly state an offense—should be a simple task; RCM 307, the discussion that follows RCM 307(c)(3), and the model specifications provided in Part IV of the *MCM* provide sufficient instruction.³⁸ The model specifications are like recipes in a cookbook—follow them, and the result will almost always be palatable. On the other hand, only very experienced, naturally talented, or inherently lucky cooks can deviate from the recipe and still deliver a masterpiece.³⁹

The second goal—alleging only those offenses supported by sufficient evidence—is simply a matter of choice. Although some prosecutors choose to “[e]rr on the side of liberal charging and be prepared to withdraw as the case develops,”⁴⁰ the better practice for trial counsel is to have a solid understanding of the facts *before* charging the servicemember with a crime. In addition to the ethical considerations implicated by consciously over-charging,⁴¹ over-charging often yields unprofessional results. Instead, counsel should always deliver a clean and strong charge sheet to the convening authority and the military judge. Charging offenses based on insufficient evidence and then relying on further investigation to develop the case will ultimately diminish the trial counsel’s credibility.

The final goal—charging consistent with the interests of justice—encompasses two fundamental concepts that highlight the dangers of over-charging and even charging liberally. First, charges must appropriately reflect the seriousness of the conduct. In other words, avoid multiplicitous charges or an unreasonable multiplication of charges.⁴² Second, charging

³³ The notable exception appears to be a brief article concerning “tactical charging.” Faculty, The Judge Advocate Gen.’s Legal Ctr. & Sch., U.S. Army, *The Art of Trial Advocacy: Tactical Charging: Choosing Wisely the Terrain on Which You Want to Fight!*, ARMY LAW., Sept. 2002, at 54 [hereinafter *Tactical Charging*].

³⁴ See *id.* at 54 (“Tactical charging focuses on preferring only those charges that are consistent with the government’s theory or provide a particular tactical advantage for the prosecution. Unfortunately, many trial counsel complete their charging analysis after determining ‘what’ they can charge.”).

³⁵ Violations of the UCMJ are alleged in the form of charges and specifications. *MCM*, *supra* note 5, R.C.M. 307(c)(1). The “charge” identifies the particular provision of the UCMJ, law of war, or penal law of a local territory alleged to have been violated. *Id.* R.C.M. 307(c)(2). The “specification,” the heart of the military pleading, is a “plain, concise, and definite statement of the essential facts constituting the offense charged.” *Id.* R.C.M. 307(c)(3).

³⁶ *Id.* R.C.M. 307(c)(3).

³⁷ NAT’L DISTRICT ATTORNEY’S ASS’N, NATIONAL PROSECUTION STANDARDS 130 (1991) [hereinafter *PROSECUTION STANDARDS*].

³⁸ Another source of model specifications is Chapter 3 of the *Benchmark*, which contains the panel instructions regarding each offense following an updated model specification. *BENCHMARK*, *supra* note 23; see also CRIMINAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, 31ST CRIMINAL LAW ADVOCACY COURSE DESKBOOK A-1 to -4 (2009) [hereinafter *CLAC DESKBOOK*] (reviewing the basics of the charging process and common legal errors); Cuculic, *supra* note 20, at 5–6 (discussing common drafting errors).

³⁹ There will be rare cases in which no enumerated offense adequately encompasses the misconduct and the trial counsel or commander believes the misconduct should be subject to criminal sanction. In these circumstances, the trial counsel should meet with her Chief of Military Justice for guidance before drafting a novel specification under Article 133 or, more commonly, Article 134. See *CLAC DESKBOOK*, *supra* note 38, at A-6 (providing a methodical approach to researching and drafting novel specifications).

⁴⁰ *Id.* at A-2; see also Major Lawrence J. Morris, *Keystones of the Military Justice System: A Primer for Chiefs of Justice*, ARMY LAW., Oct. 1994, at 18 (“It often makes sense to err on the side of over-charging and then to reassess the case after the Article 32 investigation is complete. Chiefs should be liberal in recommending that charges be dropped after the Article 32 before referral.”).

⁴¹ See U.S. DEP’T OF ARMY, REG. 27–26, RULES OF PROF’L CONDUCT FOR LAWYERS R. 3.8(a) (1 May 1992) (stating trial counsel shall “recommend to the convening authority that any charge or specification not warranted by the evidence be withdrawn”); MODEL RULES OF PROF’L CONDUCT R. 3.8(a) (2008) (stating prosecutors “shall refrain from prosecuting a charge . . . not supported by probable cause”); see also AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 3–3.9 (3d ed. 1993) (“A prosecutor should not institute cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.”); PROSECUTION STANDARDS, *supra* note 37, R. 43.3 (“The prosecutor should file only those charges which he reasonably believes can be substantiated by admissible evidence at trial.”).

⁴² Trial counsel often confuse the two concepts. “Multiplicity” is “[t]he improper charging of the same offense in several counts” BLACK’S LAW DICTIONARY 1036 (7th ed. 1999) Doing so violates an accused’s protection against double jeopardy. U.S. CONST. amend. V. See generally *United States v.*

decisions should not be based on improper motives, such as using charges solely to leverage guilty pleas, pleas to lesser charges, or cooperation in other cases.⁴³

The “gravamen method” of charging should serve as a best practice in this area. In all cases, some facts reflect conduct strongly offensive to good order and discipline, while others are tangential to the central misconduct. “[C]ounsel (and complaining commanders) [must focus] on the gravamen of the offense by . . . articulat[ing] what it is about the conduct that is offensive or irritating. . . . [T]hat question will help reveal conduct that is truly derelict from that which is merely ignorant, inane, or indiscreet.”⁴⁴ When focusing on the accused’s conduct, select the most serious charge that is clearly supported by available, admissible evidence. Be conservative when selecting charges beyond the gravamen offense. These offenses should only be charged with good reason. One justifiable reason might be for offensive purposes, such as creating an evidentiary advantage; for example, charging conspiracy to ensure that co-conspirators’ statements in furtherance of the conspiracy will not be considered hearsay.⁴⁵ Another good reason might be defensive in nature, such as avoiding exclusionary rules, including those relating to uncharged misconduct.⁴⁶

Avoid reflexively charging misconduct. Although the gravamen method of charging may appear to be in tension with the military justice system’s preference for charging all known offenses at one time,⁴⁷ the rules do not prevent (or relieve) trial counsel from using sound judgment when selecting charges. Bottom line: the charging decision should be a reasoned, calculated, and educated choice that supports a coherent theory. No stipulation of fact can cure an incoherent theory.

