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Practice Notes

Effectively Presenting Digital Evidence

By Colonel Charles L. Pritchard Jr.

If we continue to [use] our technology without wisdom or prudence, our servant may prove to be our executioner.[1]
—General Omar Bradley

Digital evidence continues to make its way into court-martial presentations with varying degrees of success. Military courtrooms have modernized (and continue to modernize[2]) to maximize trial practitioners' ability to persuade the factfinder.[3] Yet, courtroom technology is simply the medium for conveying that which is of paramount importance to the trial: the evidence. Sometimes, trial practitioners focus on whether to use a horse-drawn cart, a bus, or a limousine without considering how many people the conveyance will hold; whether the right passengers are on board; whether someone got on or off without their knowledge; and where the pick-up and drop-off points are. In these instances, use of digital evidence and its technological carrier can be the "executioner" of a trial practitioner's case rather than a thought-provoking enhancement of the case.

This article explores issues with handling digital evidence in the courtroom and, to a lesser extent, the technology that conveys it. This is not a how-to article for the use of courtroom technology,[4] and it attempts to be more than a basic guide to evidence handling.[5] The article explores foundation, admission, publication, argument, and deliberation issues. The issues are developed through a hypothetical attempted premeditated murder case and are framed in a suggested methodology for thinking about digital evidence. If counsel use the suggested framework, they can reduce and possibly eliminate the routine practice of creating digital stumbling blocks and thus present persuasive digital evidence.

Consider the following scenario:

Specialist (SPC) Brown is charged with attempted premeditated murder of her husband, Mr. Brown. Specialist Brown lured her husband into the woods behind their house under the auspice of a birthday treasure hunt at the end of which Mr. Brown would find his present. Along a path in the woods, SPC Brown set up a swinging log trap. When Mr. Brown reached a certain clue along the path, SPC Brown cut a rope releasing the swinging log in order to crush him against a tree. The log crashed into the left side of his chest, fracturing ribs, puncturing his heart, and collapsing his lung. Mr. Brown crawled back to the house and called 911. He told the 911 operator that a bicycle rider crashed into him when he was crossing the street. Later, he told police about the log. Specialist Brown will testify that she was a battered spouse and was peremptorily defending herself. She has the bruises to prove it. During SPC Brown's video-recorded Criminal Investigation Command (CID) interview, she denied injuring her husband. She also said he cheated on her twice, but she reluctantly admitted to cheating on him as well. The pertinent evidence includes a hard-copy photo of Mr. Brown's chest bruise, a CD with digital pictures of SPC Brown's bruises, a CD with the 911 audio, and a DVD with the video-recorded CID interview.

The trial and defense counsel in the hypothetical are armed with digital evidence, but are they prepared to establish a legal basis for its use, handle it with technical and oral savvy, ensure others who are required to handle it can do so, project it properly to everyone who needs to see and hear it, preserve it for the record, and argue it with effect? If they think about the digital evidence using the following methodology, the answers will be yes.

A Methodology to Prepare for the Use of Digital Evidence

Because digital evidence relies on courtroom technology, which has multiple points of potential failure, trial practitioners should not treat digital evidence the same as traditional evidence. So, what must trial practitioners consider about digital evidence when preparing their cases? Asking (and answering) the following questions about each item of digital evidence will help them get it right.

Why Do You Need It?

This is a different question from "why do you want it?" First, ask, "why do you need it at all?" Then, ask, "why do you need it in that form?" The first question invokes the standard relevance and necessity concerns,[6] but it also forces you to think about technical foundation and admission issues. The defense counsel in the hypothetical wants to introduce the CD with digital photos of the accused's bruising to help establish the battered spouse defense. Assuming all the photos are admissible, the entire CD can be admitted as one exhibit—a relatively straightforward foundation for substantive evidence.

