

## A View from the Bench

### Sentencing: Focusing on the Content of the Accused's Character

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#### Introduction

In the military justice system, sentences are crafted based on the unique characteristics of the accused and the specific details of the crime(s) she has committed. The *Federal Sentencing Guidelines* do not apply at courts-martial, and no tables exist to assist the military judge or court members in determining an appropriate sentence. Instead, the military justice practitioner's job during the sentencing phase of the court-martial is to provide the sentencing authority with a clear picture of the accused, and why a particular sentence in this particular case is appropriate.

Counsel, particularly trial counsel (TC), are frequently hesitant to directly make an issue of the accused's character. While this hesitancy may be understandable on the merits, it is misplaced during sentencing proceedings.<sup>1</sup> On the merits, a myriad of rules largely discourages the TC from putting on character evidence by setting an appropriately high burden.<sup>2</sup> Our system is predicated on the notion that "fair play"<sup>3</sup> governs the trial, and thus shuns the notion that guilt may be proven merely by showing the accused to be a habitually bad apple who therefore must have committed the crimes alleged.<sup>4</sup> Thus, these rules appear to have the effect of making counsel cautious before attempting to introduce character evidence during sentencing. However, this prudence is misplaced as the fact-finder's role shifts during this phase of the trial. Having determined the guilt of the accused, the fact-finder is now charged with crafting an appropriate sentence. This process is based largely on an assessment of the accused. Consequently, both defense and trial counsel should focus their sentencing cases on the accused's character.

A clear and steady focus on Rule for Court-Martial (RCM) 1001 should guide both parties in their presentation of sentencing evidence. For the prosecution, RCM 1001(b) provides the roadmap to a sentencing case, while the defense is guided by RCM 1001(c). On rebuttal, both parties are then constrained by the scant guidance provided by RCM 1001(d), as supplemented by case law.

#### Government Case

Trial counsel typically focus on getting a sentencing witness to provide an opinion on the accused's "rehabilitative potential." "Rehabilitative potential" is a term of art that is defined for the witness by the MCM.<sup>5</sup> Counsel, after having sailed through a too often formulaic establishment of the requisite foundation, then, after properly orienting the witness to the definition of rehabilitative potential in RCM 1001(b)(4),<sup>6</sup> asks the ultimate question: "What is her rehabilitative potential?" The answer is generally "high," "medium," or "low." Is this really that helpful? Not so much. Counsel have missed the opportunity to present a picture of the accused by rushing through the foundation, expecting the answer of "low rehab potential" to be both meaningful to the fact-finder and justifying counsel's request for a particular sentence.

By emphasizing the various foundational elements set forth in RCM 1001(b)(5),<sup>7</sup> and eliciting an answer on each, trial counsel will better inform the fact-finder not only of the foundation for the witness's ultimate opinion, but also of the accused's character. It might be tempting to elicit an opinion from the witness about each of the foundational elements by asking such questions as "What is your opinion about the accused's desire to be rehabilitated?" However, RCM 1001(b)(5)(D) provides that opinions offered under the rule

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<sup>1</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001 analysis, at A21-73 (2012) [hereinafter MCM] ("The accused's character is in issue as part of the sentencing decision, since the sentence must be tailored to the offender.").

<sup>2</sup> See Major Walter A. Wilkie, *A Primer on the Use of Military Character Evidence*, ARMY LAW., June 2012, at 26 (covering the use of character evidence on the merits).

<sup>3</sup> 1A WIGMORE, EVIDENCE § 57 (Tillers rev. 1983) ("This policy of the Anglo-American law is more or less due to the inborn sporting instinct of Anglo-Normandom—the instinct of giving the game fair play even at the expense of efficiency of procedure.").

<sup>4</sup> *Id.* ("The rule, then, firmly and universally established in policy and tradition, is that the prosecution may not initially attack the defendant's character."). *But see* MCM, *supra* note 1, MIL. R. EVID. 413, 414.

<sup>5</sup> MCM, *supra* note 1, R.C.M. 1001(b)(5) ("Rehabilitative potential refers to the accused's potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society."); *see also* United States v. Ohrt, 28 M.J. 301, 304 (C.M.A. 1989); United States v. Horner, 22 M.J. 294, 295–96 (C.M.A. 1986).