IV. Composing a Powerful Narrative

The first stage of work, including gathering facts, reviewing the law, and making sound charging decisions, is common to all courts-martial. During the next stage of work, trial counsel should construct an account of the facts that tells a compelling story and develops the rudimentary theory presented by the charges themselves.

A. STEP FOUR: Identify Persuasive Themes

All courts-martial, contested and uncontested, share a single purpose: to reveal and redress past events the fact-finder did not observe. As a result, there is an inherent tension between the fact-finder’s skepticism and the advocate’s position in all proceedings. The advocate’s task is to overcome that skepticism so that the fact-finder accepts as real the events described. The skepticism is most directly a product of law; it is the burden of persuasion placed upon the Government to establish the accused’s guilt. It is also important to understand that it is a product of human psychology.

“The theory of a case . . . is the fact picture to be presented and the references to logic, consistency, and, above all, *human experience*, that support acceptance of that fact picture by the fact finder. ‘What happened, and why do we believe it?’”⁴⁸ Trial counsel who wish to powerfully and persuasively relay their theories have myriad advocacy techniques to employ and many more comprehensive resources to which to turn; however, the single most powerful tool in their arsenal will always be a short, simple theme based on the accused’s own motives.

Teters, 37 M.J. 370 (C.M.A. 1993) (stating the general rule that multiple convictions and punishments under different statutes, for the same act or course of conduct, is unlawful without a clear expression of congressional intent to the contrary).

“Unreasonable multiplication of charges,” on the other hand, is a doctrine aimed at preventing prosecutorial overreaching. The prohibition is codified in RCM 307(c)(4), and the legal test is most explicitly described in *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001) (providing five factors for analyzing whether the number of charges and specifications reasonably represent the conduct of the accused). Although the Court of Appeals for the Armed Forces explicitly rejected the notion that the doctrine is equitable in nature (to protect its appellate jurisdiction), rather than a legal standard, trial counsel would do well to treat it as both in practice. See MCM, *supra* note 5, R.C.M. 1003(c)(1)(C) (if convicted of two specifications that are essentially the same, the maximum punishment is the greater of the two) Despite the title of the paragraph, “multiplicity,” this rule is often aimed at remedying unreasonable multiplication of charges during the sentencing phase.

⁴³ See, e.g., PROSECUTION STANDARDS, *supra* note 37, R. 43.4 (inappropriate leveraging).

⁴⁴ Morris, *supra* note 40, at 18.

⁴⁵ MCM, *supra* note 5, MIL. R. EVID. 801(d)(2).

⁴⁶ *Id.* MIL. R. EVID. 404(b).

⁴⁷ See *id.* R.C.M. 307(c)(4), R.C.M. 601(e)(2) (rule and discussion).

⁴⁸ PETER L. MURRAY, BASIC TRIAL ADVOCACY 53 (1995) (emphasis added).

Themes convey the trial counsel's theory in small, powerful, and memorable portions. "Themes are the psychological anchors that [fact-finders] instinctively create to distill and summarize what the case is about. . . . Themes become the essential tool [fact-finders] use to reduce a large amount of information and summarize their attitudes about that information in easily remembered words and phrases."⁴⁹ Trial counsel will discover many of their most powerful themes when identifying the gravamen offense: What about the accused's conduct, if true, most warranted punitive action? The best themes do not label the accused, such as "thief," "thug," or "brute," but characterize the accused's choices. His reasons for choosing one course of action over another may or may not be logical, intelligent, or even effective at achieving his goals, but they are essential to understanding the "what" and the "why" of events described at trial.

The necessity of demonstrating the accused's motives becomes clearer when one considers that the mind is essentially a pattern-recognition device. "[H]uman beings do not evaluate facts in isolation, but rather tend to make sense of new information by fitting each new fact into a preexisting picture."⁵⁰ This process, sometimes known as script theory, can be demonstrated as follows:

Think about these words and phrases: popcorn, coming attractions, tickets, summer blockbusters. What do you see in your mind? Chances are good that you have envisioned an entire movie theater, and not just any movie theater, but probably one that you have attended recently or often. That theater is your script. You can "see" the box office, the candy counter, the lobby, the posters. Even if you attempt self-consciously to focus on "popcorn" to the exclusion of the theater, you will probably envision a particular bag or box or bucket of popcorn familiar from your past experience.⁵¹

How does this work to trial counsel's advantage? Script theory relies on the concept that people avoid uncertainty and desire validation as a means to achieve a safe, certain, and stable picture of the world.⁵² The stable, certain picture of the world people yearn for most involves other people's behavior.⁵³ In other words, our natural desire to understand ourselves forces us to study other people. Good advocates address this need within the fact-finder. Even if an accused's motive or intent is not an element of any charged offense, trial counsel should always address it.

B. STEP FIVE: Organize Logically

Although the contents will often dictate the best format for the stipulation, bear in mind the following guidelines that apply to *all* stipulations. First, list facts in numbered paragraphs, each of which should convey a single thought. The single thought may require one sentence or ten to communicate the idea effectively, but no more than one thought should be included in a paragraph. Second, use a separate section to describe the accused only if necessary to establish an element of an offense; for example, you must include such a section for an accused whose service history is necessary to support a conviction for desertion.⁵⁴ Third, incorporate matters in aggravation throughout the stipulation, in the context of the accused's actions. Do not wait to place them in a separate section at the end. The trial is meant to be bifurcated, not the stipulation. Fourth, avoid a separate disclaimer of defenses. The facts that foreclose all relevant defenses should be stated in context with the facts supporting each specification.⁵⁵

Beyond the necessary elements of the opening and closing paragraphs, there is no "perfect" format for a stipulation. The stipulation's structure and organization should flow from the charges and the facts themselves. Trial counsel can organize facts in chronological order or group them by supported charges and specifications. Both approaches feature advantages and

⁴⁹ THOMAS A. MAUET, TRIAL TECHNIQUES 62 (6th ed. 2002).

⁵⁰ STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 32 (3d ed. 2004); *see also* MAUET, *supra* note 49, at 15 ("We try to make sense of the world around us, and use stereotypes—our beliefs and attitudes—to organize our views of that world.").

⁵¹ LUBET, *supra* note 50, at 32.

⁵² *See id.* ("New information is confusing, especially when presented piece by piece. Thus, people 'call up' scripts so as to impose order on uncertainty or confusion.").

⁵³ *Id.*

⁵⁴ The accused's personal and service data will be established with the charge sheet, the Soldier's record brief, and the military judge's colloquy with the accused. The more times the trial counsel recites this information, the more likely incorrect or inconsistent data may be transmitted.

