Trial Judiciary Note

A View from the Bench: The Care and Keeping of Documents: Proper Handling and Use of Documentary Exhibits at Trial

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Introduction

Nearly every case, whether a simple judge alone guilty plea or a complex contested panel case, involves the use of documents. These exhibits come in all shapes and sizes, ranging from sworn statements made by the accused to Enlisted Record Briefs to enlarged diagrams of the crime scene. Despite the frequency with which these documents come into play at trial, military justice practitioners often struggle with the proper handling and use of documentary exhibits. This note is designed to assist counsel by outlining the basic rules for the use of documents, as well as by providing practical tips on the actual handling of documents during trial. Following these guidelines should ensure that your use of documents at trial not only follows the law and *Rules of Practice Before Army Courts-Martial*[1] (*Rules of Practice*), but also assists, instead of distracts, the fact-finder in determining guilt or innocence and an appropriate sentence, if necessary.

Choosing Documents

Counsel should always ask themselves the question: "For what purpose am I offering this document?" The answer to that question drives all that follows. Not all documents discovered during the investigatory stage and pre-trial preparation can or even should be used during trial. Documents tending to prove or disprove a fact in issue may be relevant.[2] Documents which contain prior statements of witnesses testifying at trial might be helpful to refresh a witness' recollection[3] or be admissible as the witness' recorded recollection.[4] Some documents may even be useful as demonstrative evidence to assist a witness in her testimony or to aid the fact-finder in understanding the witness' testimony.[5]

After identifying a relevant document, counsel should next determine if all portions of the document are relevant. For example, if an accused is charged with breaking restriction during a certain time period and the trial counsel has obtained the Installation Access Control System (IACS) records for the accused, the trial counsel might limit the IACS records to the relevant time period, rather than introduce every entry available for the accused. While counsel should certainly present all documents at court-martial which are necessary, there is no need to use each and every page of each and every document.

Marking Documents

The *Rules of Practice* direct that counsel shall provide all documents that they intend to use or introduce at trial to the court reporter for marking prior to trial.[6] This rule also applies to pre-trial hearings such that all documents intended for use during a motions hearing should also be marked prior to the hearing. Waiting until the middle of trial or the middle of a hearing to mark documents unnecessarily delays the presentation of the case and wastes time.

When marking documents, counsel should have those documents that they intend to use during the merits or sentencing case marked for identification as either Prosecution Exhibits or Defense Exhibits. Prosecution Exhibits will be numbered consecutively with Arabic numbers and Defense Exhibits will be labeled consecutively with capital letters, i.e., Prosecution Exhibit 1 for Identification and Defense Exhibit A for identification. All other exhibits, to include those used in support of motions, will be marked as appellate exhibits and numbered consecutively with Roman numerals, i.e., Appellate Exhibit I. When marking documents, counsel should have the documents marked in the order that they anticipate using the documents at trial or during the course of the hearing.[7]

Documents used in support of a motion should ordinarily be attached to the written brief at the time the written brief is marked as an Appellate Exhibit. Counsel frequently provide

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[1] U.S. ARMY TRIAL JUDICIARY, RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL 15.1 [hereinafter RULES OF PRACTICE].

[2] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 401 (2008) [hereinafter MCM].

[3] *Id.* MIL. R. EVID. 612.

[4] *Id.* MIL. R. EVID. 803(5).

[5] *See* United States v. Heatherly, 21 M.J. 113, 115 & n.2 (C.M.A. 1985) (citing generally J.E. Macy, Annotation, *Evidence: Use and Admissibility of Maps, Plats, and Other Drawings to Illustrate or Express Testimony*, 9 A.L.R.2d 1044 (1950)).

[6] RULES OF PRACTICE, *supra* note 1, 15.1.

[7] *Id.*

the military judge and opposing counsel with electronic documents when electronically "filing" a motion (or response),[8] but then fail to include those documents with the original document at the hearing. Those documents that were provided at the time of filing are a part of the written brief and must be marked for the record. If additional documents are presented by counsel at the motions hearing, they should be marked before the hearing as separate Appellate Exhibits.