However, the defense counsel also wants to impeach Mr. Brown's trial testimony that the accused set a trap for him by using the portion of the 911 audio where Mr. Brown said he was hit by a bicycle. This CD is not admissible in its entirety for its substance,[7] so the foundation is trickier. The defense counsel knows that a prerequisite to introducing extrinsic evidence of a prior inconsistent statement for impeachment purposes is an evidentiary confrontation with the declarant.[8] So, rather than introducing this in the defense case-in-chief (necessitating having a case-in-chief and permitting recall of an adverse witness during the defense case), the defense counsel instead cross-examines Mr. Brown about the prior statement. If Mr. Brown cannot remember making the prior statement, is the CD available to refresh his recollection?[9] Is the audio a "writing" per Military Rule of Evidence (MRE) 612?[10] If so, does this open the door for the trial counsel to admit other portions of the audio relating to Mr. Brown's testimony? Are there portions of the audio that are irrelevant or privileged? If so, how are those portions to be deleted or redacted? Beyond these legal issues, the defense counsel must be prepared to play only that portion of the audio that establishes the prior statement and provides enough context for Mr. Brown to authenticate the 911 call.[11] The defense counsel should have previously queued the audio to the prior statement, have the courtroom technology on which it will be played already prepared, and have practiced publication beforehand. Assuming Mr. Brown still cannot remember making the prior statement or disavows it, the defense counsel must be prepared to introduce that portion of the audio as extrinsic evidence of the prior inconsistent statement. But, mechanically, how is this accomplished? Does the military judge admit the entire CD (by marking the exhibit sticker on the CD itself) with a record caveat that only certain time-hacks in the audio are actually admissible? Does the military judge maintain the CD as a "for Identification" exhibit while permitting the defense counsel to play the admissible portion to the members and giving a limiting instruction? You should be prepared to answer these questions before the military judge asks them.

If you want the digital evidence for its substance, the mechanics can get more complicated. The trial counsel wants to introduce the portion of the accused's CID video interview where she says her husband cheated on her for its substance under MRE 801(d)(2)[12] as a non-hearsay statement or under MRE 803(3)[13] as proof of the accused's motive. Assume that there are portions of the interview the trial counsel does not want to introduce (e.g., unhelpful statements or aggressive CID interrogation tactics). The defense counsel invokes the rules of completeness[14] and demands that the government admit the rest of the video except for a part where the accused admits to having an extramarital affair.[15]

The military judge rules that fairness dictates admission of more than the trial counsel offered but not as much as the defense requested and that the portion about the affair is inadmissible. Assume there are now four admissible sections of video all separated in time from one another, and consider the mechanics of admission again. The DVD contains substantive evidence, so the panel members can consider that evidence during deliberations. Again, does the military judge admit the DVD and provide written guidance to the panel members about what they may and may not watch during deliberations? Does the military judge permit the trial counsel to play the admissible portions for the members, but not allow the members to take the DVD with them during deliberations and tell them they can request to reopen the court to re-watch those portions? Must the trial counsel have the video copied onto a second Prosecution Exhibit DVD and edited to contain only the admissible portions? If the latter, does the trial counsel have the editing capability readily at hand so as not to unduly delay the proceedings?

If the foundation and admission of the digital evidence involves the creation of a new exhibit, does the courtroom have the capability to create the new exhibit? For example, the trial counsel wants to display the image of Mr. Brown's chest bruise on the witness-stand touchscreen monitor and have a bruise expert draw on the image to indicate the point of impact. The trial counsel uses a software program to select a pen feature and a color, and directs the expert to circle a part of the bruise. Now that this new exhibit is created, how does the trial counsel offer it for admission? Is it admitted as an altered digital file? Does the touchscreen software (which is likely separate than the Art program) have the ability to "freeze" and save the altered image? Does the courtroom have a networked printer to which the trial counsel can send the altered image? If the trial counsel is not prepared to answer these questions, the digital evidence may unravel the government case rather than enhance it.

The second "why do you need it" question—i.e., "why do you need it in its digital form?"—is simply a cost-benefit analysis. It is tempting to receive digital evidence from its custodian and accept the evidence as tendered. When the CID Special Agent hands the trial counsel the DVD, the natural tendency is to plan to play it for the panel members. But why digital? You should, after asking the first "why do you need it" question, balance the technical and mechanical difficulty in admitting the digital evidence with its possible non-digital alternatives. If the trial counsel wants to prove Mr. Brown's injuries, should the trial counsel play the 911 audio of Mr. Brown's labored breathing or, alternatively, have Mr. Brown testify to his injuries? What more does the defense counsel achieve by having the pictures of the accused's bruises on a CD rather than as printed, color pictures?