⁵⁵ Most trial counsel, if they include a separate disclaimer of defenses, succumb to the temptation to fill the space with conclusory statements like "the accused was not suffering from a severe mental disease or defect." That conclusion, like all others, is up to the military judge—and the judge will need *facts* to make that determination.

disadvantages. Chronological presentation often produces a concise, easily understandable story; however, this method of organization can lead to omissions of critical information because unwary trial counsel may draft the document without comparing the facts with the elements of the offenses. Grouping facts to support each offense addresses this pitfall and can ease drafting. Grouping facts also assists the military judge during the providence inquiry because facts are logically presented with their corresponding elements. On the other hand, this approach will often result in longer narratives with redundant information repeated to support elements common to several offenses.

Adroit trial counsel should exploit the advantages of both techniques by using a chronological narrative that also flags portions pertaining only to certain specifications.⁵⁶ Trial counsel should first identify facts whose relevance does not depend on a specific time or event, as well as facts common to all offenses, and then list them in a stand-alone section at the beginning of the stipulation. The remaining facts should then be presented chronologically in sections labeled according to the supported specification, which avoids the need to introduce information in the order the offenses appear on the charge sheet.

C. STEP SIX: Draft and Refine

When drafting stipulations of fact, trial counsel must limit themselves to facts or reasonable inferences stated as facts.⁵⁷ Individual paragraphs of the stipulation should be composed with the primary purpose of the stipulation in mind. Trial counsel must persuade the reader that the accused is guilty and must fill in potential gaps in the judge's providence inquiry.⁵⁸ Ironically, trial counsel most often fail to achieve either goal because they include legal positions and conclusory language.⁵⁹ Parties cannot stipulate to a legal conclusion within the purview of the fact-finder; they may only stipulate to the facts from which a conclusion can be reached.

1. Facts That Support the Charges

While trial counsel should be conservative when deciding what to charge, they should exercise a policy of liberal inclusion when drafting a stipulation. Drafting a stipulation begins by choosing which facts to include in the document. The guiding principle is simple: everything in the stipulation must have a basis.⁶⁰ Permissible bases include direct knowledge of the accused, indirect knowledge of the accused, and reasonable inferences drawn from other facts and evidence.⁶¹ In short, trial counsel should include any fact (1) for which there is some basis, (2) that the accused is willing to admit is true, and (3) that will advance the Government's theory of the case. Drafters cannot shy away from setting forth a person's thoughts, feelings, and motives as incontrovertible fact. With regard to the accused, the trial counsel *must* do so.

Liberal inclusion of facts will often draw in otherwise inadmissible evidence. Trial counsel may incorporate facts derived from evidence that would be otherwise inadmissible at trial.

⁵⁶ Most trial counsel will find it much easier to tell the story from a third-person perspective. This kind of narrative can encompass facts not directly observed by the accused and is therefore well-suited for factually elaborate cases. Nothing prohibits the trial counsel from using a first-person narrative, which may be appealing for uncomplicated cases. Counsel should rarely employ this format, however; unless it was composed with care, its tone and phraseology will likely contrast sharply with the accused's own responses during the providence inquiry. Neither the judge nor a panel need be reminded so explicitly that the Government supplied the words needed to convict the accused.

⁵⁷ Another cardinal rule when composing a stipulation is that defense counsel should never be allowed to draft any part of it. It is a Government document—the Government document representing all of the facts the Government has the burden to prove. In the event that defense counsel produce a “draft stipulation” to submit with an offer to plea, the trial counsel should skim through it and then toss it into the recycle bin.

⁵⁸ A thorough stipulation supplements the judge's “conclusions and leading questions that merely extract from an accused ‘yes’ and ‘no’ responses during the providence inquiry.” *United States v. Negron*, 60 M.J. 136, 143 (C.A.A.F. 2004). Conversely, if the stipulation itself is composed of legal conclusions, it adds nothing to the inquiry and will not assist the appellate courts' determination as to the sufficiency of the evidence supporting a conviction.

⁵⁹ See *United States v. Jordan*, 57 M.J. 236, 239 (C.A.A.F. 2002) (finding that the accused's answers of “Yes, sir” amounted to “legal conclusions with which appellant was asked to agree without any admissions from him to support them. As such, they were ‘mere conclusions of law recited by an accused [that] are insufficient to provide a factual basis for a guilty plea.’”) (quoting *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996)); *accord* *United States v. Tenk*, 33 M.J. 765 (A.C.M.R. 1991); *United States v. Vinson*, 33 M.J. 1073 (A.C.M.R. 1991); *United States v. Duval*, 31 M.J. 650 (A.C.M.R. 1990).

⁶⁰ See MCM, *supra* note 5, R.C.M. 811(c) discussion; see also *United States v. Craig*, 48 M.J. 77, 80 (C.A.A.F. 1998); *United States v. Bertelson*, 3 M.J. 314, 317 (C.M.A. 1977).

⁶¹ See, e.g., *United States v. Moglia*, 3 M.J. 216, 218 (C.M.A. 1977) (finding accused provident when stipulation included facts outside his direct knowledge and those inferences that followed obviously from the stated facts).

Subject to limitations which might be imposed by the military judge “in the interest of justice,” R.C.M. 811(b), we see no reason why evidence, even though otherwise inadmissible under the Military Rules of Evidence, cannot come into the trial by way of stipulation. . . . This is particularly true in a negotiated guilty plea where the accused is willing to stipulate to otherwise inadmissible testimony in return for a concession favorable to him from the Government, assuming no overreaching by the Government.⁶²

This rule specifically applies to uncharged misconduct and matters in aggravation.⁶³ In this context, the prohibition against “overreaching” appears to address the voluntariness of the accused’s plea.⁶⁴ Government overreaching can be inferred from the contents themselves if they appear to serve no legitimate purpose.⁶⁵ It is important to note that while parties may relinquish any objection to the admissibility of the stipulated facts, this does not usurp the military judge’s role to consider prohibitions against those facts.⁶⁶ Accordingly, parties cannot introduce facts by stipulation when there is a specific prohibition against the admission of that particular form of evidence, such as that for polygraph results.⁶⁷

To avoid repeating bare legal conclusions, trial counsel should ask themselves “how?” and “why?” for each fact that they include in the stipulation. When the drafter states a legal conclusion, such as the satisfaction of a particular element of an offense, counsel should then think “because . . .” and continue the thought. For example, “the accused’s conduct was prejudicial to good order and discipline, because . . .” What follows “because” will address the elements more fully by describing both the effect (discredit to the service or disruption of discipline) and the cause (the accused’s choices).

