Ethics Materials - 2019 Fulton Conference

materials derived from TJAGLCS, Criminal Law Deskbook, January 2019

A. Military Trial Judge Qualifications:

1. Article 26, UCMJ. Military judge shall be a commissioned officer who is a member of the bar of a Federal court or the highest court of a State and who is certified to be qualified for duty as a military judge by TJAG.

a. Member of a bar. Military judge's "inactive status" with her state bar nevertheless equated to her being a "member of the Bar" of Pennsylvania as contemplated by Article 26(b). United States v. Cloud, ARMY 9800299 (A. Ct. Crim. App., Dec. 14, 2000) (unpub), aff'd, 55 M.J. 164 (C.A.A.F. 2001) (summary disposition); United States v. Brown, ARMY 9801503 (A. Ct. Crim. App. Dec. 11, 2000) (unpub), aff'd, 55 M.J. 366 (C.A.A.F. 2001) (summary disposition) (ACCA also considered fact that judge, although "inactive" in state bar, was a member in good standing of "this [the ACCA] Federal bar"). See also United States v. Corona, 55 M.J. 247 (C.A.A.F. 2001) (summary disposition).

2. Reserve Judges. Change to MCM.
a. Change to RCM 502; Executive Order removed holdover provision concerning qualifications for military judges.
b. MCM had mandated that military judges be commissioned officers on active duty in the armed forces. The current RCM 502(c) deletes that requirement, enabling reserve military judges to try cases while on active duty, inactive duty training, or inactive duty training and travel.
c. Issue: Does this mean reservists can try GCM and SPCMs? Generally, no. Only military judges assigned directly to TJAG and TJAG's delegate (Trial Judiciary) may preside at GCMs. AR 27-10, paras. 8-1(c)(2), 8-2(a) (11 May 2016).

3. Detailing. Military judges are normally detailed according to the regulations of the "Secretary concerned."

B. Military Appellate Judge Qualifications:

4. Article 66(a), UCMJ. Each Judge Advocate General Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (h). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State and must be certified by the Judge Advocate General as qualified, by reason of education, training, experience, and judicial temperament, for duty as an appellate military judge. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel. In accordance with regulations prescribed by the President, assignments of appellate military judges under this section (article) shall be for appropriate minimum periods, subject to such exceptions as may be authorized in the regulations

5. **Replacement of military judges – RCM 505(e)(2).** *United States v. Kosek*, 46 M.J. 349 (C.A.A.F. 1997). The Air Force did not violate a CAAF remand order by substituting a new military judge at accused's court-martial after the CAAF ordered that the record be returned to the "military judge" for reconsideration.

6. Appellate Judges.

a. *United States v. Walker*, 60 M.J. 354 (C.A.A.F. 2004). In a capital case, the CAAF granted the accused's motion for extraordinary relief regarding the composition of judges on his N-MCCA panel. In 1995, the accused's case was assigned to the N-MCCA panel 3. Over the years the composition of panel 3 changed resulting in the presence of only one judge in the spring of 2004. Most N-MCCA judges, to include the Chief Judge, were disqualified in the case. Based on the Chief Judge's disqualification the TJAG under Article 66, UCMJ selected a new Chief Judge to handle the accused's case. Immediately prior to the TJAG's appointment, the original Chief Judge established a new court policy establishing "an order of precedence among judges on the court for the purpose of exercising the responsibility to make panel assignments in a particular case in the event of the absence or recusal of the chief judge." The problem at issue occurred when the substitute Chief Judge appointed by the TJAG retired requiring the appointment of another substitute Chief Judge to proceed over the accused's case. At that time the N-MCCA attempted to use the new policy letter to select a substitute Chief Judge with objection from the accused. The CAAF held because the N-MCCA did not use the policy to select the first substitute Chief Judge it was not appropriate to use the policy to select the second substitute Chief Judge and a substitute appointment by the TJAG was necessary.

b. *United States v. Lane,* 64 M.J. 1 (C.A.A.F. 2006). A Member of Congress may not serve as an appellate judge for a service court because of the Ineligibility and Incompatibility Clauses of the United States Constitution. The CAAF reasoned that no Person holding any office under the United States [i.e., a service court judicial position] should simultaneously serve as a Member of either House during his Continuance in Office. In the case, Senator Lindsey Graham, a reserve military judge on the AFCCA, was challenged.

7. Tenure/Fixed Term and Appointment.

a. Settled issue regarding appointment of civilians to Coast Guard Court of Criminal Appeals. *Edmond v. United States*, 520 U.S. 651 (1997), *aff'g United States v. Ryder*, 44

M.J. 9 (C.A.A.F. 1996) (holding that civilian judges on Coast Guard Court of Criminal Appeals are inferior officers and do not require additional presidential appointment; therefore, the Congressional delegation of appointment authority to Secretary of Transportation to appoint judges is consistent with Appointments Clause. *See also United States v. Graf*, 35 M.J. 450 (C.M.A. 1992); *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1993), *aff'd*, 510 U.S. 163 (1994). *United States v. Grindstaff*, 45 M.J. 634 (N-M. Ct. Crim. App. 1997) (judges of courts of criminal appeals, military judges, and convening authorities

are not principal officers under Appointments Clause and do not require a second appointment).

b. *United States v. Paulk*, 66 M.J. 641 (A.F. Ct. Crim. App. 2008). Accused, an Air Force officer, pled guilty to several offenses and was sentenced to confinement for 30 days and a dismissal. On appeal, the defense argued that the Equal Protection component of the Fifth Amendment's Due Process Clause was violated because the military judge and the appellate judges serve without a fixed term of office, while those in the Army and Coast Guard judiciary enjoy such protection by regulation. "Essentially, the appellant is saying that either all or none of the services should have fixed terms, but the mixed bag currently existing violates constitutional imperatives of equal protection." The court rejected the defense argument.

C. **Disqualification and Recusal**

1. **General.** Under RCM 902(a), "a military judge shall disqualify himself or herself in a proceeding in which that military judge's impartiality might reasonably be questioned." RCM 902(e) allows parties to waive any ground for challenge predicated on this subsection.

