

## A View from the Bench

### Findings, Sentencing, and the “Good Soldier”<sup>1</sup>

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#### Introduction

You are a defense counsel (DC) assigned to Fort Swampy. The senior defense counsel just gave you a case in which an E-7 platoon sergeant has been charged with wrongfully using marijuana. You have talked with the platoon sergeant and have done some basic pretrial investigation. From what you can determine, your client has no disciplinary record prior to the marijuana use, except an Article 15 for shoplifting a candy bar from the post exchange during basic training some fifteen years ago. Everyone in the unit loves him. Your client even has a Soldier’s Medal for helping motorists trapped in a collapsed freeway during the San Francisco earthquake; a letter of commendation from the local mayor for spending an entire weekend filling sandbags for local residents when the river flooded last year; received the maximum score on his APFT; and qualified “expert” on his weapon at every range for the last eight years. He also has top blocks and glowing language on every single evaluation report ever given to him. A range of witnesses—from private to lieutenant colonel—say they would be proud to serve with him again, even if convicted as charged.

You read Rule for Courts-Martial (RCM) 1001(c)(1)(B),<sup>2</sup> remember the language about “particular acts” and can’t wait to blast the Government with all the specifics at sentencing (if you even get that far).<sup>3</sup> However, you also recall being told at the Criminal Law Advocacy Course that it is a good idea to start presenting your sentencing evidence during the findings portion of the case. On the other hand, you also remember that different rules govern the admissibility of evidence at different stages of the trial. This note explores the rules you should consider before deciding whether and when to offer this information.

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<sup>1</sup> For a good in-depth discussion of this subject, see Randall D. Katz & Lawrence D. Sloan, *In Defense of the Good Soldier Defense*, 170 MIL.L. REV. 117 (Dec. 2001).

<sup>2</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(c)(1)(B) (2008) [hereinafter MCM].

<sup>3</sup> For a good overall discussion of a good soldier defense, see *United States v. Brewer*, 43 M.J. 43 (1995).

#### Findings

When you ask your client how he could test positive for marijuana, he shrugs and says “Sir, I have no earthly idea.” You’ve looked at the chain of custody: nothing. You’ve talked to the lab folks: nothing. What’s left? How about the “Good Soldier” defense.<sup>4</sup>

Generally, evidence of a person’s character is not admissible to show that the person acted in conformity with that character on a particular occasion.<sup>5</sup> However, an accused can offer evidence of a character trait that is “pertinent” to the charged offense to show that the accused did act in conformance with that character trait.<sup>6</sup>

What is a “pertinent” character trait? It is generally a character trait that is relevant to the charged offense.<sup>7</sup> For example, truthfulness might be a pertinent character trait for a charge of false swearing, but not for a charge of assault consummated by a battery. As a DC, how should you offer a “Good Soldier” defense on the merits? Under Military Rule of Evidence (MRE) 405(a), you can prove it by opinion or reputation evidence only, not by specific acts of conduct (except in very limited circumstances under MRE 405(b)). Remember that the witnesses must have a sufficient foundation to testify about their opinion of the accused’s character or his reputation for that character in the community. (See *United States v. Breeding*<sup>8</sup> for a good discussion of those foundational requirements.)

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<sup>5</sup> MCM, *supra* note 2, MIL. R. EVID. 404(a).

<sup>6</sup> *Id.* MIL. R. EVID. 404(a)(1). The power of character evidence cannot be underestimated. The Supreme Court long has recognized that, in some circumstances, character evidence alone “may be enough to raise a reasonable doubt of guilt,” as “the jury may infer that” an accused with such a good character “would not be likely to commit the offense charged.” *United States v. Gagan*, 43 M.J. 200 (1995) (citations omitted). See also U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHBOOK para. 7-8-1 (10 Jan. 2010).

<sup>7</sup> According to Professors Saltzburg, Schinasi, and Schlueter, the term “pertinent” is roughly equivalent to the legal term “relevant.” STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 4-82, 4-83 (6th ed. 2006). Those scholars have said that “good military character” can be a pertinent character trait to “virtually any offense a service member is charged with.” *Id.* at 4-82 n.14; see generally *United States v. Wilson*, 28 M.J. 48 (C.M.A. 1989). Specifically, the Court of Military Appeals (CMA) has held it pertinent to a drug charge under Article 112(a). *United States v. Belz*, 20 M.J. 33 (C.M.A. 1985).

<sup>8</sup> 44 M.J. 345 (1996).

If you decide to present a “Good Soldier” defense, be familiar with the Government’s ability to respond to it. The defense holds the key to the character door; if you don’t open it, the Government cannot attack your client’s character. The Government’s ability to attack your client’s character is also limited by how far you open the door. Under MRE 405(a), the Government can cross-examine a witness on *relevant* specific instances of conduct. The narrower the character trait offered by you under MRE 404(a)(1), the narrower the range of specific instances of conduct that will be relevant to challenge the basis of that opinion.<sup>9</sup> However, “good military character” is about as broad a character trait as possible. By offering this type evidence, you probably kick the character door off its hinges and allow the Government a nearly unfettered opportunity to cross-examine the witness.