2. Facts That Support the Sentence

Although the parties can stipulate to the admissibility of certain facts and evidence, the facts must always be relevant to some issue before the court.⁶⁸ The relevance of sentencing information is limited to evidence specifically allowed by RCM 1001 and its interpreting cases. Generally, facts should relate to one of the following: (1) the impact of the accused’s conduct upon the victim;⁶⁹ (2) the duration and seriousness of the accused’s course of conduct;⁷⁰ (3) the likelihood that the accused will reoffend;⁷¹ (4) the magnitude of danger to the public posed by the accused should he reoffend;⁷² and (5) factors

⁶² United States v. Glazier, 26 M.J. 268, 270 (C.M.A. 1988) (citing United States v. Kinman, 25 M.J. 99, 100 n.2 (C.M.A. 1987); United States v. Zelenski, 24 M.J. 1 (C.M.A. 1987); United States v. Jones, 23 M.J. 305 (C.M.A. 1987)).

⁶³ See, e.g., United States v. McCrimmon, 60 M.J. 145, 154 (C.A.A.F. 2004) (finding that an admission of uncharged misconduct in the stipulation supported the sufficiency of an element of a charged offense); United States v. Ross, 34 M.J. 183, 187 (C.M.A. 1992) (allowing the use of a stipulation that included uncharged misconduct to establish the full impact of the accused’s course of conduct).

⁶⁴ Courts will look for abusive prosecutorial efforts designed to coerce the accused to accept the contents of a Government-drafted stipulation. See, e.g., United States v. Davis, 50 M.J. 426, 431 (C.A.A.F. 1999) (finding no Government overreaching in obtaining a pretrial agreement and confessional stipulation because the accused “repeatedly assured the military judge that his actions were completely voluntary and were taken after receiving the advice of his defense counsel”).

⁶⁵ See, e.g., United States v. DeYoung, 29 M.J. 78, 81 (C.M.A. 1989) (“[A]ttorneys for the Government have an ethical responsibility to avoid bringing inadmissible matters before a court-martial merely for the purpose of inflicting gratuitous injury upon an accused.”).

⁶⁶ See *id.* at 80 (determining that the military judge must independently review admissibility and rule on objections even as to stipulated facts).

⁶⁷ United States v. Clark, 53 M.J. 280, 281 (C.A.A.F. 2000) (holding that RCM 707 prohibited the admission of polygraph evidence, therefore the military judge should not have considered the report, despite its inclusion in the stipulation of fact).

⁶⁸ MCM, *supra* note 5, MIL. R. EVID. 402.

⁶⁹ See *id.* R.C.M. 1001(b)(4).

⁷⁰ See *id.* This includes preparatory actions. Earlier crimes or a demonstrated course of conduct directed at the victim is permissible to show the “full impact” of the accused’s actions. United States v. Nourse, 55 M.J. 229 (C.A.A.F. 2001); see also United States v. Patterson, 54 M.J. 74 (C.A.A.F. 2000) (holding that evidence of grooming behavior was permissible aggravation evidence); United States v. Hollingsworth, 44 M.J. 688 (C.G. Ct. Crim. App. 1996) (finding that testimony from the child victim of a withdrawn specification could testify to the extent of the accused’s scheme involving charged offenses).

⁷¹ See MCM, *supra* note 5, R.C.M. 1001(b)(5). These facts can include those bearing on whether accused will make the same decisions again, also known as the accused’s potential for rehabilitation. See, e.g., United States v. George, 52 M.J. 259 (C.A.A.F. 2000) (allowing prosecution evidence regarding the accused’s poor rehabilitative potential). Effective stipulations will also include facts regarding the likelihood that the accused will encounter circumstances similar to those that originally contributed to the accused’s poor decision-making (e.g., those providing opportunity or motive).

⁷² See MCM, *supra* note 5, R.C.M. 1001(b)(5); United States v. Williams, 41 M.J. 134 (C.M.A. 1994) (finding psychiatric testimony regarding the accused’s future dangerousness to be proper evidence relevant to rehabilitative potential).

bearing on the appropriateness of specific forms of punishment or magnitude of punishment, also known as matters in aggravation.⁷³

Most mistakes and shortcomings of stipulations occur in the sentencing area. The Government can require the accused to stipulate to evidence in aggravation, as well as evidence that supports the factual predicate of the plea, as part of the pretrial agreement.⁷⁴ Often, the best source of aggravation evidence may be the accused's uncharged misconduct.⁷⁵ Significantly, parties can stipulate to the truth and permissible uses of uncharged misconduct in the same way they can for other facts that would normally be excluded from consideration, although similar limitations apply.⁷⁶ For example, there must be no overreaching by the Government, the conduct must be relevant, and the evidence must not be specifically prohibited elsewhere.⁷⁷ For the purposes of aggravation evidence, relevance is statutorily defined as those "circumstances directly relating to or resulting from the offenses of which the accused has been found guilty."⁷⁸ Such a definition implies a "higher standard" than "mere relevance."⁷⁹ This heightened scrutiny also means that uncharged misconduct, even if directly related to the charged offenses, may also need to survive an RCM 403 balancing test.⁸⁰ In practice, the decision to redact portions of the stipulation based upon an RCM 403 test should be extremely rare because the military judge must raise the issue.⁸¹

Even successful stipulations should not act as a complete substitute for the Government's sentencing case. Nothing is more persuasive than effective live testimony. Instead, a properly crafted stipulation will deny, as much as possible, the accused from making an effective sentencing case. In other words, seek out facts that pre-empt foreseeable extenuation or mitigation arguments.

V. Packaging a Persuasive Stipulation

The finest example of written advocacy will fail to influence its reader if it is not presented in a persuasive form. Counsel must follow through on their drafting efforts by proofreading, choosing which evidence best supplements the narrative, negotiating with defense counsel, and, most importantly, by remaining vigilant during the providence inquiry.

⁷³ For example, the accused's unrepentant attitude during prior statements may militate for a harsher sentence. *See, e.g.,* United States v. Alis, 47 M.J. 817, 825-26 (A.F. Ct. Crim. App. 1998) (finding that accused's attitude regarding the victims and his offenses was relevant and admissible for sentencing purposes).