Finally, keep in mind when marking documents that any document that is shown to a witness should first be shown to opposing counsel;[9] counsel are required by the *Rules of Practice* to show all exhibits to opposing counsel prior to trial.[10] Consequently, the wisest and most efficient course of action is to show opposing counsel all documents prior to marking them, whether before trial or, in the rare exception, during the course of trial.[11] Assuming the exhibit, after being shown to opposing counsel and marked, has remained with the court reporter as required by the *Rules of Practice*,[12] it is rarely necessary to show it to opposing counsel again before showing the exhibit to a witness or offering the exhibit into evidence.

Referring to Documents

Once a document has been marked, counsel should refer to the document by its exhibit name and number or letter. Appellate Exhibits are always referred to as an Appellate Exhibit, i.e., "Appellate Exhibit I" or "Appellate Exhibit IX." Prosecution and Defense Exhibits, on the other hand, are first marked for identification and until they are admitted into evidence, should always be referred to by the appropriate number or letter and as being "for identification," as in "Prosecution Exhibit 5 for identification" or "Defense Exhibit C for identification."[13]

Often, counsel refer to an exhibit that has been marked for identification as "what has been marked as Prosecution Exhibit 5 for identification." While not technically incorrect, this extra language is unnecessary. It is more appropriate and straightforward to refer to the exhibit as "Prosecution Exhibit 5 for identification." Most frequently, this arises when counsel are describing a certain document as they hand it to a witness; for example, "Mr. Witness, I'm handing you the accused's Enlisted Record Brief, which has been previously marked as Prosecution Exhibit 5 for identification." There are two problems with this approach. First, there is rarely a need to identify a piece of evidence for a witness. If that witness does not recognize the document, then he or she most likely should not be testifying about that document.[14] Second, the identification is unnecessarily wordy. If there is a specific need to identify the document for the witness, an efficient way to handle this is to state, "Mr. Witness, I'm handing you Prosecution Exhibit 5 for identification."

Once the exhibit has been offered and admitted into evidence, the military judge will strike the words "for identification" and the exhibit becomes simply a Prosecution or Defense Exhibit and should be referred to as "Prosecution Exhibit 5" or "Defense Exhibit C." Counsel frequently make the mistake of referring to an exhibit as "what's been marked as Prosecution Exhibit 5." Remember that once it has been admitted, it is no longer "marked" as an exhibit, it *is* the exhibit as labeled.

Handling Documents During Trial

After a document has been marked, it should remain with the court reporter for the duration of the trial.[15] When counsel need to show a document to a witness, they must first retrieve the document from the court reporter. As counsel approach the court reporter, they should announce that they are retrieving the document. When handing the document to the witness, they must also announce which document they are handing to the witness. Finally, counsel should indicate that the opposing counsel has previously viewed the document. As an example, imagine a case in which Prosecution Exhibit 6 for identification is a DA Form 3881, Rights Warning Procedure/Waiver Certificate, dated 7 June 2008. The trial counsel wishes to show the DA Form 3881 to a Criminal Investigation Division (CID) witness to lay the foundation for the form in order to enter it into evidence. The trial counsel would approach the court reporter, announcing, "I am retrieving Prosecution Exhibit 6 for identification, which has previously been shown to the defense, from the court reporter." The trial counsel would then take the DA Form 3881 from the court reporter and carry it to the witness, announcing, "I am handing Prosecution Exhibit 6 for identification to the witness." At that point, the trial counsel would hand the DA Form 3881 to the witness.

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[8] Note that the RULES OF PRACTICE consider a document to be "filed" when the original, with enclosures, is provided to the court reporter, with a copy (with enclosures) provided to the judge and opposing counsel. On occasion, the judge may allow "filing" to be done electronically, with the original given to the court reporter at the time of the motions hearing. *Id.* 3.1.

[9] *Id.* 15.1.

[10] *Id.* 15.4.

[11] As noted below, when actually offering the exhibit, counsel will confirm they have done this by concluding their offer with the phrase "previously shown to the [Government][defense];" i.e., "The Government offers Prosecution Exhibit 1 for identification, previously shown to the defense."

[12] *See* "Handling Documents During Trial," *infra*.

[13] RULES OF PRACTICE, *supra* note 1, 15.1.

[14] Identifying the document might also be leading—if the point is to find out whether the witness can identify the document—or it might disclose to the members information that should not be published to the members prior to admission of the document itself.

[15] RULES OF PRACTICE, *supra* note 1, 15.1.