2. **Legal standard for recusal.** The Discussion to RCM 902(d)(1) directs a military judge to "broadly construe grounds for challenge" but not to "step down from a case unnecessarily." On appeal, a military judge's decision regarding recusal will be reviewed for an abuse of discretion.

3. **Non-waivable grounds for recusal.** Under RCM 902(b), five non-waivable (and rare) grounds are listed, directing that a military judge should be disqualified if he or she: (1) has a personal bias or prejudice about a party or personal knowledge of "disputed" facts in the case; (2) has acted as counsel, investigating officer legal officer, SJA, or convening authority for any of the offenses; (3) has been or will be a witness in the case, was the accuser, forwarded charges with recommendations, or expressed opinion about the accused's guilt; (4) is not qualified under RCM 502(c) or not detailed under RCM 503(b); or (5) is personally or has a family member who is a party to the proceeding, has a financial or other interest in the outcome of the proceeding, or likely to be a "material" witness.

4. **Appellate review – Liljeberg factors.** On appeal, courts apply the three factors from *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988), to determine if reversal is warranted when a military judge should have been recused: (1) risk of injustice to the parties in the case, (2) risk that the denial of relief will result in injustice in other cases, and (3) the risk of undermining public confidence in the judicial process.

5. Disqualification Mechanics

a. **General.** RCM 902 governs disqualification of a judge.

b. **Personal attack on judge may create UCI.** *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006). Trial counsel requested military judge's recusal based mainly on an alleged inappropriate professional and social relationship with the accused's civilian defense counsel (CDC). Military judge denied the Government's recusal motion and defense filed a UCI motion. During testimony on the UCI motion, the SJA alluded that the military judge lied regarding her relationship with the CDC and characterized "the [MJ] and [CDC] being seen leaving a theater together as a 'date.'" Without ruling on the UCI motion, military judge recused herself finding that there was no basis for recusal in fact or appearance but she was unable to remain impartial "following the Government's attack on her character." Another military judge was detailed who sua sponte recused himself because "he was so shocked and appalled by the unprofessional conduct of [the TC] and [the SJA] that he was not convinced he could remain objective." This required detailing two additional military judges to conduct

various proceedings which eventually lead to a guilty plea by the accused. On appeal, the N-MCCA held that the actions of the TC and SJA were unprofessional and constituted unlawful command influence but that their actions did not prejudice the accused's court-martial which was tried by two impartial military judges. The CAAF, however, ruled "since the appearance of unlawful influence was created by the Government, achieving its goal of removing [the MJ] without sanction, a rehearing before any [judge] other than [the detailed MJ] would simply perpetuate this perception of unfairness." Findings and sentence set aside and charges dismissed with prejudice.

6. Disqualification Standard

a. **Remote financial interest not enough.** *United States v. Reed*, 55 M.J. 719 (A. Ct. Crim. App. 2001). The accused pled guilty to conspiracy to commit larceny and to willfully and wrongfully damaging nonmilitary property in a scheme to defraud USAA automobile insurance company. During sentencing, a USAA claims handler talked about fraudulent claims and their effect on the company's policyholder members. The military judge (himself a policyholder member) immediately disclosed his affiliation with USAA and stated this would not affect his sentencing decision. The military judge allowed the defense an opportunity to voir dire, and the DC exercised it. The military judge also offered the defense the opportunity to challenge him for cause, but the defendant declined. The court, after *sua sponte* disclosing all judges of the ACCA are also policy holders of USAA, held there was nothing improper or erroneous in the judge's failure to disclose his policy holder status until a potential ground for his disqualification unfolded. Further, it found the military judge's financial interests were so remote and insubstantial as to be nonexistent. *See also* RCM 902(b)(5)(B) (non-waivable basis for recusal if military judge has financial interest that could be "substantially affected" by outcome of case).

b. **Potential disqualification based on previous victimization**. *United States v. Robbins*, 48 M.J. 745 (A.F. Ct. Crim. App. 1998). Military judge who was the victim of spousal abuse 13 years ago before presiding at a trial of an accused charged with battery of his pregnant wife (and intentionally inflicting grievous bodily harm on his wife and involuntary manslaughter by unlawfully causing termination of his wife's pregnancy) did not abuse her discretion in failing to recuse herself. The Air Force court directs military judges to apply a totality of the circumstances type test to resolve recusal matters involving military judges who are victims of the type of offense with which an accused is charged. The court emphasizes that our "national experience" supports a preference for "judges with real-life experiences."

c. **Military judge and accused members of same chain of command.** *United States v. Norfleet*, 53 M.J. 262 (C.A.A.F. 2000). Presence of military judge's superiors in SPCMCA chain of command did not require military judge's recusal under RCM 902. Accused was an Air Force paralegal, assigned to AF Legal Services Agency. Commander, AFLSA, served as director of Air Force judiciary and endorser on military judge's OER. Commander of AFLSA forwarded case (without recommendation) to Commander, 11th Wing (the SPCMCA), for disposition. CAAF held that this did not constitute a *per se* basis for disqualification. In light of military judge's superiors taking themselves out of the decision making process, the full disclosure by the military judge, and opportunity provided to defense to voir dire the military judge, the accused received a fair trial by an impartial judge.

d. **Knowledge of sentence limitation in a PTA.** *United States v. Phillipson*, 30 M.J. 1019 (A.F.C.M.R. 1990). Inadvertent exposure to sentence limitation does not require judge to recuse himself.

e. **Previous judicial exposure.**

(1) ***General rule.*** *United States v. Soriano*, 20 M.J. 337 (C.M.A. 1985). If the military judge is accuser, witness for prosecution, or has acted as investigating officer or counsel, disqualification of military judge is automatic. But military judge need not recuse himself solely on basis of prior judicial exposure to the accused. *See also United States v. Proctor*, 34 M.J. 549 (A.F.C.M.R. 1992).