⁷⁴ *See* MCM, *supra* note 5, R.C.M. 1001(b)(4); *see also* United States v. Harrod, 20 M.J. 777, 779 (A.C.M.R. 1985) ("The government is prohibited neither by law nor by public policy from requiring an accused, pursuant to the terms of a pretrial agreement, to stipulate to aggravating circumstances surrounding the offenses to which the accused will plead guilty."); United States v. Sharper, 17 M.J. 803, 806 (A.C.M.R. 1984) ("Such a stipulation, by its very nature, recounts the circumstances surrounding the commission of the offenses and is often, and properly, considered by the trial court not only during the *Care* inquiry but . . . are the sort which the sentencing authority may properly consider in aggravation.").

⁷⁵ United States v. Vargas, 29 M.J. 968, 971 (A.C.M.R. 1990) ("While in the normal context of sentencing proceedings, such consensual use of uncharged misconduct might amount to ineffective assistance of counsel, . . . appellant and his counsel [may] negotiate[] a tactical if not strategic benefit by [permitting] the sentencing authority to consider such evidence by means of stipulation.") (citations omitted).

⁷⁶ *See supra* notes 62-67 and accompanying text; *see also* United States v. Mezzanatto, 513 U.S. 196, 203-04 (1995) (recognizing the accused's right to waive favorable evidentiary rules).

⁷⁷ *See Harrod*, 20 M.J. at 779; *Sharper*, 17 M.J. at 806.

⁷⁸ MCM, *supra* note 5, R.C.M. 1001(b)(4).

⁷⁹ United States v. Hardison, 64 M.J. 279, 281 (C.A.A.F. 2007) (quoting United States v. Rust, 41 M.J. 472, 478 (C.A.A.F. 1995)); *see also* United States v. Lowe, 56 M.J. 914 (N-M. Ct. Crim. App. 2002) (finding evidence of uncharged incidents of harassment was not directly related to the charged offenses because they involved different victims and were not part of a single criminal scheme).

⁸⁰ *See generally* MCM, *supra* note 5, MIL. R. EVID. 403 ("[R]elevant . . . evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ."). *See, e.g.,* United States v. Rust, 41 M.J. 472, 478 (C.A.A.F. 1995) (finding prejudicial error in the military judge's decision to allow admission of the victim's suicide note because it failed the RCM 403 balancing test).

⁸¹ Because the defense agreed to the truth and admissibility of the uncharged misconduct, raising an objection at trial would be tantamount to withdrawing from the stipulation, and therefore the pretrial agreement itself:

[The accused] agreed that his pretrial agreement would be "automatically . . . cancelled" if there was a "failure of agreement with the Trial Counsel on the contents of the stipulation of fact" or any "modification at any time of the agreed stipulation of fact without consent of the trial counsel." Accordingly, judicial modification of the stipulation without consent of both parties, which appellant desired . . . was not an available remedy.

United States v. DeYoung, 29 M.J. 78, 80-81 (C.M.A. 1989).

A. STEP SEVEN: Properly Use Attachments and Enclosures

Carefully select attachments and enclosures because each may dramatically affect the stipulation and, consequently, the providence inquiry. Common attachments and enclosures include confessions or admissions; documentary evidence, such as bank statements; photographs; and descriptive evidence, such as charts, maps, or diagrams. Trial counsel must then decide how to treat the evidence: Should the contents be considered unassailable fact or simply contextual information for the judge? Each piece of evidence must fall into one category or the other. A good way to distinguish the two is to use different terminology when referring to the evidence itself.

Trial counsel should consider an “attachment” a separate exhibit referenced in the stipulation solely for the purpose of memorializing the parties’ agreement that the exhibit is relevant and admissible.⁸² In other words, an attachment is not incorporated into the stipulation, and the parties can attack, contradict, or explain its contents at trial. Attachments merely supplement the judge’s understanding of the stipulated facts and the accused’s anticipated statements during the providence inquiry. Remember to move for admission of attachments on the record because they are not automatically admitted with the stipulation in the same way enclosures are. When the judge receives attachments into evidence, trial counsel should ensure that the record is clear as to the purpose and permissible uses of the attachments as expressed by the parties in the final paragraph of the narrative portion of the stipulation.⁸³

In contrast, an “enclosure” is a piece of evidence that follows the main narrative or recitation of facts within the stipulation itself.⁸⁴ Enclosures are not marked as separate exhibits, and their pages are included in the pagination of the stipulation. As part of the stipulation, parties agree enclosures are relevant, admissible, and true. Trial counsel should avoid lengthy or complex enclosures, which can spawn inconsistencies within the stipulation and threaten the viability of both the stipulation and the plea.⁸⁵ For example, an accused’s confession should never be included as an enclosure because confessions inevitably contain information that differs from, or contradicts, facts in the narrative portion of stipulations. Instead, only useful information should be extracted from the confession and recited in the narrative; the rest should be left out altogether. For similar reasons, other witness statements (except prepared victim impact statements) generally make poor attachments *or* enclosures. Be wary of using statements even as attachments unless they are both truly damning to the accused and free of explanation, extenuation, or mitigation.⁸⁶

B. STEP EIGHT: Negotiate and Adjust (Slightly)

Many of the facts in the stipulation will not be essential to establish the accused’s providency and, therefore, may be fertile ground for negotiation.⁸⁷ The more detailed the stipulation, the more room for adjustment. The ultimate aim should always be to create a stipulation that is as complete, and aggravating, as the accused will stomach without withdrawing the offer to plead guilty. As a consequence, adjustments should be kept to minor changes in language, not content.

Insist that all legitimate aggravation, background, and *res gestae* appear in the stipulation. Allow no favorable defense evidence in the stipulation. Do not consider the withdrawal of proffered defense evidence . . . as [a] defense concession[.]. The defense must not be relieved of its responsibility for placing that evidence before the court through methods by which the government can test it.⁸⁸

⁸² An attachment is a “supplementary part; an accessory . . . [including] a supplementary document that is attached to a primary document.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2004).

⁸³ See app. A-6, para. 31.

⁸⁴ To “enclose” something is to “surround on all sides,” or “to contain . . . so as to envelop . . .” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE. An enclosure is therefore dependent on the stipulation; it is a fully incorporated element.

⁸⁵ See *infra* Section V.C.; see also MCM, *supra* note 5, R.C.M. 705(d)(4)(B) (permitting the accused to withdraw from a pretrial agreement when there is a disagreement concerning the meaning or effect of a material term). Stipulations that are internally inconsistent could certainly create disagreements of this type.

⁸⁶ Safe attachments or enclosures include: victim impact statements; photographs of injuries, destroyed or stolen property; copies of checks or bank statements; and representative images in child pornography cases.