The trial counsel will next conduct any necessary examination of the witness with respect to the document. When the examination is complete, and prior to cross-examination, the trial counsel should retrieve the document from the witness and return it to the court reporter,[16] announcing, "I am retrieving Prosecution Exhibit 6 for identification from the witness and returning it to the court reporter." Counsel must not leave the exhibit on the witness stand with the witness. Additionally, counsel must never take the exhibit back to counsel table, nor should they leave the exhibit on the lectern. Exhibits that are not being used during the course of examination belong in one place—with the court reporter.[17]

Showing Documents to Witnesses

Any document presented to a witness or used by a witness must first be marked as an exhibit. Counsel must not hand a document to a witness or show a witness a document without first having it marked. Likewise, counsel must never permit a witness to bring an unmarked document with him to the witness stand.[18] If, during the course of a witness' testimony, counsel discover that a particular document would be helpful to the witness, but that document has not been marked as an exhibit, counsel should pause, show the document to opposing counsel, hand the document to the court reporter to be marked as an exhibit, and then hand the exhibit to the witness.

When handing an exhibit to a witness, counsel should always give the original exhibit to the witness. Often, counsel have previously made copies of the exhibit for their own use; however, these copies are not a substitute for the exhibit and may not be given or shown to the witness. For example, defense counsel may intend to use Defense Exhibit D for identification, a sworn statement, while examining an eyewitness to a shooting. If the sworn statement is long, the defense counsel may have highlighted the relevant portions on her copy for her use. The defense counsel may not then hand her version of Defense Exhibit D for identification to the witness and ask him to review the highlighted portion, as this copy of Defense Exhibit D for identification does not accurately reflect Defense Exhibit D for identification because it contains additional markings that are not contained on Defense Exhibit D for identification. If the highlighted portion is absolutely necessary, the defense counsel should either highlight that portion and show it to the opposing counsel prior to having the document marked or, while using the document during examination, highlight the portion, show it to the opposing counsel, and then hand the document to the witness. Keep in mind that once an exhibit has been admitted into evidence, it cannot be changed or marked upon under any circumstance without first obtaining permission from the military judge.[19]

Although there are circumstances when it is appropriate for a witness to read a document to the panel,[20] it is improper for a witness to read from a document that has not been admitted into evidence.[21] Likewise, it is improper for a witness to read a document to herself, then look up and testify about what the document says. For example, it is improper for a law enforcement agent to examine a sworn statement for the time that the statement was given, and then announce to the court, "According to the sworn statement, we concluded at 1630 hours." Testifying about the contents of a document that has not been admitted into evidence is just as impermissible as reading aloud from that same document.

Notwithstanding the prohibition on reading documents to the fact-finder which have not yet been admitted into evidence, Military Rule of Evidence (MRE) 612 does allow a witness to read a document to herself to refresh her memory.[22] To properly refresh a witness' memory, counsel should first establish that (1) the witness does not currently remember a particular fact and (2) reviewing a particular document would assist the witness to remember that fact.[23] Once counsel have laid this basic foundation, the process of refreshing a witness' memory is very simple. Counsel should show the witness the relevant document, which has already been marked for identification as an exhibit, and have her read it (or a particular portion of it) silently to herself. When she is done reading, counsel should first retrieve the document and then determine if the document did, in fact, refresh the witness' memory. If the document was successful in refreshing the witness' memory, she may then testify about that specific fact. If the document did not refresh her memory, she may not rely on what she read in the exhibit as a basis for her testimony.[24]

[16] *Id.*

[17] *Id.*

[18] This is a frequent problem with experts, who have a tendency to bring case files with them. Trial counsel must be alert to intercept these files before the witness takes the stand.

[19] RULES OF PRACTICE, *supra* note 1, 15.1.

[20] *See* "Publishing Documents," *infra*.

[21] Until a document is admitted into evidence, the military judge has not made a determination under Military Rule of Evidence (MRE) 104 that the evidence is admissible, and therefore proper for consideration by the Court. MCM, *supra* note 2, MIL. R. EVID. 104(a). Allowing a witness to read from a document that has not been admitted into evidence invites violation of MRE 103(c), which states, "In a court-martial composed of a military judge and members, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the members by any means, such as making statements or offers of proof or asking questions in the hearing of the members." *Id.* MIL. R. EVID. 103(c).

[22] *Id.* MIL. R. EVID. 612.

[23] STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL § 612.02[04] (6th ed. 2006) (citing United States v. Jimenez, 613 F.2d 1373 (5th Cir. 1980)).