<sup>6</sup> Obviously the military judge and counsel are familiar with the definition; however, the members are not. The preferred method of orienting the witness in a members trial is to read the definition from Rule for Courts-Martial 1001(b)(4) before asking the ultimate opinion question. This method ensures all present in the courtroom are operating from a common definition and minimizes the chance the witness will answer that question with an impermissible euphemism.

<sup>7</sup> Such foundational elements include, "but are not limited to, information and knowledge about the accused's character, performance of duty, moral fiber, determination to be rehabilitated, and nature and severity of the offense or offenses." MCM, *supra* note 1, R.C.M. 1001(b)(5).

are “limited to whether the accused has rehabilitative potential and the magnitude or quality of any such potential.”

Does this mean that, when examining a witness about the rehabilitative potential of the accused, TC may not ask such questions as “How would you rate the accused’s moral fiber?” The question appears to be an open one. Rule for Courts-Martial 1001(b)(5)(A) provides that counsel may present “evidence in the form of opinions concerning the accused’s previous performance as a servicemember and potential for rehabilitation.” Since counsel may explicitly ask about the accused’s duty performance, it follows that counsel must also ask about the foundational elements contained in RCM 1001(b)(5)(B) even if these questions do not lead to an “ultimate issue” question about rehabilitation potential.<sup>8</sup>

In the event counsel find that a military judge forbids a TC from eliciting an opinion on the foundational aspects concerning rehabilitative potential, counsel could ask the witness whether the accused meets the expectations of the witness. One such method is shown in the following colloquy:

TC: Are you familiar with the accused’s desire to be rehabilitated?

Wit: Yes.

TC: What would you expect to see from a Soldier who desires to be rehabilitated?

Wit: I would expect such a Soldier to show in word and deed that he truly wants to abide by the Army values, that his commitment to integrity and selfless service remains paramount.

TC: Has the accused shown you such attributes?

Wit: Yes/No. (In conducting such questions, the TC ought to know what answer will follow. Not knowing the answer will lead to predictably embarrassing results.)

In eliciting a response to each of the foundational predicates required by RCM 1001(b)(5)(B), a TC will provide the sentencing authority with a clearer picture of the accused’s character. Such a picture will aid the fact-finder in fashioning an appropriate sentence more than an opinion based solely on whether the accused does or does not have rehabilitative potential.

<sup>8</sup> This should not be interpreted as granting a license to the trial counsel to smuggle in specific acts of conduct under the guise of laying the foundation for rehabilitative potential. Such would be improper. *See United States v. Powell*, 45 M.J. 637 (N-M. Ct. Crim. App. 1997), *aff’d* 49 M.J. 460 (C.A.A.F. 1998) (Government can not smuggle in specific acts of misconduct under the guise of laying a foundation for an opinion on rehabilitative potential.).

Rule for Courts-Martial 1001(b)(5)(B) provides that among the relevant information and knowledge a witness may possess an opinion on the rehabilitative potential of the accused is the “nature and severity of the offense or offenses.”<sup>9</sup> However, a witness may not testify at sentencing if the testimony is based solely on the severity of the offenses.<sup>10</sup> Trial counsel should therefore be hesitant to call a witness whose only demonstrable knowledge of the accused is familiarity with the offense(s) committed. This is true even when the witness is called to rebut defense evidence showing that the accused ought to be retained.<sup>11</sup>

The TC may also choose to display the character of the accused through the filter of recidivism.<sup>12</sup> Using this filter, which typically requires the use of an expert witness, the TC seeks to portray the offender as one who is likely to reoffend, thus negatively impacting his rehabilitative potential.<sup>13</sup> The expert must be shown to have sufficient knowledge of the accused and her crimes to offer such opinion.<sup>14</sup> Pitfalls to this approach abound, among them the danger of presenting profile evidence<sup>15</sup> and of presenting evidence that is merely generic and not necessarily applicable to the accused.<sup>16</sup>

## Defense Case

An examination of the accused’s character can be, by definition, a presentation of mitigation evidence, particularly where the accused’s background is one of hardship and

<sup>9</sup> MCM, *supra* note 1, R.C.M. 1001(b)(5)(B).

<sup>10</sup> *United States v. Armon*, 51 M.J. 83 (C.A.A.F. 1999); MCM, *supra* note 1, R.C.M. 1001(b)(5)(C).