(2) ***Prior trial of same accused.*** *United States v. Howard*, 50 M.J. 469 (C.A.A.F. 1999). No prejudicial error occurred where military judge presided at prior case involving accused (who was tried twice, first for assault, then for AWOL). Military judge noted prior adjudication on the record and accused maintained he wished to proceed with the present judge. During the sentencing phase in the AWOL case, the defense introduced the accused's version of the events underlying the prior conviction; military judge interrupted defense counsel and stated that, although he had awarded the accused "an unusually light sentence for a fractured jaw," he found him guilty during that prior trial because he had kicked the victim in the head while he was on the ground. CAAF held that there was no error.

(3) ***Prior judicial rulings.*** *Liteky v. United States*, 510 U.S. 540 (1994). Supreme Court (interpreting 28 U.S.C. § 455(b)(1)) indicates that prior judicial rulings against a moving party almost never constitute a basis for a bias or partiality recusal motion. Recusal not required except when prior rulings or admonishments evidence deep-seated favoritism or antagonism as would make a fair judgment impossible. *Cited in United States v. Loving*, 41 M.J. 213 (C.A.A.F. 1994).

(4) ***Contact with SJA/DSJA regarding companion cases.*** Military judges should not communicate with the SJA office about pending cases. In *United States v. Greatting*, 66 M.J. 226 (C.A.A.F. 2008), the military judge presided over three companion cases before hearing the present case. The accused's defense counsel questioned the military judge about the other cases and the judge admitted to having ex parte communications with "the staff judge advocate and probably his deputy" about the companion cases. Specifically, the military judge remembered saying that, for one co-accused, Government "sold the case too low given his culpability." For the other two cases, he "questioned the appropriateness of their being at a special court-martial." The military judge also commented on the accused's level of culpability as one of the "two staff NCOs." By contrast, the military judge "questioned" (his word) whether the two junior Marines should have been sent to a special court-martial at all. Based on the military judge's communications with the SJA and "probably his deputy," trial defense counsel made a motion for the judge to recuse himself under RCM 902(a) for implied bias. The military judge denied the request. In reversing, the court noted the SJA was "the very individual responsible for advising the convening authority," and the military judge made ex parte comments while clemency matters in the other cases were pending and, likely, before the accused's pretrial agreement had been finalized.

f. ***Ex parte communication***

(1) In certain circumstances, ex parte contact with the military judge may be required. The 2016 MJA provides for a ex parte proceeding to issue certain warrants before referral. Practitioners should consult the relevant RCM, their service regulations, and their technical chain of command to ensure the communication is necessary and appropriately scoped.

(2) ***Contact with trial counsel.*** *United States v. Butcher*, 56 M.J. 87 (C.A.A.F. 2001). The military judge, who was presiding over a contested trial, went to a party at the trial counsel's house and played tennis with the trial counsel. The CAAF reviewed whether

the military judge abused his discretion by denying a defense request that the judge recuse himself. The CAAF advised that under the circumstances the military judge should have recused himself. However, the Court held there was no need to reverse the case, because there was no need to send a message to the field, the social interaction took place after evidence and instructions on the merits, and public confidence was not in danger (the social contact was not extensive or intimate and came late in trial).

(3) ***Assisting trial counsel ex parte.*** *United States v. Cornett*, 47 M.J. 128 (C.A.A.F. 1997). Military judge did not abuse discretion when he denied a defense recusal request based on an *ex parte* conversation between military judge trial counsel, wherein the judge stated, "Well, why would you need that evidence in aggravation, because I've never seen so many drug offenses? Why don't you consider holding that evidence in rebuttal and presenting it, if necessary, in rebuttal?" Military judge invited voir dire concerning any predisposition toward sentence; accused selected trial by judge alone pursuant to voluntary pretrial agreement term; counsel and accused were given a recess to confer about the challenge after the accused made his forum selection; and the military judge made full disclosure on the record and disclaimed any impact on him. RCM 902(a) requirements regarding recusal and disqualification were fully met.

g. **Presiding over a companion case**

(1) **General.** A military judge is not per se disqualified from presiding over companion cases. *See also United States v. Nave*, ACM 36851, 2008 WL 5192217 (A.F. Ct. Crim. App. Dec. 10, 2008) (unpublished) (military judge not required to recuse after presiding over three companion cases, even though two of those co-accused were set to testify in this case and the military judge had ruled in a companion case about an entrapment defense the accused planned on raising). The CAAF noted that sitting on companion cases, without more, does not mandate recusal. *United States v. McIlwain*, 66 M.J. 312 (C.A.A.F. 2008 (citing *United States v. Oakley*, 33 M.J. 27, 34 (C.M.A. 1991)). *United States v. Rivers,* 49 M.J. 434 (C.A.A.F. 1998) (military judge did not abuse his discretion in denying defense motion that he recuse himself based on the fact that he had ruled on a command influence issue similar to the accused's in a companion case, and that he had learned that accused had offered to plead guilty. The military judge ruled in the accused's favor on the UCI issue, and no incriminating evidence or admissions from the accused relating to the offer to plead guilty were disclosed during trial on the merits. There was no reasonable doubt about the fairness of accused's trial.); *United States v. Burris*, 25 M.J. 846 (A.F.C.M.R. 1988) (holding presiding over earlier trial involving same urinalysis inspection did not disqualify trial judge).