[24] Counsel might want to consider past recollection recorded in this situation. *See* MCM, *supra* note 2, MIL. R. EVID. 803(5).

Admitting Documents Into Evidence

Before documents can be considered by the fact-finder, they must be admitted into evidence. In order to be admissible as evidence, a document must be relevant as defined by MRE 401,[25] meaning that it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[26] Even if relevant, the admissibility of a document is dependent on the application of all the MRE and may be excluded for a variety of reasons.[27]

To properly admit documentary exhibits, counsel must lay a proper foundation for each document, identifying the evidence and connecting it with the issue in question.[28] Laying a proper foundation does not need to be, and rarely should be, formulaic. The foundation will naturally vary based on the exhibit and the purpose for which it is offered.

After showing its relevance and laying a proper foundation, the next hurdle in moving to admit a document into evidence is authenticating the document, or convincing the court that the document is what it purports to be.[29] Military Rule of Evidence 901, 902, and 903 govern the means and methods by which documents may be authenticated; as noted in MRE 901, there is no set method for proving authenticity.[30] Generally, the ways counsel may authenticate a document are: (1) through the testimony of a witness and (2) by self-authentication following MRE 902.

Laying a proper foundation and authenticating a document are not the only evidentiary requirements counsel face when introducing a document into evidence. Other applicable rules of evidence when introducing documents include the original documents rule, rule of completeness, and hearsay.

The original documents rule is addressed by MREs 1001 through 1008. Although MRE 1002 establishes the general rule requiring the production of the original document to prove the contents of any writing,[31] this strict rule is attenuated by MRE 1003, which allows a "duplicate" to be admitted into evidence as long as there is no question about the authenticity of the original and it would not be unfair to admit the duplicate in lieu of the original.[32] Applying MRE 1003 practically, a duplicate will be adequate in most circumstances. Further, MRE 1004 and MRE 1005 provide even more specialized circumstances under which a duplicate will be admissible, to include when the original is lost, destroyed, not obtainable, or collateral[33] and when the document is a public record.[34]

The rule of completeness is contained in both MRE 106 and MRE 304(h)(2). Military Rule of Evidence 106 allows an adverse party to require opposing counsel to introduce a full document, as opposed to just a portion of the document, when fairness would demand it.[35] Specifically, when providing just one portion of a document to the fact-finder would present the evidence in a manner that is misleading because the full disclosure of all the contents would fill in relevant facts and/or circumstances, MRE 106 would apply.[36] Additionally, MRE 106 allows an adverse party to require opposing counsel to introduce other documents which ought in fairness be considered contemporaneously with the document being introduced.[37] Military Rule of Evidence 304(h)(2) applies the rule of completeness to admissions or confessions such that the defense may introduce any remaining portions of an admission or confession that the Government did not introduce.[38]

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[25] *Id.* MIL. R. EVID. 402.

[26] *Id.* MIL. R. EVID. 401.

[27] *Id*. MIL. R. EVID. 402. Some reasons for excluding relevant documents include: the document cannot be authenticated properly under MRE 901; the document is inadmissible hearsay under MRE 802; the document is the result of privileged communications under MREs 502, 503, 504, or 513; or the probative value of the document is substantially outweighed by the danger of unfair prejudice under MRE 403.

[28] BLACK'S LAW DICTIONARY 656 (6th ed. 1990) (citing Taylor v. State, 642 P.2d 1294, 1295 (Wyo. 1982)).

[29] MCM, *supra* note 2, MIL. R. EVID. 901(a).

[30] *Id*. MIL. R. EVID. 901(b).

[31] *Id*. MIL. R. EVID. 1002.

[32] *Id*. MIL. R. EVID. 1003.

[33] *Id*. MIL. R. EVID. 1004.

[34] *Id*. MIL. R. EVID. 1005.

[35] *Id*. MIL. R. EVID. 106.

[36] *See, e.g.*, United States v. Salgado-Agosto, 20 M.J. 238, 239 (C.M.A. 1985) (applying MRE 106 to favorable portions of the accused's personnel records when the Government admits unfavorable portions); *see also* United States v. Maracle, 26 M.J. 431, 433 (C.M.A. 1988) (holding that MRE 106 permitted defense counsel to require the trial counsel to introduce the sentence imposed at a prior court-martial when introducing evidence of conviction by a prior court-martial) ("[B]asic considerations of fairness require that if the members be informed that appellant committed prior crimes for purposes of sentencing, they also should be informed how he was punished for them.").