<sup>11</sup> *See United States v. Eslinger*, 70 M.J. 193 (C.A.A.F. 2011).

<sup>12</sup> *United States v. Ellis*, 68 M.J. 341 (C.A.A.F. 2010) (holding that the military judge did not abuse his discretion in allowing recidivism expert to opine on the rehabilitative potential of the accused, despite not having personally examined the accused).

<sup>13</sup> *Id.* This kind of evidence has a high potential for misuse; obviously the members can only sentence the accused for the offenses of which she has been convicted, not because she is a future risk to reoffend. Accordingly, the military judge might consider an instruction to the members limiting this evidence to its impact, if any, on the accused’s rehabilitative potential.

<sup>14</sup> *Id.* at 346 (providing the following helpful string cite: *United States v. Gunter*, 29 M.J. 140, 141 (C.M.A.1989) (reviewing data from a drug rehabilitation file was sufficient basis); *United States v. Stinson*, 34 M.J. 233 (C.M.A. 1992) (reviewing accused confession; observing the guilty plea inquiry; reviewing the Office of Special Investigation report and statements by the victim; reviewing the accused’s mental health records; and interviewing the victim was sufficient basis); *United States v. Scott*, 51 M.J. 326, 328 (C.A.A.F.1999) (reviewing an accused’s unsworn statement and two mental health evaluations was sufficient basis); *United States v. McElhaney*, 54 M.J. 120, 134 (C.A.A.F. 2000) (interviewing the victim and observations in court were not sufficient basis, also relying on fact that expert was a child psychiatrist rather than a forensic psychiatrist)).

<sup>15</sup> *United States v. Banks*, 36 M.J. 150 (C.M.A. 1992).

<sup>16</sup> *McElhaney*, 54 M.J. at 134.

disadvantage.<sup>17</sup> Defense counsel (DC) too often rely on the accused's unsworn statement to present such evidence. While this is an appropriate method, others might prove more persuasive.

Defense counsel should begin preparing their sentencing cases by first talking to the accused. This background interview can provide several leads for witnesses or documentary evidence in support of the defense theme. In cases where the theme, for example, is overcoming serious hardships, records documenting the accused's placement in foster care, orphanages, and other difficult or abusive environments should be a DC's target. Witnesses unrelated to the accused who can recount the nature of such hardships will often prove more persuasive than relatives providing similar information.

Few matters are more important and indicative of an accused's character of service than the awards and decorations a Soldier has received.<sup>18</sup> Defense counsel often present the enlisted record brief or officer record brief of the accused, combined with the "good Soldier book," as the sole evidence on these matters. Counsel should, however, consider that the citations in support of awards and decorations, while informative, are not as compelling as an account by an eyewitness establishing the reasons for the decoration. Award-earning service in a combat zone merits a detailed inquiry. Counsel should take heed that a Soldier who has deployed multiple times to Iraq and Afghanistan has contributed a level of service to the country that few can claim. Such service should be highlighted, explored, and offered as mitigation whenever available.

Defense counsel often ask their witnesses about the rehabilitative potential of the accused. This ignores the fact that the term "rehabilitative potential" comes from RCM 1001(b)(5), the portion of the rule outlining what the prosecution may present in sentencing. Defense should find far more profit in focusing on matters in mitigation and extenuation, those matters provided for in RCM 1001(c).<sup>19</sup>

In many cases, the accused's goal will be to continue her military service. Several methods may be employed to convey this theme to the sentencing authority. A particularly persuasive method of conveying this "retention evidence" to the sentencing authority is through the testimony, letters, and affidavits of fellow Soldiers who have

served with the accused.<sup>20</sup> While retention evidence appears to be a euphemism for "no punitive discharge is warranted here," the courts have consistently held that such evidence is indicative of the accused's rehabilitative potential and is thus allowed.<sup>21</sup> Nonetheless, "there can be a thin line between an opinion that an accused should be returned to duty and the expression of an opinion regarding the appropriateness of a punitive discharge."<sup>22</sup> Defense counsel should ensure they stay on the right side of this thin line by focusing the inquiry on the witness's willingness to serve or deploy with the accused again rather than the appropriateness of a punitive discharge; otherwise, the TC, in rebuttal, may seek to provide a "consensus view of the command."<sup>23</sup> Counsel should anticipate whether this view will differ from that offered by the defense witnesses.<sup>24</sup> Defense counsel should be alert to the prosecution overreach during rebuttal, as when the TC puts on a commander with limited knowledge of the accused or when such a commander brings with him the specter of unlawful command influence.<sup>25</sup>