(2) **Bias raised when judge conceded her partiality could be questioned.** In *United States v. McIlwain*, 66 M.J. 312 (C.A.A.F. 2008), before the accused made forum election, the military judge stated on the record that she had presided over two companion cases (one a guilty plea and one a mixed plea). In the course of those companion cases, the military judge conducted providence inquiries and heard evidence that implicated the accused. The military judge advised defense counsel: "[I]f your client desires to go with a judge alone, then I would not sit; I would recuse myself. If your client decides to go with a panel of either all officers or officers and enlisted members, then I'm comfortable that I will be able to objectively instruct the members, rule on objections, and that sort of thing, because my role is different." The accused elected trial by member and challenged the military judge. In response, the military judge noted she had made decisions favorable to the accused regarding witness credibility in the companion cases, decisions that "would suggest to an impartial person looking in that I can't be impartial in this case" if serving as the fact finder; however, the military

judge reiterated that she would be comfortable presiding over a members case. The CAAF held the military judge abused her discretion in refusing the recusal request and set aside the findings and sentence. On the military judge's concession that an "impartial person" would have questioned her impartiality, the CAAF held the military judge abused her discretion in denying the recusal motion.

h. **Repeated sua sponte (and pro-Government) decisions may create appearance of partiality**. *United States v. Johnston*, 63 M.J. 666 (A.F. Ct. Crim. App. 2006). Military judge "abandoned his impartial role in th[e] case solely on the basis of his actions and rulings during the trial." The court noted the ruling was unusual because a specific ground for dismissal did not arise under RCM 902 but that after applying an objective test, based on the standpoint of a person watching the proceedings, the judge's rulings created the appearance of partiality in favor of the Government. The military judge twice sua sponte reversed a previous judge's ruling and admitted evidence regarding statements made by the accused's wife that were strongly pro-Government. The court stated that although no actual bias by the military judge was noted, the judge abused his discretion by not disqualifying himself under RCM 902. Findings and sentence reversed.

i. **Busted providence inquiry.**

(1) **General.** The military judge is not required, *per se*, to recuse himself from further proceedings in a trial unless his impartiality was reasonably in question. *United States v. Bray*, 49 M.J. 300 (C.A.A.F. 1998) (where judge has conducted a providence inquiry, reviewed a stipulation of fact, and entered findings of guilty to initial pleas but accused thereafter withdrew plea based on possible defense that came out during sentencing, military judge was able to preside over subsequent guilty plea unless he had formed an "intractable opinion as to the accused's guilt," and a reasonable person who knew the facts of the case would question the appearance of impurity and have doubts as to the military judge's impartiality).

(2) **Preference for recusal.**

(a) Army. The Army's preference is for the military judge to recuse himself after the withdrawal of a guilty plea. *United States v. Rhule*, 53 M.J. 647 (A. Ct. Crim. App. 2000)

(b) Air Force. Judge not disqualified simply based on participation in first providence inquiry. *United States v. Dodge*, 59 M.J. 821 (A.F. Ct. Crim. App. 2004), *rev'd on other grounds*, 60 M.J. 368 (C.A.A.F. 2004). Accused completed the entire providence inquiry but prior to the announcement of findings the parties disagreed over the maximum punishment. The accused then requested to withdraw his plea and proceed to trial, which request the military judge granted, and the case was adjourned for sixty days. During forum selection for the now contested proceeding, the accused claimed his rights to forum were circumscribed by the continued presence of the military judge who heard his providence inquiry and that he had no practical option but to select a trial by members. Military judge allowed the accused to voir dire her regarding her potential bias and denied his challenge noting "she had not accepted [his] plea, had not formed an opinion concerning his guilt or innocence and everything she knew about the case was learned in her judicial capacity." Subsequently, accused pled guilty to the same specifications (except for one) that he attempted to plead guilty to in the first hearing. AFCCA held the accused's forum rights were not impinged citing RCM 903(c)(2)(B) and stated "there is no concomitant absolute right" to have a case tried by military judge alone. Further the court held the military judge is not disqualified "based simply on her participation in

the first providence inquiry." The court declined to adopt the Army's approach in this situation stating "We are aware of the [ACCA's] approach . . . expressing a preference for recusal after withdrawal of guilty pleas" (citing *Rhule*) but "this Court rejected that approach long ago."

(3) **Revalidation of request for trial by military judge encouraged.** *United States v. Winter*, 35 M.J. 93 (C.M.A. 1992). Military judge is not *per se* disqualified after conducting a providence inquiry and then rejecting accused's plea of guilty to a lesser included offense. Counsel and judges should determine whether the judge should ask the accused if accused wants to continue to be tried by judge alone when the judge has rejected the plea.

j. **Knowledge of witnesses.**

(1) ***Exposure to witnesses.*** *United States v. Davis*, 27 M.J. 543 (C.M.A. 1988) (military judge must use special caution in cases where he has heard a witness' testimony against a co-actor at a prior trial); *United States v. Oakley*, 33 M.J. 27 (C.M.A. 1991) (exposure to motions and pleas at prior trial of co-actors did not require recusal of military judge in trial before members).

(2) ***Relationship to witness.*** *United States v. Wright,* 52 M.J. 136 (C.A.A.F. 1999). Military judge announced at trial that he had a prior "close" association with NCIS agent stemming from a duty station at which the military judge, as a prosecutor, worked closely with the agent on several important criminal cases. Military judge said he felt the NCIS agent was an honest and trustworthy person and a very competent NCIS agent, but that the witness would not have a "leg up" over the credibility of other witnesses, particularly the accused. The judge said he gave all members of the Marine Corps a certain "credence." CAAF noted that military judges have broad experiences and a wide array of backgrounds that are likely to engender ties with other attorneys, law firms, and agencies. Here, military judge's full disclosure, sensitivity to public perceptions, and sound analysis objectively supported his decision not to recuse himself; these factors contribute to a perception of fairness.

k. **Consultation with other judges not improper.** *United States v. Baker*, 34 M.J. 559 (A.F.C.M.R. 1992) (holding that a military judge's consultations with another judge concerning issue in a case is not improper.)

l. ***Conduct outside of court.***

(1) ***Contact with civilian witness.*** *United States v. Quintanilla*, 56 M.J. 37 (C.A.A.F. 2001). The military judge became involved in verbal out-of-court confrontations with a civilian witness that included profanity and physical contact. The military judge also engaged in an *ex parte* discussion with the trial counsel on how to question this civilian witness about the scuffle. The CAAF held the military judge's failure to fully disclose the facts on the record deprived the parties of the ability to effectively evaluate the issue of judicial bias. As such, the court remanded the case for a *DuBay* hearing.