⁸⁷ During these negotiations, it may occur to trial counsel that the accused would be the best potential source of information for the stipulation. Trial counsel should avoid attempting to “fish” information from accused and defense counsel at this stage. If the military judge rejects the accused’s plea, or he withdraws from it, the Government may not use any of the information solely obtained from the accused during the negotiation. See generally MCM, *supra* note 5, MIL. R. EVID. 410.

⁸⁸ Morris, *supra* note 40, at 41.

Trial counsel should transmit their initial draft to defense counsel for review and negotiation in an inalterable format, such as hardcopy or Portable Document Format (.pdf). Defense counsel's comments and suggested changes will, therefore, be easily distinguishable, and trial counsel will be less tempted to accept defense "re-drafts" without adequate review.⁸⁹ Remember, trial counsel, not defense counsel, draft stipulations.

C. STEP NINE: Getting the Stipulation Before the Court

Draft stipulations before referral and obtain the signatures of accused and counsel at the time a pre-trial agreement is offered to the convening authority. Although this will be challenging at times, it is both essential and within the Government's power to effectuate. The Government possesses the initiative and is in the strongest bargaining position when the accused first submits an offer to plead. Once the Government commits to a deal, it "will have called off witnesses, redirected its energies, and will be unwilling to answer to the [commanding general] for the deal's failure."⁹⁰ As soon as the convening authority signs the pretrial agreement, trial counsel must send the stipulation to the military judge with the referral documents and the offer to plead guilty. Provide the military judge with the maximum amount of time to review the stipulation before trial because it shapes the providence inquiry. Likewise, send any revised versions to the judge, with changes conspicuously noted, as soon as possible.

At trial, be on the lookout for issues that may threaten the stipulation and the plea. If the accused contradicts information in the stipulation, the military judge must inquire into the inconsistency.⁹¹ Failure to do so may render the plea legally insufficient upon appellate review. If, after the judge has sought clarification, the accused insists upon contradicting a sentence in the stipulation, that sentence must be redacted.⁹² If the redacted sentence relates to an element of an offense, the judge will consider the contradiction a "matter inconsistent with the plea" or a failure to plead within the meaning of Article 45(a).⁹³

Is the stipulation "dead" at this point? Perhaps not. Generally, the military judge may not consider anything presented during an unsuccessful attempt to plead guilty.⁹⁴ The accused may, however, agree to submit the previous stipulation, another stipulation, or even a confessional stipulation to the judge for consideration.⁹⁵ Such an agreement may obligate the convening authority to apply the sentence limitations imposed in the defunct pretrial agreement.⁹⁶ In other words, if the Government benefits from the stipulation, the accused may continue to benefit from the sentence limitation originally contemplated by the parties.

VI. Conclusion

Supervising attorneys who "take the long view"⁹⁷ will require trial counsel to draft stipulations of fact in every case. Ultimately, the majority of cases will be resolved, partially or completely, by guilty pleas. Ignoring this fact will increase the likelihood of a last-minute rush to produce a stipulation of fact before the staff judge advocate's meeting with the convening

⁸⁹ Sending a draft stipulation to defense counsel in a digitally modifiable format, especially unfamiliar counsel, is inadvisable. Unless trial counsel desire to review and compare every word in every sentence each time they receive a return copy, they should rely on .pdf or hardcopy formats.

⁹⁰ Morris, *supra* note 40, at 41 ("Additionally, a judge may be reluctant to permit such a withdrawal, further enabling the defense to drive a difficult bargain over the contents.").

⁹¹ See *United States v. Epps*, 25 M.J. 319, 321 (C.M.A. 1987) ("Therefore, when, as in this case, a stipulation of fact clearly demonstrates guilt but the accused's testimony is inconsistent therewith, the military judge has a duty to note the inconsistency and seek explicit clarification from the accused.").

⁹² See *United States v. Enlow*, 26 M.J. 940, 945 (A.C.M.R. 1988); *United States v. Cozine*, 21 M.J. 581, 584 (A.C.M.R. 1985).

⁹³ See UCMJ art. 45(a) (2008) ("If an accused . . . after a plea of guilty sets up matter inconsistent with the plea, . . . or if he fails or refuses to plead, a plea of not guilty shall be entered in the record . . .").

⁹⁴ See MCM, *supra* note 5, MIL. R. EVID. 410; *United States v. Grijalva*, 55 M.J. 223, 227 (C.A.A.F. 2001) ("If a plea of guilty is rejected, any statement made by an accused during the plea inquiry is inadmissible.").

⁹⁵ If the stipulation amounts to a confessional stipulation (i.e., it admits all facts necessary for a finding of guilty on a contested charge), the military judge must determine that the accused made a knowing and intelligent waiver of his rights with regard to each offense covered by the stipulation. See *United States v. Craig*, 48 M.J. 77 (C.A.A.F. 1998); *United States v. Matlock*, 35 M.J. 895 (A.C.M.R. 1992); see also *United States v. Bertelson*, 3 M.J. 314 (C.M.A. 1977) (detailing the necessary elements of the judge's inquiry into the accused's consent).

⁹⁶ See *United States v. Cunningham*, 36 M.J. 1011 (A.C.M.R. 1993).

⁹⁷ Morris, *supra* note 40, at 19 ("Take the Long View: Think of Pleas, PTAs, and the Theory of Your Case").

authority. In addition to being shortsighted, the reactionary drafting of stipulations as an incidental requirement of each particular case will yield hurried, cut-and-paste solutions rife with poor logic, bad syntax, and inexcusable typos. Calculated, well-reasoned written advocacy can only be achieved by scrupulously marshaling facts and law and then funneling them into a single, cohesive, and compelling theory with recurring themes and persuasive devices. Crafting an effective stipulation of fact requires more than creative storytelling or properly employing English grammar—it requires, time, effort, and most of all, *practice*.

5. Unless otherwise noted, the accused's chain of command at the time of the offenses was as follows: SGT Richard J. Brown was his squad leader, SFC Donald A. Granger was his platoon sergeant, 1SG Maxwell K. Bonnaker was his first sergeant, and CPT Keith M. Muller was his company commander.

Dereliction of Duty (Charge I and its Specification)

6. [Chronological listing often makes the most persuasive story; however, trial counsel should also flag the particular specification or specifications to which particular facts relate.] A few days before the Sandistan national elections on 15 October 2008, the accused's platoon was tasked to patrol for weapons caches near their patrol base (PB), Razorback. For ten days prior to receiving this mission, the accused's platoon had been in "refit cycle," which means that their duties had been limited to resting, repairing equipment, and preparing for future combat missions.