If the digital evidence is not more persuasive than its non-digital alternative, you should balance the difficulties of admitting each and pick the version that enhances smooth case presentation. Even where the digital evidence is clearly more powerful than its alternative, the anticipated technical and mechanical difficulties in admitting it may cause you to decide the juice is not worth the squeeze. Take the above example about the CID video interview. Seeing and hearing the accused say she had a motive to kill might be more persuasive than reading the same words on paper. But, given the admission and deliberations difficulty mentioned above, does a transcription or a summary[16] of the interview make case presentation smoother? Perhaps not, but if you do not ask why you need evidence in digital form, you have not performed this cost-benefit analysis or thought coherently about effective case presentation.

Once you have consciously decided to use the evidence in its digital form and are prepared for the mechanics of foundation, admission, and deliberations, you must determine whose help you need and who might present an obstacle.

Whom Do You Need to Tell?

You cannot effectively handle digital evidence by yourself. Others who have a stake in the courtroom and the proceedings will become stumbling blocks to your effective presentation if you surprise them in the middle of trial with digital evidence and the courtroom technology necessary to present it.

First, tell the court reporter and courtroom administrator (if one exists). These individuals can help ensure the courtroom technology works and is prepared for use. During trial, the courtroom administrator, if briefed beforehand, can assist you in quickly setting up, turning on, and moving the technology necessary to display the digital evidence.[17] The court reporter, whose primary duty is to ensure the proceedings are recorded accurately, has a vested interest in a smooth presentation of evidence. If court reporters know what is coming next, they will be more effective. They may even offer you alternatives to digital evidence or to the presentation technology that you had not considered.

Next, consider telling opposing counsel. While not specifically required by the Rules of Court,[18] you are likely to avoid the *quid pro quo* objection—that is, you surprise me with your presentation style, and I will surprise you with an objection. Even if it does not preclude the objection, pretrial notice to opposing counsel may engender a collegial reciprocity where opposing counsel gives you pretrial notice of their objection. Your goal should be to avoid unnecessary interruptions to your case or, at the least, to be prepared for known or anticipated interruptions. This is one way to do that.

Finally, tell the military judge. While the Rules of Court do not require this, you should consider it non-negotiable. If you surprise the military judge with courtroom technology or complicated issues involving digital evidence, you are certain to interrupt your smooth case presentation. The military judge will promptly excuse the panel members to "take up a matter" with you. There are several reasons other than smooth presentation to notify the military judge before trial. First, if you intend to make your opening statement or closing argument digitally (e.g., using a PowerPoint slideshow, scrolling through digital photographs on CD or displaying them on an overhead projector, or playing a video), the military judge needs to review your presentation for obvious issues that will be difficult to "unring." For example, a digital opening statement that includes embedded substantive evidence could expose the members to inadmissible evidence that is incurable by an instruction.[19]

Some curable examples are an opening statement that includes improper argument or a closing argument that misstates the law. In the first example, you prevent the military judge from performing evidentiary gatekeeping.[20] In the latter two, you unnecessarily interrupt your presentation with an objection (from your opponent or the military judge *sua sponte*), argument on the objection, and a curative instruction. Seeing the issue for the first time during trial, the military judge is likely to excuse the panel members and require you to display your entire statement or argument for review anyway. The second reason to notify the military judge before trial is to establish who holds the "kill switch." If an audio or video exhibit is playing, who has the ability to stop it because of an objection or at the military judge's direction? Does the military judge let the proponent operate the kill switch? Does the military judge do it? Does the court reporter have the controls? If so, does the court reporter know when to stop the playback? Is it when an objection is entered? Is it when the military judge directs? Without this prior coordination, an audio or video exhibit is likely to keep playing for some amount of time, possibly exposing the panel members to inadmissible evidence.

Your goal is to ensure your case presentation conveys what you want it to convey to the factfinder. You do not want to convey the impression that you do not know what you are doing or that your case is out of your control. Identify those court-martial participants that you need to recruit for the limited purpose of ensuring your digital evidence presentation is smooth. Once you have done that, you must anticipate how effectively the digital evidence will be received.

Who Needs to See/Hear It?