[37] MCM, *supra* note 2, MIL. R. EVID. 106; *see, e.g.*, Mariani v. United States, 80 F. Supp. 2d 352, 361 (M.D.Pa. 1999) (holding that under Fed. R. Evid. 106, the Thompson Committee Minority Report should be admissible if the Majority Report was accepted into evidence).

[38] MCM, *supra* note 2, MIL. R. EVID. 304(h)(2). Military Rule of Evidence 304(h)(2) "(1) applies to oral as well as written statements; (2) governs the timing under which applicable evidence may be introduced by the defense; (3) permits the defense to introduce the remainder of a statement to the extent that the remaining matter is part of the confession or admission or otherwise is explanatory of or in any way relevant to the confession or admission, even if such remaining portions would otherwise constitute inadmissible hearsay; and (4) requires a case-by-case determination as to whether a series of statements should be treated as part of the original confession or admission or as a separate transaction or course of action for purposes of the rule." United States v. Gilbride, 56 M.J. 428, 430 (C.A.A.F. 2002) (citing United States v. Rodriguez, 56 MJ 336, 341–42 (C.A.A.F. 2002)).

Finally, the hearsay rules under MREs 801 through 807 apply to documentary evidence. If a document contains an assertion by a person, was made prior to trial, and is offered to show that the contents are true, then that document most likely contains hearsay[39] and will not be admissible at trial unless it fits within one of the exemptions in MRE 801(d) or one of the exceptions contained within MRE 803, MRE 804, or MRE 807.[40] When counsel introduce documents that fit one of the hearsay exemptions or exceptions, laying a proper foundation for that exemption or exception is particularly important. Consequently, counsel should carefully evaluate all documents for hearsay prior to introducing them and ensure that they are prepared to lay the foundation for their admission well before the start of trial.

Once the proper foundation has been laid and the authenticity of the document has been established, the verbal introduction of a document into evidence is a simple process. With respect to Appellate Exhibits, they are ordinarily marked and accepted by the military judge without any formal offer from counsel. While the military judge is bound by the rules of evidence when deciding many motions,[41] she is not bound by the rules of evidence (except those concerning relevance and privilege) when resolving "preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, the admissibility of evidence, an application for a continuance, or the availability of a witness."[42] For those matters in which the rules of evidence do not apply, the military judge will consider all appellate exhibits submitted by counsel, as long as they are relevant. For motions where the rules do apply, counsel should be ready to lay a proper foundation, to include establishing authenticity, for those documents or get opposing counsel to agree to admissibility in advance.[43] Procedurally, if the military judge determines that a document submitted by either side as an Appellate Exhibit is inadmissible and should not be considered, she will indicate on the record that she is not considering that particular document.

For Prosecution and Defense Exhibits, counsel should first retrieve the document from either the court reporter or the witness who was laying a foundation for the document. Counsel should then make an offer similar to the following: "Your Honor, the Government moves to admit Prosecution Exhibit 1 for identification into evidence." Although many trial guides suggest that counsel offer an exhibit into evidence "as Prosecution Exhibit 1" (for example),[44] this extra step is unnecessary. If the exhibit is admitted, it will already include the number or letter that is marked on it.

Assuming that counsel have already shown opposing counsel the document prior to offering it into evidence (an assumption that ought to be true ninety-nine percent of the time), there is no need to show the document to opposing counsel a second time prior to offering it. Counsel should instead include the fact that the exhibit has been previously shown to the opposing counsel at the time it is offered into evidence; i.e., "Your Honor, the defense moves to admit Defense Exhibit F for identification, which has been previously shown to the Government, into evidence." If the document has previously been shown to a witness, then counsel should have already accounted for the showing of the document to the other side; there is no need to restate this information.

Contemporaneously with verbally offering the document into evidence, counsel should hand the document to the court reporter, who will in turn hand the document to the military judge. The military judge needs to be afforded an opportunity to review the document before determining whether to admit it into evidence. Additionally, once the military judge has admitted the document, the military judge will indicate on the document that it has been admitted by lining through the words "for identification" and placing his initials on the document. After admitting a document, the military judge will return the document to the court reporter and counsel can retrieve the document from the court reporter for further use.