To recap, you as the DC can offer a pertinent character trait in the accused’s defense at trial. The character trait must be relevant to the charged offense, but, even then, you can only use opinion or reputation evidence on direct examination to prove it, not specific acts (except in very limited circumstances). When you do offer this evidence, the Government can cross-examine the witnesses about relevant specific instances of misconduct; the wider the character trait offered, the wider the range of allowable specific acts on cross-examination.

In this case, you know the only misconduct your client has committed is shoplifting, so you are comfortable offering the “Good Soldier” defense. You’d love to tell the members the reason your client received the Soldier’s Medal and about the other specific acts of laudable conduct, but you know you can’t do that now. You call a raft of witnesses to give their opinions about his good military character and their knowledge about his reputation in the unit for the same, but not their “opinions about his reputation.” Disappointed and thinking he’ll look foolish for asking “Did you know the accused shoplifted a candy bar 15 years ago?” when all the witnesses already know about it, the trial counsel (TC) decides not to ask about the specific instance on cross-examination, although he could have.<sup>10</sup>

However, the TC does say, “Mr. Witness, you just testified that the accused has good military character, in essence is a good Soldier. Would a good Soldier use

marijuana?” Immediately, you object, and the military judge (MJ) responds, “Basis?” You explain that the Government is prohibited from asking guilt-assuming questions on findings; whether the accused used marijuana is, after all, the question at issue on findings. Based on *United States v. Brewer*, the MJ should sustain your objection.<sup>11</sup>

### Sentencing—Government

Despite your best efforts, your client is convicted as charged. You now move to the sentencing phase of the court-martial, where the rules are a bit different.

The Government proceeds first. They must fit all their evidence into five “pigeon-holes”: RCM 1001(b)(1) through (5). If the evidence does not fit into one of these “pigeon-holes,” it is inadmissible.<sup>12</sup> Let’s review the two most frequently cited rules: RCM 1001(b)(4) and 1001(b)(5).

The Government is allowed to offer aggravation evidence under RCM 1001(b)(4) when that evidence “directly relate[s] to or result[s] from the offense[] of which the accused has been found guilty.”<sup>13</sup> If such evidence exists, the Government could offer evidence as to the impact on the unit of the accused’s drug use—maybe he was hospitalized for the use and the unit was without a platoon sergeant for a day or two—or the cost to the Army of the hospitalization.

Now the TC decides he wants to offer the shoplifting charge under RCM 1001(b)(4). Does it come in? The answer is no. Although the TC could have asked the “have you heard?” question about it on findings given the “Good Soldier” defense, it is *not* admissible as aggravation evidence; the TC will not be able to show that the shoplifting was a direct result of, or relates to, the drug use of which your client was convicted.<sup>14</sup>

The TC may also offer evidence of rehabilitative potential through opinion testimony of witnesses.<sup>15</sup> Because the opinion of rehabilitative potential involves the accused’s ability to become a productive member of society—not just whether he should stay in the Army<sup>16</sup>—the witness must

<sup>9</sup> Typically, the Government will ask the defense character witness if he or she “has heard” or “is aware” of “salient facts or events that logically bear upon the character trait in issue.” *United States v. Brewer*, 43 M.J. 43, 46 (1995). Restating the language from MRE 405(a), the Air Force Court of Criminal Appeals characterized those cross-examination questions as limited to “relevant facts bearing on the trait at issue.” *United States v. Pruitt*, 43 M.J. 864 (A.F. Ct. Crim. App. 1996), *aff’d* 46 M.J. 148 (1997).

<sup>10</sup> Keep in mind here that the Government can ask about the shoplifting—the underlying misconduct—not the Article 15 itself, which was the Government’s response to the misconduct. *United States v. Robertson*, 39 M.J. 211 (C.M.A. 1994). The TC is stuck with the answer—no extrinsic evidence of that specific act is allowed. *Id.*

<sup>11</sup> 43 M.J. 43 (1995).

<sup>12</sup> The Government’s evidence must also be in the proper form—for example, non-hearsay—and it must pass MRE 403 muster. While the Defense can ask for the MRE to be relaxed for them (RCM 1001(c)(3)), they are not initially relaxed for the Government.

<sup>13</sup> MCM, *supra* note 2, R.C.M. 1001(b)(4).

<sup>14</sup> On the other hand, the TC could offer the Article 15 under RCM 1001(b)(2). Here, the Article 15 comes in as evidence of the underlying misconduct and the accused’s character of prior service—in contrast to the Article 15’s inadmissibility on findings.

<sup>15</sup> MCM, *supra* note 2, R.C.M. 1001(b)(5).

<sup>16</sup> However, the Defense does not suffer from such a limitation on sentencing.

have sufficient knowledge of the accused to render such an opinion. It is up to the TC to lay the foundation for the opinion. The TC must establish that the witness knows the accused more thoroughly than as just a face in formation. Absent a sufficient foundation, the opinion testimony is inadmissible.