Many times, trial practitioners are their own stumbling blocks during their presentation of digital evidence. They create stumbling blocks for two reasons: they do not broadcast the evidence to everyone who

needs to see or hear it or they broadcast it to more people than are permitted to see or hear it; and they fail to preserve the record with their or their witnesses' references to the contents of the digital evidence. Any of these stumbling blocks will require intervention by the military judge and interrupt your presentation. If you ask this subsection's question, you should avoid creating your own presentation stumbling blocks.

First, consider the various categories of people in the courtroom, and then determine which of those groups must be able to perceive the evidence and which are not permitted to perceive it. The military judge must be able to perceive everything you are doing to properly rule on objections and to *sua sponte* prevent inadmissible evidence from reaching the factfinder. If you are conveying your digital evidence through courtroom technology, ensure the military judge can perceive it instantaneously and in the form you want it admitted. In the hypothetical, when the trial counsel displays the color picture of Mr. Brown's bruise on an overhead projector, the colors on the screen should not be significantly different than on the picture itself. Further, the screen should be located where the military judge can see it without having to move. When the defense counsel tries to refresh Mr. Brown's memory of his prior inconsistent statement using the 911 audio, the military judge must be able to hear it simultaneously with the witness, the court reporter, opposing counsel, and the accused. The author presided over one case in which the audio on the original recording was so poor that it could not be heard through speakers. However, it could be heard using headphones. The court recessed and the military judge, opposing counsel, the accused, and the witness separately listened to the recording using headphones. On the record, each stated they had listened to the audio and heard it. Then, the examining counsel continued with the refreshing recollection examination. Although burdensome, this method permitted the military judge to perceive the digital evidence "simultaneously" with the other trial participants for the purpose of gatekeeping.

The court reporter should be able to perceive the digital evidence as well. The court reporter is not merely transferring oral words to written words when creating the record. Rather, the court reporter is creating the eyes and ears of the non-trial participants: the convening authority and the appellate courts. They are annotating the record to show non-verbal actions and events.[21] If they cannot perceive the digital evidence, the record is less complete and less helpful.

Opposing counsel and the accused must be able to perceive the digital evidence simultaneously with the proponent, the proponent's witness, and the panel members (if admitted and published). Counsel must be capable of objecting to evidence in a timely fashion.[22] Further, if the accused cannot perceive the evidence, there may be a Fifth Amendment Due Process violation.[23] If there are no monitors on counsel tables and a projection screen is placed where the accused cannot see the evidence, the trial counsel must be prepared to either move the screen or request the military judge's permission to have defense counsel and the accused move to a place where they can perceive the evidence. This should be built into your presentation and not be an afterthought.

The witness must be able to perceive the digital evidence. Further, if the proponent intends for the witness to perform a demonstration with or on the evidence, the witness should have practiced the demonstration before trial. The witness must be familiar not only with the evidence itself, but with the courtroom technology that will serve as its carrier. The witness should not be leaving the witness stand, drawing on an overhead overlay, using a telestrator pen, using their finger to mark on a touchscreen, or demonstrating on a Smart Board for the first time during trial. That is a sure way to undermine your smooth evidence presentation.

The panel members should not perceive the digital evidence until it has been admitted.[24] Additionally, some admissible evidence may not be shown to the panel members, but may be read to them.[25] Consider again the discussion of non-substantive and substantive evidence concerning the 911 audio and the CID video interview from the above section. The defense counsel wants to refresh Mr. Brown's recollection of his prior inconsistent statement to the 911 operator by playing the CD for him. Normally, witness recollections are refreshed using writings that the witnesses read silently to themselves, thereby avoiding exposure of the inadmissible evidence to the factfinder. Here, there is no way for Mr. Brown to review the 911 audio without exposing the panel members to it as well. The members must be excused, and Mr. Brown's recollection must be refreshed during an Article 39(a),[26] UCMJ, session.

A similar result occurs when laying a foundation for the CID video interview. Given the military judge's ruling that four separate sections of the video are admissible, the trial counsel must be vigilant in ensuring the panel members only perceive the admissible portions when the video is played. If the digital evidence does not involve audio (e.g., digital photos or a police body-cam video with no sound), it is possible to lay a foundation for it without excusing the members. If the witness, military judge, counsel, and the panel members all have individual audio/visual monitors, the proponent could disable the members' monitors as well as the large courtroom screens while laying the foundation. Because the members cannot see or hear the inadmissible evidence, they need not be excused. Once the proponent successfully lays the foundation, the military judge may permit publication of the admitted evidence to the members' monitors (and the courtroom screens). You must understand when your presentation of digital evidence will require excusal of the panel members and seamlessly weave the excusal request into your case. Failure to do so will at least cause the military judge to interrupt your presentation or, at worst, cause a mistrial because you exposed the panel members to inadmissible evidence that an instruction will not cure.