(2) ***Comments about accused outside of court.*** *United States v. Miller*, 48 M.J. 790 (N-M. Ct. Crim. App. 1998). Assuming *arguendo* that military judge stated, upon hearing that the accused suffered a drug overdose and was medically evacuated to a hospital, that the accused was a "cocaine addict and a manipulator of the system" and that "perhaps the accused would die," such comments did not establish a personal bias or prejudice on part of the judge. Rather, the remarks indicated a high level of impatience and frustration with an unplanned delay in a scheduled court-martial proceeding. The test applied by the Navy court was whether the remarks reasonably suggests a "deep-seated and unequivocal

antagonism" towards the accused as to make fair judgment impossible. *See Liteky v. United States*, 510 U.S. 540 (1994).

m. **Conduct of trial & judicial advocacy.**

(1) ***Impartial and objective stance***. *United States v. Hardy*, 30 M.J. 757 (A.C.M.R. 1990). Military judge erred in *sua sponte* initiating discussion of appropriateness of defense counsel's sentencing argument and allowing trial counsel to introduce additional rebuttal.

(2) ***Praise***. *United States v. Carper*, 45 C.M.R. 809 (N.M.C.R. 1972). Improper for military judge to praise Government witness for his testimony.

(3) ***Examination***. Assess whether the judge's questions assist either side of the case. The number of questions is not a significant factor, but the tenor of those questions will be. *United States v. Johnson*, 36 M.J. 866 (A.C.M.R. 1993).

(a) *United States v. Foster*, 64 M.J. 331 (C.A.A.F. 2007). The accused, convicted of committing an indecent act against his daughter, argued on appeal that the military judge failed to remain impartial in his conduct toward their expert witness by: (1) limiting their expert's testimony, (2) questioning their expert, (3) failing to instruct the members that their expert was an expert and inaccurately summarizing her testimony, and (4) making inappropriate comments about their expert outside the panel's presence. The CAAF stated that a strong presumption exists that a military judge's trial conduct is impartial and "the test is whether, taken as a whole in the context of [the] trial, [the] court-martial's legality, fairness, and impartiality were put into doubt by the military judge's actions." The court held that the military judge's conduct, especially in relation to the inappropriate comments, departed from judicial propriety but "a reasonable observer would conclude that in the context of the whole trial, his actions did not compromise the court-martial's legality, fairness, or impartiality."

(b) *United States v. Acosta*, 49 M.J. 14 (C.A.A.F. 1998). Accused was convicted of wrongful distribution and use of methamphetamine. Defense case was based on entrapment. Defense cross examination resulted in Government witness stating that he put undue pressure on the accused to purchase drugs. When trial counsel failed to elicit the entrapment-negating information, military judge asked the witness 89 questions about the accused's prior uncharged misconduct relating to a drug transaction that predated the drug offenses that were the basis of the court-martial. Held: no error. The law provides the military judge with wide latitude in asking questions of witnesses. The military judge has a right, equal to counsel's, to obtain evidence. Here, the information was clearly rebuttal evidence that was admissible once the defense raised the entrapment defense.

(c) *United States v. Sanford,* No. 200500993, 2006 CCA LEXIS 303 (N-M. Ct. Crim. App. Nov. 6, 2006) (unpublished). During a motion to suppress incriminating statements made to "Capt M," military judge did not have enough evidence to rule and notified the parties that he wanted to call three witnesses who had also given statements to Capt M in order to discern the procedures Capt M used to interview witnesses. The military judge questioned the witnesses and offered counsel an opportunity to question them. On appeal, the defense claimed that the military judge "abandon[ed] his neutral role in resolving the . . . motion to suppress." The court noted that under Article 46, UCMJ and MRE 614, the military judge is permitted to call or recall witnesses and has wide latitude in questioning witnesses. As such, the

military judge did not abandon his neutral role, as his efforts in calling the witnesses were an attempt to clarify the facts pertaining to the defense motion. The court concluded that "a reasonable person observing the . . . court-martial would not doubt its fairness or the impartiality of the military judge." *See also United States v. Johnson,* No. 36433, 2007 CCA LEXIS 127 (A.F. Ct. Crim. App. Mar. 29, 2007) (unpublished) (the military judge did not abandon his impartial role when he questioned a defense witness (also a co-actor) about what sentence the co-actor received in his own trial when the defense did not object and the answer favored the defense).

(d) *United States v. Hernandez,* No. 200501599, 2007 CCA LEXIS 183 (N-M. Ct. Crim. App. Jun. 12, 2007) (unpublished) (the military judge did not become a "partisan advocate when he 'ask[ed] clearly incredulous impeaching questions' of the appellant's mother who was a defense witness" because the defense did not object or move to disqualify the military judge and "a reasonable person . . . would not have doubted the military judge's impartiality or the legality or fairness of the trial.").

(e) *United States v. Paaluhi,* 50 M.J. 782 (N-M. Ct. Crim. App. 1999), *rev'd on other grounds*, 54 M.J. 181 (C.A.A.F. 2000). Military judge did not abandon his impartial role despite accused's claims that the judge detached role and became a partisan advocate when his questions laid the foundation for evidence to be admitted against the accused and when he instructed the accused to assist the Government to procure the presence of the prosecutrix.

(f) *United States v. George*, 40 M.J. 540 (A.C.M.R. 1994). Military judge improperly limited defense voir dire and cross-examination, extensively questioned defense witnesses, limited number of defense witnesses, assisted TC in laying evidentiary foundations, and limited DC's sentencing argument.

(g) *United States v. Morgan*, 22 M.J. 959 (C.G.C.M.R. 1986). Military judge overstepped bounds of impartiality in cross-examining accused to obtain admission of knife, which trial counsel had been unsuccessful in obtaining admission. *But see United States v. Zaccheus*, 31 M.J. 766 (A.C.M.R. 1990) (holding military judge's assistance in laying foundation for the admission of evidence was not error; actions did not make the judge a partisan advocate.).

(h) ***Outer limits?*** *United States v. Bouie*, 18 M.J. 529 (A.F.C.M.R. 1984) (no error on facts of case for military judge to ask 370 questions of accused).