Defense counsel should also consider the use of recidivism experts, particularly where the accused is vulnerable to a lengthy sentence to confinement. Such experts often come from the field of psychiatry.<sup>26</sup> In cases where the crime is particularly egregious, DC may best serve their clients by focusing their sentencing strategy on "rehabilitation of the wrongdoer" and "protection of society from the wrongdoer."<sup>27</sup> Such a focus could lead DC to seek

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<sup>20</sup> *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005) (finding retention evidence to be "classic mitigation evidence, which has long been relevant in courts-martial") (internal citations omitted).

<sup>21</sup> *Id.* at 410; *United States v. Eslinger*, 70 M.J. 193 (C.A.A.F. 2011); *Hill*, 62 M.J. 271; *United States v. Danes*, No. 20091072, 2011 WL 6010041 (A. Ct. Crim. App. Nov. 23, 2011) (unpublished), *rev'd on other grounds*, 71 M.J. 353 (C.A.A.F. 2012).

<sup>22</sup> *Griggs*, 61 M.J. at 409.

<sup>23</sup> *Id.* at 410 (quoting *United States v. Aurich*, 31 M.J. 95, 97 (C.M.A. 1990)).

<sup>24</sup> *See Eslinger*, 70 M.J. 193 (providing an account of how such evidence can favor both the government and the defense, and how both sides can commit error in presenting such evidence).

<sup>25</sup> *United States v. Pompey*, 33 M.J. 266, 270 (C.M.A. 1991) ("Where a rehabilitation opinion lacks a proper 'rational basis' or presents a risk of command influence, the opinion is no less objectionable because it is offered at the rebuttal stage rather than at the aggravation stage of the sentencing proceeding.").

<sup>26</sup> *United States v. Barfield*, 46 C.M.R. 321, 322 (C.M.A. 1973) ("[P]sychiatric evaluations of offenders and the nature of their behavior are often considered [at sentencing]. Whether such behavior is likely to be repeated or is an isolated aberration on the accused's part is obviously of importance in determining the sentence to be imposed.").

<sup>27</sup> U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHMARK para. 2-6-9 (1 Jan. 2010) (listing the five principal reasons society recognizes as justifying a sentence for one who breaks the law. They are: rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society of the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of (his) (her) crimes and (his) (her) sentence from committing the same or similar offenses.).

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<sup>17</sup> *See United States v. Loving*, 68 M.J. 1 (C.A.A.F. 2008).

<sup>18</sup> *United States v. Demerse*, 37 M.J. 488 (C.M.A. 1993) (finding "defense counsel's unexplained failure to present as sentencing evidence appellant's service record of awards and decorations for Vietnam service was legal error").

<sup>19</sup> *United States v. Hill*, 62 M.J. 271 (C.A.A.F. 2006) (finding that the defense "has broad latitude to present evidence in extenuation and mitigation under R.C.M. 1001(c), is not subject to the limitations of R.C.M. 1001(b)(5).").

and present expert evidence tending to minimize the future dangerousness of the accused, or on presenting evidence showing that rehabilitative programs available in confinement will prevent the accused from posing a threat to society in time. In the absence of a witness able to explain, for example, about sex offender rehabilitation programs at the United States Disciplinary Barracks at Fort Leavenworth, DC could ask the military judge to take judicial notice of such programs.<sup>28</sup>

## Conclusion

In the end, both TC and DC should focus their sentencing cases on the character of the accused. Such a focus is in line with military practice, a practice which treats each case as unique and each accused as worthy of an individually crafted sentence.

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<sup>28</sup> United States v. Flynn, 28 M.J. 218 (C.M.A. 1989) (finding the judge's instruction on such a program at Fort Leavenworth not to be error when the judge instructed on similar programs available at the Fort Riley Correctional Activity). Of course, to inform the military judge's decision on the request for judicial notice, counsel should be prepared to provide substantiating documentation to the military judge regarding the issue on which judicial notice is sought.