Spectators in the gallery should be able to perceive the evidence. If you display evidence the public cannot see, there is an argument that the public has been excluded from the trial.[27] Normally, the public does not witness every piece of evidence in a court-martial. However, if the parties choose to publish evidence and the public cannot view or hear it, have they been effectively excluded?[28] Has public access been

"limited" or "reduced"?[29] Does this violate the accused's constitutional right to a public trial?[30] Do you want to deal with that issue in the midst of your presentation? Avoid this potential interruption by ensuring the public can see what it should be able to see. On the other hand, you should ensure the public does not see sensitive evidence that has not been admitted and is not being published. Be wary of what the spectators sitting behind you can see on your table or your monitor. The public should not see pictures of the alleged victim's sexual assault forensic examination or autopsy that have not been made a formal part of the trial.[31]

Finally, the record must be able to perceive the evidence. You must accurately describe the digital evidence and its components and properly refer to interactions with the digital evidence. In the hypothetical, the defense counsel attempts to lay a foundation for the CD containing digital photos of the accused's bruising. The defense counsel inserts the CD into a device that allows the witness, the military judge, and trial counsel to see the photos, then clicks on a file name. This displays a photo, and the defense counsel asks the accused, "Do you recognize this picture?" The military judge then stops the defense counsel and asks, "Counsel, what are you showing the witness?" The defense counsel invited this interruption because they failed to identify a component of the digital evidence for the record. The defense counsel should have identified what they were doing with the marked evidence, i.e., the CD. The defense counsel should have said, for example, "I am placing Defense Exhibit A for Identification into the courtroom DVD player and am double-clicking on the file named 'Bruise Number 1.'[32]"

The same is true when the defense counsel publishes the digital photos to the panel members using the courtroom screens or monitors. In addition to identifying the components of the digital evidence, you must also accurately describe witness interactions with it. This is true whether the evidence is digital or not. However, the courtroom technology you choose for the interaction may demand additional description. For example, the trial counsel who wants the bruise expert to draw on the image of Mr. Brown's chest bruise might say the following: "Dr. Expert, please take this red digital stylus and draw on the image displayed on the Smart Board an outline around the part of the bruise indicating point of impact; the witness complied"; or "I am using the Art program to select the red color and the pen feature for the touchscreen in front of you; please use your finger to draw . . . . I am now using the freeze and save feature in the Touchscreen program and printing to the courtroom printer." Do not assume the technological carrier will preserve the record for you. Practice saying what you and your witness are doing with the evidence and you will avoid forcing the panel members to watch you struggle through multiple interruptions.

Understand the mechanics of introducing your digital evidence; minimize interruptions to your presentation by notifying those who would otherwise be surprised; ensure you have the required courtroom technology; know when, how, and to whom you are going to expose the evidence; and then prepare for the worst.

What Is Your Plan B?

In answering this question, you should pay heed to the warning that "[a]ll technology should be presumed guilty until proven innocent."[33] Effective case presentation depends largely on how much control you can exert over that process. Most of the advice in this article centers on exerting control over your case by minimizing unwanted interruptions. The use of courtroom technology cedes a certain measure of control to the vagaries of its fallibility. This question asks whether you are expecting the unexpected and are prepared for it. What happens when the digital photo files on your exhibit are corrupted and will not open during trial? What if the disk itself is corrupted? What if the corrupted disk shuts down the courtroom computer? What if the courtroom technology on which you were relying fails? What if it produces a distorted or discolored picture when clarity and color are important? What if it displays a picture or video without the accompanying sound? What if it plays sound but shows no picture? What if the Smart Board or touchscreen monitor is merely being temperamental and only displays parts of drawings the witness makes on them? Can you use an "erase" feature in the software to correct it? Will the record be complete if you do that? If so, how do you preserve that action for the record? What will you do if the technology in the deliberations room that the panel members must use to review the digital evidence fails?