Publishing Documents

Counsel may only publish a document to the panel that has been previously admitted into evidence. One limited exception to this rule is demonstrative exhibits. Demonstrative exhibits are those which assist a witness with his testimony or assist the fact-finder in understanding the witness' testimony. These types of exhibits are quite frequently used by expert witnesses to illustrate their testimony in a manner to make it more understandable to the fact-finder; examples include photographs, charts, maps, and diagrams. Like all documents used during the course of trial, demonstrative exhibits must be marked and included in the record of trial; however, they do not need to be admitted into evidence before the fact-finder can consider them. When publishing demonstrative exhibits, the exhibit should be large enough and positioned for all parties to see.[45] If

[39] MCM, *supra* note 2, MIL. R. EVID. 801.

[40] *Id*. MIL. R. EVID. 802.

[41] *Id*. MIL. R. EVID. 1101(a).

[42] *Id*. MIL. R. EVID. 104(a).

[43] Most of the time, there is no legitimate dispute concerning the authenticity of documents in support of the motion (or opposition to the motion) and parties should readily agree to the documents being considered on the motion rather than waste time or effort disputing such matters at the motions hearing. Counsel should focus their energies on how the law ought to apply to the facts to achieve the desired outcome.

[44] *See, e.g.*, EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 65 (7th ed. 2008) (recommending the following verbiage for offering evidence: "Your Honor, I now offer plaintiff's exhibit number ten for identification into evidence as plaintiff's exhibit number ten.").

[45] RULES OF PRACTICE, *supra* note 1, 15.3.

counsel wish to provide individual copies of a piece of demonstrative evidence, such as a chart, to all members, they must first obtain the permission of the military judge.[46]

For documents that have been admitted into evidence, counsel may ask the court's permission to publish the document to the panel immediately after it has been admitted into evidence, so that the panel members are aware of its contents and can use that information while evaluating further evidence as the case develops.[47] Documentary evidence may be published in a number of ways, including, but not limited to: displaying it by electronic projection that allows each member to view the document, handing the document to the panel members for their review, or having a witness read the document to the members.

Unless the courtroom is specially designed to handle electronic projection, this method of publishing documents is the least desirable. Given that the majority of military courtrooms cannot accommodate having electronic equipment pre-arranged and ready for use at a moment's notice, the time and inconvenience of setting up the electronic equipment to project a document outweighs most benefits of publishing in this manner.

The most practical means of publishing a document is to hand it to the panel members for their review. A common mistake counsel make when publishing documents this way is to hand the original document to the panel and wait for all members to have an opportunity to examine the original document. Not only does this waste time, but it also violates the *Rules of Practice*. According to the Rules, "[w]hen a counsel requests to publish a document admitted in evidence to the members, that counsel will have previously made copies for each member."[48] Counsel should publish the document by having the bailiff assist in passing copies to each member and then collecting them when they have finished looking at the document.

Another way to publish documents to the members is to have a witness read the document to the members. This method of publication is most effective when the document is a personal letter or note. Generally, the witness authenticating the document is the most appropriate person to read the document to the members.

Reading documents to the panel members is not only an optional form of publication for most documents, but is also required in some circumstances. One instance in which reading a document to the members is required is when the contents of the document are admitted as a hearsay exception under MRE 803(5), recorded recollection.[49] When a document is admitted into evidence under MRE 803(5), the rule allows the document to be read to the members, but the document itself may not be shown to the members unless it is offered by an adverse party.[50] In this circumstance, the witness whose recollection has been recorded is the appropriate person to read the document to the members.

Another circumstance requiring the reading of a document to the members is when the parties have entered into a written stipulation of expected testimony. In accordance with the MRE, when a stipulation of expected testimony has been accepted into evidence, the stipulation "shall be read to the members, if any, but shall not be presented to them."[51] In this case, the counsel who introduced the stipulation into evidence should then read the stipulation to the members. Keep in mind that because the members will not have an opportunity to examine the stipulation later and must rely on their recollection and notes from the reading, counsel should be careful to read slowly and carefully to give the members time to digest the substance of the witness' expected testimony.

Using Documents During Opening Statements and Closing Arguments

Unless already admitted into evidence, the presentation of documents to the members during opening statements is rarely wise. As the military judge instructs the panel, "Opening statements are not evidence; rather, they are what counsel expect the evidence will show in the case."[52] In making opening statements, counsel should only remark on evidence which "they believe in good faith will be available and admissible."[53] While showing the members documents which they believe will be admitted in opening statements is not per se limited by the Rules for Courts-Martial, counsel must first receive permission from the military judge before showing such documents to the members during opening statements.[54] In most cases, the slight benefit that might be

[46] *Id.*

[47] Counsel should be prepared to explain to the judge why this publication is necessary for the members to understand other evidence that will follow. Otherwise, it should suffice that the members will have the exhibit for their use during deliberations.