7. The accused attended a formation at the beginning of his platoon's refit cycle. At that formation the platoon sergeant, SFC Granger, instructed each of the Soldiers to sleep at least seven hours per night. He also told the platoon, including the accused, that the unit would receive a combat mission before ten days had passed.

8. When afforded personal time during those ten days, the accused chose to play video games and watch movies in his tent instead of sleep. His squad leader, SGT Brown, observed the accused acting disoriented and exhausted during daily maintenance operations. When he asked the accused whether he was sick, the accused said that he had been playing a game, Command and Conquer, "till my eyes was red." SGT Brown instructed him to stop playing games and get more sleep.

9. On 11 October 2008, the accused's platoon received a mission brief informing them of their task to conduct sweeps for weapons caches. Immediately following that briefing, SGT Brown told the accused that he would be a member of that patrol.

10. Once out in sector, SFC Granger directed the accused to pull security for the dismounted patrol: specifically, he instructed the accused to face a certain direction and observe the area for suspicious activity while they walked down the street. As he exited the tactical vehicle, the accused staggered and dropped his weapon, an M-4 carbine, into the dirt at the side of the road. The accused then stated, "I'm so tired I can't see straight," and "I can't remember the last time I slept." He could not bear the thought of walking on patrol for seven or eight hours, as was the expected length of the patrol.

11. Knowing his duties, he refused to perform them. He begged the platoon sergeant to let him sleep in one of the vehicles instead of patrol with his squad. Unable to rely upon the accused to be alert, SFC Granger knew that forcing the accused to patrol might endanger him or his squad-mates. Accordingly, he told the accused to ride in one of the platoon's vehicles.

12. The accused's daily choice to forsake sleep in favor of video games or movies caused him to be unwilling and unable to perform his duties safely. The accused's conscious decisions to neglect his own physical wellbeing made him derelict in the performance of his duties.

13. This caused a shortage of manpower within the squad during the remainder of that mission. The accused's squad contained only eight Soldiers, and the accused's last-minute removal from the patrol forced significant changes to the patrol plan. The platoon sergeant was forced to reallocate Soldiers from different vehicles and squads in order to provide adequate security for the rest of his men while the accused simply rested in his vehicle.

14. This disruption and resulting loss of manpower endangered the platoon on Route Scotsman, a route that has repeatedly been sown with improvised explosive devices (IEDs). From 1 July to 11 October 2008, A Company Soldiers encountered 126 IEDs on this route, only 74 of which were discovered before they had detonated and killed or injured personnel. In the two weeks before 11 October 2008, four Soldiers from A Company died on Route Scotsman.

Misbehavior of a Sentinel/Lookout (Charge II and its Specification)

15. On 18 November 2008, the accused's squad leader, SGT Brown, posted him as a sentinel at a blocking position on Route Cowboy. SGT Brown told the accused that his squad's mission was to deny enemy access to an area of the local neighborhood known to be a common "point of origin" for indirect fire attacks on the nearby U.S. forward operating base (FOB), FOB Crazyhorse. The accused knew from previous threat briefings that insurgents would also routinely infiltrate this area, climb to the top of some of the larger buildings, and fire at Soldiers on the FOB with sniper rifles.

16. Sergeant Brown told the accused that his specific duty was to scan his assigned sector for suspicious persons and vehicles that may pose a threat to the platoon. If he saw persons moving into or out of the area, he would radio his observations to the squad leader of the standby patrol or reaction force, depending on the perceived level of threat. He also told the accused that he was to guard his sector for four hours, between 0400 and 0800.

17. At approximately 0530 hours on 18 November 2008, 1SG Bonnaker began checking on the Soldiers assigned as sentinels for FOB Crazyhorse. He discovered the accused sleeping at his guard position. The accused was seated on the sand bags at the front of the fortification, snoring loudly. When 1SG Bonnaker awakened the accused, the accused could not say how long he had been sleeping, or whether anyone had passed his position or through his assigned sector of fire. When asked, the accused simply answered, "Duh, I was asleep," and "You got me," and "Who cares?"

18. Fearing that the accused may have had a physical or mental injury that contributed to the accused's failure to remain awake, 1SG Bonnaker took the accused to the physician's assistant on FOB Crazyhorse for a physical exam. The physician's assistant concluded that the accused suffered from no injuries, ailments, or disabilities that would make him physically unable to remain awake and alert, or that might reasonably justify his failure to do so.

19. The accused placed himself in danger by sitting down and falling asleep in front of and on top of the sandbags provided for his protection from enemy observation and direct fire attacks. A Company had fortified this position in late September 2008, approximately five weeks before the accused was found sleeping in front of them. The company leadership ensured there was a fortified fighting position at that location because a Soldier had been shot by a sniper in August. When asked why he chose to sleep outside and in front of the fortification, the accused simply stated that he could not find a comfortable position inside.

20. Additionally, the accused's unwillingness to remain awake, alert, and vigilant against threats to his platoon placed all of his fellow Soldiers in danger. Insurgents attacked FOB Crazyhorse 26 times between 1 July 2008 and 18 November 2008. These included 14 indirect fire attacks, nine of which employed 81mm mortars and five of which employed 105mm rockets. All 14 attacks originated from the neighborhood whose main ingress was within the accused's sector of fire on 18 November. The remaining attacks were sniper fire whose points of origin were never precisely identified; however, one of those attacks occurred in the early morning hours of 18 November 2008 while the accused was sleeping at his guard position.

Disorderly Conduct (Charge IV and its Specification)

21. On 14 February 2009, the accused returned to Fort Outoftheway, Utah, for rest and recuperative (R&R) leave. That very night, he went to the Hooters Restaurant in Smalltown, Utah. He spent much of the evening drinking alcohol and socializing with SPC Rusty D. Carpenter, PFC William R. Downey, and PFC Donald F. Barber. At about 1900 hours, the accused worked up the courage to ask their waitress, Cindy, if she would like to have dinner and see a movie the following weekend. She accepted.

22. The following afternoon, Thursday 15 February 2009, the accused called his friends to ask them whether they wanted to go to the Hooters Restaurant again. SPC Carpenter and PFC Barber agreed, while PFC Downey said he "had other things to do." That night, the accused, SPC Carpenter, and PFC Barber went to the Smalltown Hooters. After consuming several alcoholic drinks, the accused was surprised to notice Cindy talking to PFC Downey, who was seated at the bar. The accused imagined that he saw PFC Downey flirting with Cindy and believed that she was returning his affection. The accused loudly confronted PFC Downey, screaming profanity and knocking over a table. Restaurant staff then escorted him out of the building.