There are certainly more questions that could be asked. But, which ones are pertinent to your case? You should know the answer if you have already answered the questions in the previous subsections of this article. You know what digital evidence you are introducing and the mechanics and technology required to display it effectively. For each piece of evidence, each technological carrier, and each method of introduction, ask what could go wrong. In determining this, you will have completed the first step of the time-tested Army risk management process: Identify the Hazards.[34]

While there are various ways you could address Murphy's Law with respect to your digital evidence, you should consider the very process that your panel members use for their operations. First, identify the possible problems. Second, assess the possible problems.[35] This involves determining the likelihood of occurrence and the severity of the risk if it occurs and a conclusion as to the most severe, likely problems.[36] Third, develop plans to mitigate the likelihood that the problems will occur and to mitigate the interruption to your case if they do occur,[37] determine whether the controls are effective (including cost-effective),[38] and determine where your mitigation measures will fall short (i.e., where you accept risk).[39] Fourth, implement your mitigation measures.[40] An important feature of this step is to communicate the mitigation measures to those who need to help you implement them and those who may be surprised by them.[41] Finally, evaluate your control measures and assess whether they are effective or whether you need to make changes.[42]

Conclusion

The author has seen some very effective uses of digital evidence in courts-martial, but has seen many more instances where trial practitioners trip themselves with such evidence. Sometimes, it is not clear

why counsel decided to use digital evidence rather than its traditional counterpart. Other times, it is clear that counsel did not practice their presentation of digital evidence, the witness's manipulation of the evidence, or their publication of the evidence. Many times, the military judge or opposing counsel interrupt the proponent's presentation because they are surprised by the manner in which the evidence is presented. Sometimes counsel display the digital evidence to the wrong people at the wrong times or fail to show it to the right people at the right times. On other occasions, counsel are clearly unprepared for technological failures.

These trial practice stumbling blocks are only natural, because digital evidence presents a host of issues unique from traditional evidence. The trial practitioner who knows the potential issues before trial, plans for them, practices, and has a fallback plan is the trial practitioner who minimizes or eliminates the stumbling blocks and presents the case smoothly and effectively. Trial practitioners would be wise to remember the following rules of technology: the first rule is that digital evidence applied to an efficient case will magnify the efficiency; the second is that digital evidence applied to an inefficient case will magnify the inefficiency.[43] Trial practitioners can use digital evidence to magnify the efficiency of their cases by asking the four questions presented in this article. **TAL**

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Notes

1. General Omar Bradley, U.S. Army, Armistice Day Speech (Nov. 11, 1948), *in* 1 Collected Writings of General Omar N. Bradley (U.S. Gov't Printing Office 1967).

2. *See* Memorandum from Lieutenant General Flora D. Darpino, U.S. Army Judge Advocate General, to all Army Judge Advocate General's Corps leaders (Sept. 9, 2015) (on file with author) (establishing the "baseline technology architecture expected of modern military courtrooms" and directing staff judge advocates to identify and rectify shortfalls).

3. *See* David A. Schlueter, Stephen A. Saltzburg, Lee D. Schinasi & Edward J. Imwinkelried, Military Evidentiary Foundations, § 1-8[1], n.21 (5th ed. 2013).

4. See the following for very good primers on this topic: Federal Judicial Center, Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial (2012), https://www.fjc.gov/sites/default/files/2012/CTtech00.pdf; Nat'l Inst. of Justice, Digital Evidence in the Courtroom: A Guide for Law Enforcement and Prosecutors (2007), https://www.ncjrs.gov/pdffiles1/nij/211314.pdf.

5. *See* Lieutenant Colonel Wendy P. Daknis, *A View from the Bench: The Care and Keeping of Documents: Proper Handling and Use of Documentary Exhibits at Trial*, Army Law., June 2011, at 44 (providing a good guide to evidence handling in courts-martial).

6. Manual for Courts-Martial, United States, Mil. R. Evid. 401, 403 (2019) [hereinafter MCM]; Manual for Courts-Martial, United States, R.C.M. 701 (2019).

7. Assume no hearsay exception applies.

8. MCM, *supra* note 6, Mil. R. Evid. 613.

9. *See* MCM, *supra* note 6, Mil. R. Evid. 612.