(4) Judge demonstrated partiality where evidentiary ruling under MRE 412 prevented accused from providing an exculpatory answer to questions the military judge allowed to be asked. *United States v. Watt*, 50 M.J. 102 (C.A.A.F. 1999). The military judge abandoned his impartial role when he ruled the accused could not respond to a question from the members (he had been asked "What reason did you have to believe she would have sex with you?" His answer would have been that the complainant had a "reputation for being easy."). The military judge then repeatedly asked the accused the question, and allowed TC to badger him with similar questions. Accused repeatedly stated that he could not answer the question asked. Counsel then implied in closing that accused knew he had no reason to believe complainant would not have sex with him, as opposed to a simply inadmissible one. Accused "was left to defend himself without assistance" from defense or military judge.

(5) ***Intemperate comments from the bench concerning the case.*** Remarks that suggest the military judge will hold a party responsible for taking a legally sound and available

option (here, Article 62 appeal) undermine public confidence and should not be made. *United States v. Kirk*, No. Misc. 20100443 (A. Ct. Crim. App. July 28, 2010) (unpublished). The Government initially filed an Article 62 appeal, challenging the military judge's decision to suppress the accused's statements based on a violation of Article 31(b), UCMJ. The ACCA reversed the military judge's ruling on the suppression issue and then (on its own accord) commented on the possible recusal of the military judge from further proceedings in the case. In ruling on the motion to suppress, the military judge had noted the Government could appeal his decision but added, "I do not expect to get overturned on this issue." The military judge continued:

> [I]f this case does come, you know, back three or four months from now I will be the military judge in the case . . . that is going to hear the facts in the future including the [first sergeant]'s testimony if they believe the statements should be admissible. But if you want to appeal you are welcome to. Is that your final decision, Government? I just want to make sure.

The ACCA found that these "gratuitous comments" called into question the perception of fairness and impartiality of the military judge. The court noted that RCM 902(a) directs recusal when a military judge's "impartiality might ***reasonably*** be questioned" (emphasis added by the court). While ACCA did not actually determine the military judge should be recused, the court opined "his comments suggest he prejudged the Government's evidence, and intimated the futility of appealing his decision in light of his anticipated role as ultimate fact finder." The court concluded: "We find his comments intemperate, injudicious, and inconsistent with the impartial role he is to play in the court-martial, creating at least the perception of unfairness to the parties, potentially undermining public confidence in his judicial role."

(6) ***Intemperate remarks from the bench concerning witnesses, counsel, and panel members.*** While incivility is not condoned, the case will not be set aside where the inappropriate remarks did not call into question the legality, fairness, and impartiality of the court-martial. *United States v. Todd,* No. 200400513, 2007 CCA LEXIS 237 (N-M. Ct. Crim. App. Jul. 9, 2007) (unpublished). During the trial, the military judge made several "injudicious" comments to witnesses, counsel, and even potential panel members. The military judge even referred to the convening authority's conduct in the case as "imbecilic." The N-MCCA characterized his statements as "needless comments," "incessant sarcasm," and "pompous condescension." The N-MCCA cautioned that military judges should be "patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others . . . [and the court] will not tolerate incivility by a military judge toward any trial participant, and that includes counsel." However, the court concluded that "[w]hile we do not condone that inappropriate comments made by the military judge, in the context of the entire trial, the legality, fairness, and impartiality of the court-martial were not put in doubt." Affirmed.

n. **Assistance to a party.**

(1) *United States v. Felton*, 31 M.J. 526 (A.C.M.R. 1990). Military judge should not have advised trial counsel on the order of challenges during voir dire.

(2) *United States v. George*, 40 M.J. 540 (A.C.M.R. 1994). Military judge improperly limited defense voir dire and cross-examination, extensively questioned defense witnesses, limited number of defense witnesses, assisted TC in laying evidentiary foundations, and limited DC's sentencing argument.

(3) *United States v. Hurst,* No. 200401383, 2007 CCA LEXIS 56 (N-M. Ct. Crim. App. Feb. 8, 2007) (unpublished) (holding that military judge did not abandon his impartial role by alerting the Government that they had failed to introduce evidence that two orders had been properly published, or by allowing Government to reopen the case over defense objection when the deficiency was a mere technical one and an earlier evidentiary ruling may have created confusion in the status of the evidence the military judge would consider).

(4) ***The outer limits?*** *United States v. Cooper,* 51 M.J. 247 (C.A.A.F. 1999). Military judge said in front of members that defense counsel had "thank[ed] [him] for helping perfect the government's case" through questions of a Government witness. Military judge also commented disparagingly on the poor quality of the defense counsel's evidence, a videotape made by the accused's wife. These comments did not plainly cause him to lose his impartiality or the appearance of his impartiality. Because the defense did not object to the comments, CAAF applied a plain error analysis, and found the judge's questions were not improper. Further the military judge explained to the members his neutral intent in asking questions and instructed the members to not construe his questions as favoring the Government. CAAF found the military judge's comments about his irritation with defense was inappropriate before the members, though not sufficient to divest him of the appearance of impartiality because his comments were couched within unequivocal instructions protecting the accused from prejudice. Finally, his comments upon the quality of defense evidence were not impermissible, because just the RCM 920(e)(7) discussion permits the military judge to comment on the evidence during instructions. While the military judge's comments "may have been improper," the trial's legality, fairness and impartiality were not put into doubt.

o. **Sentencing.**

(1) **Discussion of religious principles.** *United States v. Green*, 64 M.J. 289 (C.A.A.F. 2007). Prior to announcing the sentence, military judge provided the accused an explanation for the adjudged sentence. He referenced the Bible and other religious principles. On appeal, accused claimed that the military judge demonstrated an impermissible bias by interjecting his own religious views into the sentencing process. Claims of judicial bias are evaluated to determine, "in view of the sentencing proceeding as a whole, whether a reasonable person would doubt the court-martial's legality, fairness, and impartiality." The court found that if there was any error, it was harmless based on several factors. First, the sentence did not "reflect prejudicial consideration of extraneous factors." Second, the defense first introduced the subject of religion during sentencing. Third, the military judge expressly stated that "he would not consider the [accused's] fealty to his religious tenets as a sentencing factor." Fourth, the defense did not object to the military judge's remarks. Lastly, the remarks focused primarily on proper sentencing principles and only incidentally referenced religion. Therefore, military judge's remarks did not reflect any bias in this case.