[48] RULES OF PRACTICE, *supra* note 1, 15.2. Opposing counsel should be given the opportunity to confirm the copies are accurate reflections of the original which was admitted into evidence.

[49] Military Rule of Evidence 803(5) provides that a "memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly" is not excluded by the hearsay rule. MCM, *supra* note 2, MIL. R. EVID. 803(5).

[50] *Id*.

[51] *Id*. MIL. R. EVID. 811(f).

[52] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 2-5-5 (1 Jan. 2010).

[53] MCM, *supra* note 2, R.C.M. 913(b) discussion.

[54] RULES OF PRACTICE, *supra* note 1, 14.

gained by introducing documents to the members that have not been admitted into evidence is negated by the risk that the document will not be admitted. If a counsel believes that a document will be particularly useful during opening statements, he should seek to admit that particular piece of evidence prior to trial through an appropriate motion in limine.

Similarly, counsel must exercise caution when using documents during closing arguments. Although all documents admitted into evidence may certainly be referenced and shown to the members during arguments, those that were not received into evidence may not be used during closing arguments.[55] Additionally, documents may only be used in arguments for the purpose for which they were received into evidence. For example, when documents are introduced as extrinsic evidence of a prior inconsistent statement of a witness under MRE 613, the contents of the document may be used only to cast doubt on the witness' in-court testimony, and may not be used to argue the truth of the out-of-court statement.[56] Counsel's obligation to ensure that documents are used properly extends to all phases of the trial, to include closing arguments.

Including Documents in the Record of Trial

All marked exhibits, whether received into evidence or not, must be included in the record of trial.[57] With permission from the military judge, copies of exhibits may be included in the record of trial in lieu of originals.[58] Counsel should make a request to include copies in the record of trial either when the exhibit is offered into evidence or before authentication of the record of trial.[59] Ordinarily, the request is made at the conclusion of the trial, prior to adjournment of the proceedings. Any copies produced for the record of trial must be legible, permanent-type photocopies that mirror the actual exhibit as closely as possible, to include the use of color copies when the exhibit is in color.[60]

Conclusion

Handling and using documents in the courtroom need not be complicated, provided counsel follow certain basic rules established in the MCM and the *Rules of Practice*. Start by choosing documents carefully and understand the purpose behind each document—for example, is the document a vital piece of evidence, intended only to refresh a witness' recollection or simply a demonstrative aid? Determine well in advance of trial how to lay the proper foundation and authenticate each document—will witnesses be necessary or will a self-authenticating certificate suffice? Ensure that documents offered into evidence comply with the MREs—is the document hearsay and, if so, is there a hearsay exemption or exception allowing admissibility? Make copies of those documents that will be offered into evidence and published to the panel. Show each document to opposing counsel before trial and have all documents, with enclosures, marked prior to trial. Ensure that documents remain under the control of the court reporter and that only original exhibits are shown to witnesses. Publish documents only with the court's permission, after admission into evidence. Only argue the substance of documents that were admitted into evidence for substantive purposes. If copies need to be substituted in the record of trial, request permission from the military judge before the court adjourns. Planning for the use of documents and anticipating the requirements for their presentation to witnesses or the members, as well as for their admission into evidence, will make their use not only more efficient, but also more effective at trial.

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[55] MCM, *supra* note 2, R.C.M. 919(b) ("Arguments may properly include reasonable comment on the evidence in the case.").

[56] *See* United States v. Taylor, 44 M.J. 475, 480 (C.A.A.F. 1996) ("The fact that extrinsic evidence is permissible under Mil.R.Evid. 613(b) does not mean that the prior statement is admissible as substantive evidence.") (footnote omitted).

[57] MCM, *supra* note 2, R.C.M. 1103(b) and R.C.M. 1103(c).

[58] *Id*. R.C.M. 1103(b)(2)(D)(v) and R.C.M. 1103(b)(3)(B).

[59] RULES OF PRACTICE, *supra* note 1, 15.5.

[60] *Id*. 15.2, 15.5.