To avoid definitional problems, counsel should develop a habit of offering this evidence in one of two ways. Once sufficient foundation for the opinion has been laid, counsel could ask the witness, “Do you recall reading the definition of rehabilitative potential in the *Manual for Courts-Martial (MCM)*? Applying that definition to all you know about the accused, what is your opinion of the accused’s rehabilitative potential?”<sup>17</sup> Alternatively,<sup>18</sup> the TC could read the definition from the *MCM* to the witness and then ask the witness to apply the definition in rendering an opinion. Following either of these methods can help avoid the potential that a witness may give an opinion that is a euphemism for discharge.

In summary, the Government must be prepared to identify into which of the five “pigeon-holes” of RCM 1001(b) proffered evidence falls. Evidence offered under RCM 1001(b)(4) must directly relate to, or result from, the offense of which the accused was convicted. A sufficient foundation must be laid for opinion evidence offered under RCM 1001(b)(5), and the evidence must relate to the accused’s rehabilitation potential as a member of society, not just as a member of the Army.

### Sentencing—Defense

As previously noted, the defense can request a relaxation of the MREs when presenting its sentencing case. Such a request carries certain risks, and, as with the presentation of character evidence during findings, the defense holds the key to relaxing the rules. If the military judge grants the defense request to relax the rules during the defense case, the military judge may relax the rules during rebuttal to the same degree.<sup>19</sup> While the Government may not be able to offer some hearsay evidence in their case in chief on the merits, the Government may offer, and the MJ may accept, the same evidence in rebuttal once the evidentiary rules have been relaxed.

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<sup>17</sup> While this is an acceptable method—as it reduces the likelihood that the Government witness will give an impermissible opinion on whether the accused should stay in the Army—it is not the preferred method. This is because while counsel and the witness may now be on the “same sheet of music,” the members are not.

<sup>18</sup> This is the preferred method, because the members now hear the definition too and all trial participants are on the same “sheet of music.”

<sup>19</sup> *MCM*, *supra* note 2, R.C.M. 1001(d).

Evidence offered by the defense must also fit into the RCM 1001(b) “pigeon-holes,” although the “pigeon-holes” for defense evidence are much larger than those for Government-offered evidence. Defense evidence must be offered in rebuttal to Government evidence,<sup>20</sup> or must be presented in extenuation<sup>21</sup> or in mitigation.<sup>22</sup> Let’s focus on the latter.

While the DC in the opening scenario was prevented from telling the members what a great person the accused is during findings, he can and should offer evidence of the accused’s personal story during the sentencing case. Rule for Court-Martial 1001(c)(1)(B) does not limit the defense to opinion or reputation evidence, but allows the defense to admit “*particular acts of good conduct or bravery and evidence of the reputation or record of the accused . . . for . . . any other trait that is desirable in a service member.*”<sup>23</sup> This language is sufficiently broad to allow admission of nearly all praise worthy information about specific acts of the accused’s conduct. In this case, the Soldier’s Medal citation, the letter of commendation from the mayor, the APFT score, the weapons qualification scores, and the accused’s noncommissioned officer evaluation reports are all admissible and are commonly submitted in the form of a “Good Soldier” book.

Finally, although RCM 1001(b)(5) precludes the Government from offering euphemistic testimony about the accused’s potential for further productive service in the Army, the rule does not preclude the defense from directly offering such opinions. Clarifying prior, contradictory opinions, the Court of Appeals for the Armed Forces has held that RCM 1001(b)(5) is a limitation on Government evidence only;<sup>24</sup> the defense can offer the opinion testimony of witnesses who testify they would serve with the accused again.<sup>25</sup> Again, offering such evidence presents certain risk. Opening the door to opinion testimony may allow the Government to call witnesses on rebuttal to show the opinions of defense witnesses are “not a consensus view of the command.”<sup>26</sup>

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<sup>20</sup> *Id.* R.C.M. 1001(c).

<sup>21</sup> *Id.* R.C.M. 1001(c)(1)(A).

<sup>22</sup> *Id.* R.C.M. 1001(c)(1)(B).

<sup>23</sup> *Id.* R.C.M. 1001(c)(1)(B).

<sup>24</sup> *United States v. Griggs*, 61 M.J. 402 (C.A.A.F. 2005).

<sup>25</sup> As the Court of Appeals for the Armed Forces noted, even the Defense cannot offer explicit opinion testimony that the accused should not receive a punitive discharge, although there is a “thin line” between that and what the defense can do.

<sup>26</sup> *Id.* at 410 (citing *United States v. Aurich*, 31 M.J. 95, 96–97 (C.M.A. 1990)).

## **Conclusion**

When planning your case strategy, understand and incorporate the MREs and the RCMs that apply to each phase of the trial. Knowing what you can and cannot do—and more importantly what your opponent can and cannot do in response—will go far in making your case presentation much more valuable and effective.