(2) **Questioning of accused.** *United States v. Burton*, 52 M.J. 223 (C.A.A.F. 2000). Military judge's questions of the accused which revealed judicial sentencing philosophy did not reflect an inflexible predisposition where the military judge imposed only 30 days' confinement, well below the jurisdictional limit of the court-martial and the maximum punishment for the offense.

(3) **Summary of accused's statements during providence inquiry given to panel by military judge.** *United States v. Figura*, 44 M.J. 308 (C.A.A.F. 1996). Military judge did not become de facto witness for prosecution when during sentencing he gave

members summary of accused statements during providence inquiry. Defense and Government agreed to have military judge give summary, rather than introduce evidence through transcript or witness testimony.

(4) **Evidence of racial bias or prejudice not directed at accused.** *United States v. Ettinger*, 36 M.J. 1171 (N.M.C.M.R. 1993). Although remarks by military judge may demonstrate prejudice sufficient to constitute bias, accused must be a member of that class in order for comments to be disqualifying.

(5) **Military judge's inappropriate and intemperate remarks evaluated in light of whether they were so unreasonable as to indicate the judge abandoned his impartial role.** *United States v. Thompson,* 54 M.J. 26 (C.A.A.F. 2000). Military judge did not depart from his impartial role despite issuing numerous adverse rulings against defense, taking over questioning from counsel, shutting off presentations, expressions of impatience and exasperation with counsel, and the making of condescending or berating comments about counsels' performance. Defense counsel repeatedly alluded to being "ineffective" or being forced into providing ineffective representation. CDC requested that the military judge recuse himself under RCM 902(a), 902(b)(1), 905. Military defense counsel became tearful and complained she would think twice before raising an issue. Military judge countered "you need to investigate…a new line of work." While court noted much of the blame for breakdown between parties "stems from the military judge's inappropriate and intemperate remarks to counsel on the record," CAAF found military judge's actions were not so unreasonable that he abandoned his impartial role. Nevertheless, case returned to the Court of Criminal Appeals to order affidavits from both civilian and military defense counsel or to order a *DuBay* hearing on issue of ineffective assistance of counsel.

p. **"Bridging the gap" sessions.**

(1) **General.** Evidence of judicial bias or error revealed during a 'Bridging the Gap' session will generally be evaluated according to the same legal standard as bias or error revealed prior to or during trial.

(2) **Background**. The US Army Trial Judiciary Standard Operating Procedure encourages military judges to conduct a "post-trial critique" one-on-one with counsel after trial to improve trial skills. Judges should limit such discussions to trial advocacy tips. *See United States v. Copening,* 32 M.J. 512 (A.C.M.R. 1990) (suggesting "Bridging the Gap" may need reevaluation in light of issues arising concerning discussions by trial judges of legal issues that may come before them in future cases; *ex parte* discussions with counsel about the conduct of the trial; and discussions with counsel before the trial is final about rulings in the case).

(3) **Improper sentencing considerations revealed**. *United States v. McNutt*, 62 M.J. 16 (C.A.A.F. 2005). Military judge revealed during the "Bridging the Gap" session that he framed accused's sentence to take into account good time credit. Military judge sentenced the accused to seventy days with the idea that the accused would receive ten days good time credit and would serve sixty days of confinement. CAAF reversed the sentence, finding the military judge improperly considered the collateral administrative effect of good time credit. "[S]entence determinations should be based on the facts before the military judge and not on the possibility that [the accused] may serve less time than he was sentenced to based on the Army's policy."

(4) **Comments showing bias against homosexual conduct were improper where accused was charged with indecent acts with another male**. *United States v. Hayes*,

NMCCA 200600910, 2010 WL 4249518 (N-M. Ct. Crim. App. Oct. 28, 2010). Male accused pled guilty to indecent acts with another male in the barracks. Military judge made comments during a post-trial "bridging the gap" session with counsel that suggested a bias against homosexual conduct. In a unanimous decision, the N-MCCA found the military judge's comments created an appearance of bias that mandated disqualification; the court affirmed the findings and set aside the accused's sentence. Based on a *DuBay* hearing convened, the court found the following about the military judge's actions at trial and during "Bridging the Gap":

(5) ***Practical suggestions***. For military judges who elect to conduct "Bridging the Gap" sessions, consider the following:

(a) Never conduct an *ex parte* session.

(b) Provide feedback on technical aspects of counsel performance is ok (e.g., "You had trouble admitting the prior statement of the victim. Remember, the foundation for admitting a prior inconsistent statement consists of _____.")

(c) Avoid discussing the deliberative process or judicial philosophy (e.g., "The reason I found him guilty was ____.")

(d) Always bear in mind the trial may not be truly "over." *United States v. Holt,* 46 M.J. 853 (N-M. Ct. Crim. App. 1997), *aff'd,* 52 M.J. 173 (C.A.A.F. 1999) (suggesting that, where trial judge provides post-trial "practice pointers" to counsel prior to the cases being finalized, recusal would be mandated if the case were sent back for some sort of rehearing).