10. *Id.*

11. MCM, *supra* note 6, Mil. R. Evid. 602, 901(b)(1).

12. MCM, *supra* note 6, Mil. R. Evid. 801(d)(2).

13. MCM, *supra* note 6, Mil. R. Evid. 803(3).

14. MCM, *supra* note 6, Mil. R. Evid. 106, 304(h).

15. Assume the defense seeks to exclude this under MRE 404(b). MCM, *supra* note 6, Mil. R. Evid. 404(b).

16. Military Rule of Evidence 1006 might permit the introduction of the CID Special Agent's Investigative Summary of the interview if the interview was too long to "conveniently" watch in court. MCM, *supra* note 6, Mil. R. Evid. 404(b).

17. This would require the military judge's permission per rule 9.2. U.S. Army Trial Judiciary, Rules of Practice Before Army Courts-Martial (1 Jan. 2019) (hereinafter Rules of Court).

18. *Cf.* Rules of Court, *supra* note 17, r. 17.4 (requiring counsel to show their exhibits to opposing counsel before trial).

19. *See* MCM, *supra* note 6, Mil. R. Evid. 103(e) (military judge must prevent inadmissible evidence from reaching the members).

20. *See* MCM, *supra* note 6, R.C.M. 801(a)(4) (requiring the military judge to rule on all interlocutory questions and issues of law).

21. While not required, court reporters also often record when witnesses cry, when a panel member raises a hand, when the military judge motions for counsel to continue, etc. *See, e.g.*, United States v. Pauly, 2008 CCA Lexis 292, 8 (A.F. Ct. Crim. App.). While such actions can be subject to interpretation, the trial and defense counsel and the military judge have an opportunity to correct mistakes in those annotations. U.S. Dep't of Army, Reg. 27-10, Military Justice para. 5-56 (11 May 2016) (Interim 1 Jan. 2019).

22. *See* MCM, *supra* note 6, Mil. R. Evid. 103(a)(1) (requiring an objection as predicate proof of error).

23. U.S. Const. amend. V.

24. *See supra* note 17.

25. *See, e.g.*, MCM, *supra* note 6, Mil. R. Evid. 803(5) (recorded recollections).

26. UCMJ art. 39(a) (2016) (permitting court-martial sessions without panel members).

27. Members of the public have a First Amendment right to attend criminal trials. Richmond Newspapers v. Virginia, 448 U.S. 555, 580 (1980). *See also* United States v. Story, 35 M.J. 677, 678 (A.C.M.R. 1992) (error to exclude public because of anticipated sexually explicit nature of evidence).

28. *See* MCM, *supra* note 6, R.C.M. 806(b)(1), (2).

29. *See* MCM, *supra* note 6, Discussion R.C.M. 806(b)(1).

30. U.S. Const. amend. VI.

31. This could be an unauthorized disclosure of agency records and improper trial publicity under Army regulations. *See* U.S. Dep't of Army, Reg. 25-55, The Department of the Army Freedom of Information Act Program ch. IV, para. 4-50 (1 Nov. 1997); U.S. Dep't of Army, Reg. 27-26, Rules of Professional Conduct for Lawyers app. B, rules 3.6(a)(3), (d), (e) (28 June 2018).

32. The file names should not suggest the nature of the evidence if the witness needs to identify and authenticate it.

33. This quote is widely attributable by internet sources to David Ross Brower, who was a prominent environmentalist and executive director of the Sierra Club.

34. *See* U.S. Dep't of Army, Pam. 385-30, Risk Management ch. 2 (2 Dec. 2014) [hereinafter DA Pam 385-30].

35. *Id.* ch. 3.

36. *Id.* paras. 3-3, 3-4, 3-6.

37. *Id.* para. 4-2a.

38. *Id.* para. 4-2b.

39. *Id.* paras. 4-3, 4-4. In this case, the potential interruption of your case presentation is no longer unexpected and your reaction to it will more likely demonstrate control if not actually exerting it.

40. *See* DA Pam. 385-30, *supra* note 34, para. 5-1.

41. *See supra* section *Whom Do You Need to Tell?;* DA Pam. 385-30, *supra* note 34, para. 5-2.

42. *See* DA Pam. 385-30, *supra* note 34, ch. 6.

43. These rules are paraphrased from a quotation widely attributed by internet sources to Bill Gates.