23. Several customers witnessing the violent confrontation were so disturbed that they paid their checks and immediately left. One customer loudly exclaimed: "Go back to Sandistan and tear up their restaurants, will you!" The restaurant later paid \$186.30 to repair the table, and \$43.65 to replace the broken dishes and glassware. At a local "town hall" meeting between members of the community and the Fort Outoftheway garrison commander, the restaurant manager, Mr. Gean H. Carson, presented the commander with a bill for the damage and asked him to "get his troops under control."

24. The accused's violent behavior and profane language was so reprehensible that members of the public who witnessed it were disturbed and resentful. It is foreseeable that these witnesses, and those to whom they spoke, would attribute the violent and disorderly acts of the accused to others in uniform, the result of a false impression that the U.S. military culture encourages aggression to solve disagreements.

Assault (Charge III and its Specification)

25. The accused waited in the parking lot for SPC Carpenter and PFC Barber to come out of the restaurant. After twenty minutes, the accused realized the other Soldiers were not going to leave until they finished their dinner. As the accused stood in the cold, he became angry with all three of his friends. He felt betrayed by PFC Downey, who he believed had deliberately tried to "get with his girl." He also felt abandoned by SPC Carpenter and PFC Barber, who obviously thought their food was more important than his friendship. He began to fantasize about beating PFC Downey when he came out of the restaurant. In a statement he later gave to police, the accused said: "I knew that I was gonna give Billy the beatin' of his life. See if she were gonna like his face after I was done wid it."

26. The accused strolled to the back of the parking lot, where two of the security lights had burned out. He waited in the darkness for two hours before he saw PFC Downey going to his car. He ran toward PFC Downey and violently struck him in the face. When he struck PFC Downey, he felt his knuckles sink into PFC Downey's flesh and he heard a loud "snap." PFC Downey fell onto the ground. With his fist tightly closed, the accused struck PFC Downey several more times. SPC Carpenter and PFC Barber pulled the accused off of PFC Downey and held him until police arrived. While they waited, the accused screamed profanity at them until spittle dribbled down his chin.

27. When the accused struck PFC Downey, he did so while he was angry. He struck PFC Downey in the face intending to inflict pain and injury upon him because he wanted to "learn 'em a lesson," as he later told police. PFC Downey had not threatened the accused, nor had he even seen the accused approach him from behind. Although the accused had voluntarily consumed alcohol, he was able to decide that he wanted to attack PFC Downey, lurk in the parking lot, and successfully ambush him.

28. The accused broke PFC Downey's cheekbone, requiring a lengthy surgical procedure to reconstruct its shape. As a result of his injuries, PFC Downey suffered significant pain for several weeks. The accused inflicted such grievous injuries that PFC Downey could not return to duty for four weeks after he had been scheduled to return to Sandistan.

Matters in Aggravation

29. *[Include matters in aggravation throughout the body of the stipulation, in context with the accused's actions. On occasion, there will be some aggravating matters that must be set off from the main body because they do not relate directly to the charged offenses; for example, trial counsel would list a qualifying prior conviction here.]* On 16 March 2009, the State of Utah found the accused guilty of public drunkenness, battery, and petty larceny during another altercation.

Disclaimer of Defenses

30. *[Avoid using a separate "disclaimer of defenses." The facts which foreclose all relevant defenses should be stated in context with the facts supporting each specification. On occasion, there will be possible defenses that apply to all charged offenses; in that case, trial counsel may use a separate section such as this one.]* Behavioral health professionals from Outoftheway Army Medical Center evaluated the accused in March 2009. A psychiatrist, LTC Jim S. Blalock, interviewed the accused on three occasions, and administered two psychiatric tests. He concluded that the accused suffered from a mild anxiety disorder, but nothing indicated that the accused suffered from a severe mental disease or defect, or that he would have been unable to appreciate the wrongfulness of his actions when he was derelict in his duties, fell asleep on guard duty, behaved disorderly in public, or when he attacked PFC Downey.

Admissibility of Evidence

31. The government and defense stipulate that the following attachments are admissible at trial and that they may be considered by the military judge and on appeal for all purposes described in paragraph 1 above. The accused expressly waives any objection he may have to the admission of these exhibits into evidence at trial:

- PE 1 Photograph depicting PFC Downey's face – front (1948 hrs., 15 Feb 09)
- PE 2 Photograph depicting PFC Downey's face – profile (1950 hrs., 15 Feb 09)
- PE 3 Excerpt from A Company SIGACT report (18 Nov 08)
- PE 4 Stipulation of expected testimony from Mr. Carson (2 Apr 09)

Signed this ____ day of April, 2009.

KURT R. SALVATO
SPC, U.S. Army
Accused

GUY S. ATTORNEY
CPT, JA
Defense Counsel

DAGOV S. LAWYER
CPT, JA
Trial Counsel

[A short note about style: Writing styles are as diverse as writers; however, subtlety is often the key to creating a powerful narrative. Serious cases with shocking facts do not benefit from overloaded description; a heavy-handed treatment makes the stipulation look clumsy, distracting, and unpersuasive at best, while downright offensive at worst. Similarly, less serious cases with simple facts appear comical when semantically loaded.]

Appendix B

| Article | Element | Fact | Evidence |
|---|----------------|--|-----------------|
| Negligent Dereliction of Duty | | | |
| 92 | (1) | SPC Salvato had certain duties; namely, providing security during a dismounted patrol searching for enemy weapon caches; | |
| | (2) | He knew of the duties; and | |
| | (3) | SPC Salvato was unable to perform his duties as a result of his own negligence. | |
| Misbehavior of Sentinel or Lookout | | | |
| 113 | (1) | SPC Salvato was posted as a sentinel or lookout; | |
| | (2) | He was found sleeping while on post; and | |
| | (3) | SPC Salvato committed the offense while receiving special pay under 37 U.S.C. § 310. | |
| Assault Consummated by a Battery | | | |
| 128 | (1) | SPC Salvato did bodily harm to PFC W.R.D.; and | |
| | (2) | The bodily harm was done with unlawful force or violence. | |
| Disorderly Conduct | | | |
| 134 | (1) | SPC Salvato was drunk and disorderly in public; namely, Hooters Restaurant in Smalltown, Utah; and | |
| | (2) | Under the circumstances, his conduct was of a nature to bring discredit upon the armed forces. | |