7. Actions when grounds for challenge exist

a. **Further actions void.** *United States v. Sherrod*, 26 M.J. 30 (C.M.A. 1988) (holding when a judge is disqualified, all further actions are void). *See also United States v. Howard*, 33 M.J. 596 (A.C.M.R. 1991) (holding when military judge becomes a witness for the prosecution, he is disqualified and all further actions, as in *Sherrod*, are void). *United States v. Wiggers*, 25 M.J. 587 (A.C.M.R. 1987) (holding when military judge recognized that his prior determination of witness' lack of credibility disqualified him from acting as fact finder, judge should have recused himself rather than direct a trial with members).

b. **Judge's sua sponte duty even after accused's waiver of disqualification under RCM 902(e)**. *United States v. Keyes*, 33 M.J. 567 (N.M.C.M.R. 1991). Military judge previously sat in a different case involving the accused. Defense had no challenge under RCM 902(b) and waived any challenge to the judge that might exist under RCM 902(a). Military judge properly recognized a *sua sponte* obligation to disqualify himself if warranted even with a defense waiver under 902(e). The military judge, however, found no basis for disqualification. Upheld by NMCMR.

c. **Improper for recused judge to select replacement**. *United States v. Roach*, 69 M.J. 17 (C.A.A.F. 2010). The accused's case was originally affirmed by an Air Force Court of Criminal Appeals panel that included the chief judge. The case went to CAAF and was remanded back to the AFCCA. While the initial CAAF review was pending, the AFCCA chief judge commented about the case at two public events. Following a motion by the defense, the chief judge recused himself from the case. The chief judge then sent an e-mail to the executive officer for the Air Force TJAG recommending that a specific judge be appointed to replace the chief judge on the case. The Air Force TJAG appointed this judge, who then convened the panel that considered the remanded case. CAAF vacated the AFCCA decision and remanded for new Article 66 review, finding the chief judge improperly took action in the case after recusal when he recommended his replacement. CAAF noted, "[E]ither a military judge is recused or he is not." Once recused, a judge shall not take further action in a case. If a military judge deviates from this requirement, "no matter how minimally," it "may leave a wider audience to wonder whether the military judge lacks the same rigor when applying the law."

Model Code of Judicial Conduct: Canon 2

Canon 2

A judge shall perform the duties of judicial office impartially, competently, and diligently.

Rule 2.1
Giving Precedence to the Duties of Judicial Office

Rule 2.2
Impartiality and Fairness

Rule 2.3
Bias, Prejudice, and Harassment

Rule 2.4
External Influences on Judicial Conduct

Rule 2.5
Competence, Diligence, and Cooperation

Rule 2.6
Ensuring the Right to Be Heard

Rule 2.7
Responsibility to Decide

Rule 2.8
Decorum, Demeanor, and Communication with Jurors

Rule 2.9
Ex Parte Communications

Rule 2.10
Judicial Statements on Pending and Impending Cases

Rule 2.11
Disqualification

Rule 2.12
Supervisory Duties

Rule 2.13
Administrative Appointments

Rule 2.14
Disability and Impairment

Rule 2.15
Responding to Judicial and Lawyer Misconduct

Rule 2.16
Cooperation with Disciplinary Authorities

Rule 2.11: Disqualification

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality* might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of facts that are in dispute in the proceeding.

(2) The judge knows* that the judge, the judge's spouse or domestic partner,* or a person within the third degree of relationship* to either of them, or the spouse or domestic partner of such a person is:

(a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

(b) acting as a lawyer in the proceeding;

(c) a person who has more than a de minimis* interest that could be substantially affected by the proceeding; or

(d) likely to be a material witness in the proceeding.

(3) The judge knows that he or she, individually or as a fiduciary,* or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household,* has an economic interest* in the subject matter in controversy or in a party to the proceeding.

(4) The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate* contributions* to the

judge's campaign in an amount that [is greater than $[insert amount] for an individual or $[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity].

(5) The judge, while a judge or a judicial candidate,* has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(6) The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(c) was a material witness concerning the matter; or

(d) previously presided as a judge over the matter in another court.

(B) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household.

(C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the

judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

ETHICS

Fulton Conference 2019

LTC Deidra J. Fleming
Associate Judge, ACCA

ETHICS MATERIALS

- **Outline**
- **PowerPoint Slides**
- **Model Code of Judicial Conduct Canons 2 & 2.11**
- **My Biography**

ROADMAP

- **Qualifications**
- **Disqualifications**
  - Legal Standards
  - Case Law Examples

QUALIFICATIONS

- **Trial Judges:**
  - Article 26, UCMJ
  - RCM 502 (c) - Education, Training, Experience, & Judicial Temperament
- **Appellate Judges:**
  - Article 66, UCMJ
  - RCM 1203 (a) - Education, Training, Experience, & Judicial Temperament

QUALIFICATIONS - Model Code of Judicial Conduct: Canon 2

A judge shall perform the duties of judicial office impartially, competently, and diligently.

Model Code of Judicial Conduct: Canon 2.11 - Disqualification

A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances . . .

Model Code of Judicial Conduct: Canon 2.11 Disqualification

- Personal Bias or Prejudice*/Knowledge
- Relationship
- Financial
- Campaign Donations
- Public Statement
- Prior Role

RCM 902

A military judge shall disqualify himself or her in any proceeding in which that military judge's impartiality might reasonably be questioned.

RCM 902: Disqualification

- Personal Bias or Prejudice/Knowledge
- Prior Role
- Relationship
- Financial

RCM 902 - Discussion

A military judge should carefully consider whether any of the grounds for disqualification in this rule exist in each case. The military judge should broadly construe grounds for challenge but should not step down from a case unnecessarily.

Appellate Standard of Review for Failure to Recuse

- Risk of Injustice to Parties in the Case
- Risk that the Denial of Relief Will Result in Injustice in Other Cases
- The Risk of Undermining Public Confidence in the Judicial Process

Case Studies

- Reed (ACCA/2001) – Financial Interest
- Robbins (AFCCA/1998) – Prior Victim of an Offense
- Butcher (CAAF/2001) – Interaction with Counsel
- Johnston (AFCCA/2006) – Impartiality
- Quintanilla (CAAF/2001) – Interaction with Witness

Case Studies

- Morgan (CGCMR/1986) v. Zaccheus (ACMR 1990) – Impartiality
- Kirk (ACCA/2010) – Impartiality
- Todd (NMCCA/2007) – Impartiality
- Martinez (CAAF/2011) 70 M.J. 154 – Impartiality
- Hasan (CAAF/2012) 71 M.J. 416 – Impartiality
- Roach (CAAF 2010) 69 M.J. 17 – Appellate Recusal